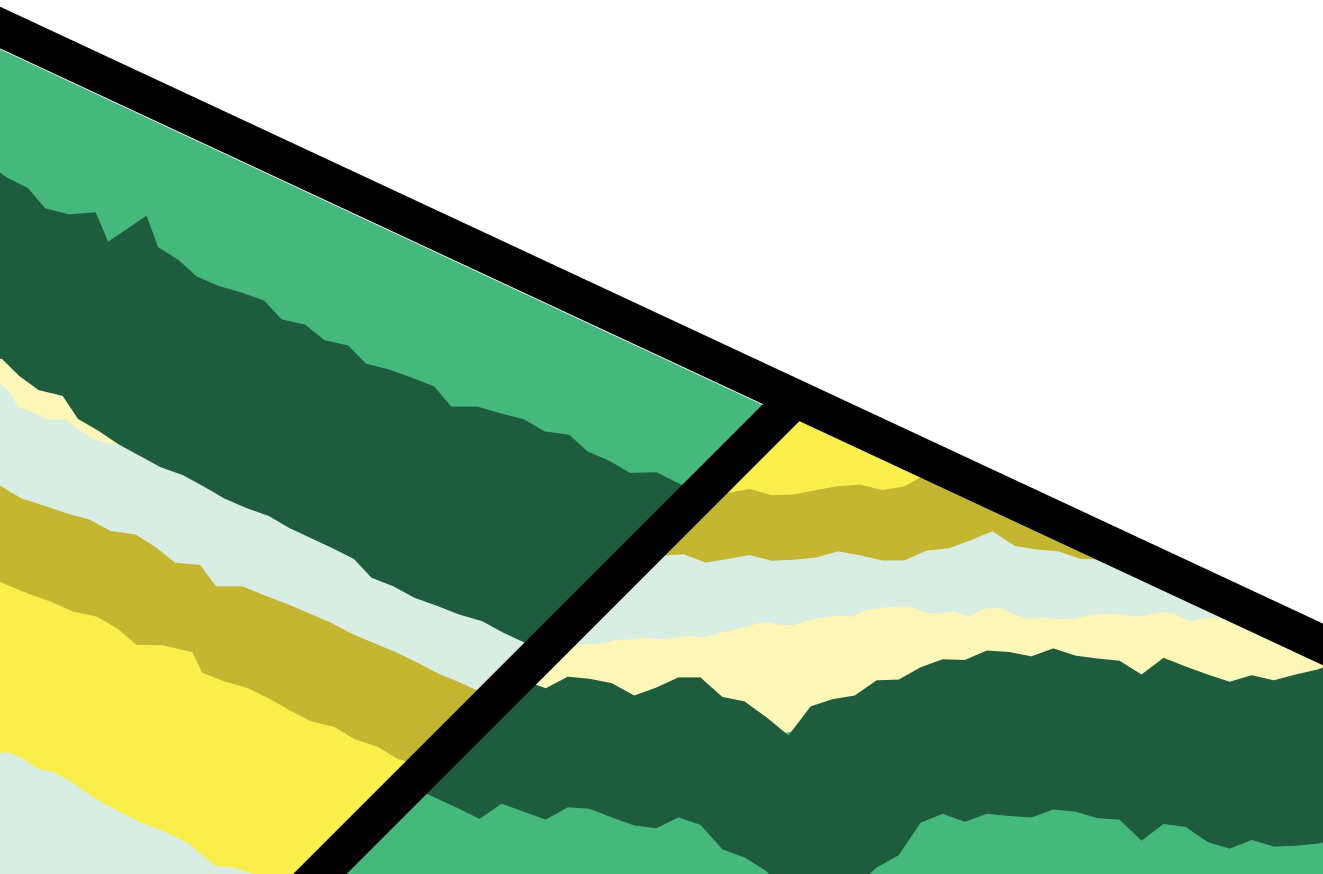
Australian Government
Australian Law Reform Commission

INTERIM REPORT A

FINANCIAL SERVICES LEGISLATION

ALRC Report 137
November 2021



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November 2021

This Interim 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).

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Australian Government

Australian Law Reform Commission

Senator the Hon Michaelia Cash
Attorney-General of Australia
Parliament House
Canberra ACT 2600

30 November 2021

Dear Attorney-General

Review of the Legislative Framework for Corporations and Financial Services Regulation

On 11 September 2020, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into simplification of the legislative framework for corporations and financial services regulation. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996* (Cth), I am pleased to present you with the first Interim Report on this reference (ALRC Report 137, 2021).

Yours sincerely,

The Hon Justice SC Derrington

President

Contents

Terms of Reference

Review of the Legislative Framework for Corporations and Financial Services Regulation

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

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

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

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

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

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

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

Scope of the reference

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

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

Consultation

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

Timeframe for reporting

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

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

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Acknowledgements

The ALRC would like to acknowledge the significant assistance of the Law Division in the Department of the Treasury (Cth), under the leadership of First Assistant Secretary Mr Simon Writer, in navigating the manifold issues arising from the complexity of legislation for corporations and financial services.

The ALRC also acknowledges the valuable contributions of the following organisations and individuals who generously provided insightful comments on preliminary draft materials: Mr Richard Batten, Emeritus Professor Stephen Bottomley, Ms Jacinta Dharmananda, Mr Bruce Dyer, Professor Bryan Horrigan, Emeritus Professor Dennis Pearce, Mr Alan Shaw, the Office of Queensland Parliamentary Counsel, the Consumer Action Law Centre, financial advice industry representatives participating in roundtable discussions, and members of the Corporations Committee of the Law Council of Australia.

Finally, the ALRC acknowledges the generous provision and review of empirical data by the Australian Financial Complaints Authority and the Australian Securities and Investments Commission. In addition, the ALRC's empirical analysis of legislation was enabled by the use of open access standards on websites operated by the Office of Parliamentary Counsel (Cth), the Parliamentary Counsel Office (NZ), and the National Archives (UK).

List of Recommendations

4. When to Define

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.

5. Consistency of Definitions

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).

6. Design of Definitions

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

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

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

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

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

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

8. Licensing

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

List of Proposals and Questions

3. Empirical Data

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?

4. When to Define

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.

7. Definitions of 'Financial Product' and 'Financial Service'

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'.

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).

9. Disclosure

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.

10. Exclusions, Exemptions, and Notional Amendments

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.

11. Definition of 'Financial Product Advice'

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.

12. Definitions of 'Retail Client' and 'Wholesale Client'

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)?

13. Conduct Obligations

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)).

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?

List of Background Papers

Background Paper Number	Title	Date
FSL1	**Initial Stakeholder Views**	June 2021
FSL2	**Complexity and Legislative Design**	October 2021
FSL3	**Improving the Navigability of Legislation**	October 2021
FSL4	**Historical Legislative Developments**	November 2021
FSL5	*Risk and Consumer Finance*	Forthcoming

Glossary

ACCC	Australian Competition and Consumer Commission
Acts Interpretation Act	*Acts Interpretation Act 1901* (Cth)
AFCA	Australian Financial Complaints Authority
AFS Licence	Australian financial services licence
AFS Licensee	Holder of an Australian financial services licence
AFSL regime	Australian financial services licensing regime
ALRC	Australian Law Reform Commission
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
ATO	Australian Taxation Office
Australian Consumer Law	*Competition and Consumer Act 2010* (Cth) sch 2
Credit Licensee	Holder of an Australian credit licence
CLERP	Corporate Law Economic Reform Program
Competition and Consumer Act	*Competition and Consumer Act 2010* (Cth)
Corporations Act	*Corporations Act 2001* (Cth)
Corporations Regulations	*Corporations Regulations 2001* (Cth)
Federal Court	Federal Court of Australia
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
FOFA	Future of Financial Advice (reforms introduced by the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) and *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth))
***FMC Act* (NZ)**	*Financial Markets Conduct Act 2013* (NZ)

FSG	Financial Services Guide
***FSM Act* (UK)**	*Financial Services and Markets Act 2000* (UK)
FSR Act	*Financial Services Reform Act 2001* (Cth)
FSR Bill	Financial Services Reform Bill 2001 (Cth)
High Court	High Court of Australia
ITA Act 1997	*Income Tax Assessment Act 1997* (Cth)
Legislation Act	*Legislation Act 2003* (Cth)
National Credit Code	*National Consumer Credit Protection Act 2009* (Cth) sch 1
NCCP Act	*National Consumer Credit Protection Act 2009* (Cth)
OPC	The Office of Parliamentary Counsel (Cth), the agency responsible for drafting Commonwealth laws, publishing the authorised and up-to-date version of Commonwealth laws, and maintaining the Federal Register of Legislation
PDS	Product Disclosure Statement
PPS Act	*Personal Property Securities Act 2009* (Cth)
SIS Act	*Superannuation Industry (Supervision) Act 1993* (Cth)
SoA	Statement of Advice
Treasury	Department of the Treasury (Cth)
UK	United Kingdom
US	United States of America
Wallis Inquiry	Financial System Inquiry in 1996–7 (chaired by Stan Wallis AC)

Figures and Tables

Figures

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1. Introduction

Contents

Scope of Inquiry

1.1 On 11 September 2020, the ALRC received Terms of Reference to consider whether the *Corporations Act* and the *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.

1.2 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.

1.3 Significantly, the Terms of Reference do not require the ALRC to consider whether the substantive law by which corporations and financial services are regulated requires reform. Rather, the focus of the Inquiry is the extent to which reform of the existing regulatory framework (including Acts, regulations, class orders, other instruments, and guidance documents) might:

- simplify corporations and financial services laws;
- provide an adaptive, efficient and navigable legislative framework, within the context of existing policy settings;

- ensure there is meaningful compliance with the substance and intent of the law; and
- recognise the continuing emergence of new business models, technologies and practices.

1.4 Simplifying legislation in form without addressing underlying substantive policy issues arguably carries the risk of giving rise to significant transition costs (for regulated entities, regulators, professionals, and others) for potentially limited benefit.[1] The ALRC has consequently endeavoured to achieve the greatest simplification practicable in line with the existing underlying policy settings. Where relevant, chapters in this Interim Report summarise the existing policy settings within which the reform recommendations and proposals are made, and which relate to the questions posed for stakeholder feedback.

1.5 Although the Terms of Reference refer specifically to the *Corporations Act* and the *Corporations Regulations*, the regulation of corporations and financial services extends well beyond the provisions contained in those pieces of legislation. Elements of corporations and financial services regulation are found within other Commonwealth Acts and their correlative delegated instruments, including: the *ASIC Act*; the *Australian Consumer Law*; the *NCCP Act*; the *SIS Act*; the *Banking Act 1959* (Cth); the *Insurance Contracts Act 1984* (Cth); the *Insurance Act 1973* (Cth); and the *Marine Insurance Act 1909* (Cth).[2] State and territory legislation also regulates some aspects of corporations and financial services,[3] and sometimes adopts definitions from the *Corporations Act*.[4] Consequently, the ALRC will consider throughout this Inquiry potential implications relating to other relevant legislation.

1.6 In short, the Terms of Reference 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, recognising that there are emerging new business models, technologies, and practices.[5] To achieve coherence and consistency across the topics to be covered in the three Interim Reports, the ALRC is using Chapter 7 of the *Corporations Act* as the lens or primary focus for each of the topics. The ALRC does, however, analyse other parts of the *Corporations Act* and other legislation relevant to corporations and financial services in developing its recommendations,

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1 For discussion of policy and legislative simplification, see **Chapter 2**.

2 See also reg 7.6.02A of the *Corporations Regulations*, which prescribes a number of Commonwealth Acts to be 'financial services laws' for the purposes of breach reporting obligations in s 912D of the *Corporations Act*.

3 See, eg, *Funeral Funds Act 1979* (NSW), which regulates (among other things) funeral expenses policies, which are a 'financial product' under the *Corporations Act*. Note also the reference to 'State or Territory legislation' in the definition of 'financial services laws': *Corporations Act 2001* (Cth) s 761A.

4 See, eg, *AGL Corporate Conversion Act 2002* (NSW) s 4(4); *NSW Lotteries (Authorised Transaction) Act 2009* (NSW) sch 1 item 4; *Electrical Safety Act 2002* (Qld) sch 2, definition of 'officer'.

5 For a discussion of technology neutrality, see **Chapter 6**.

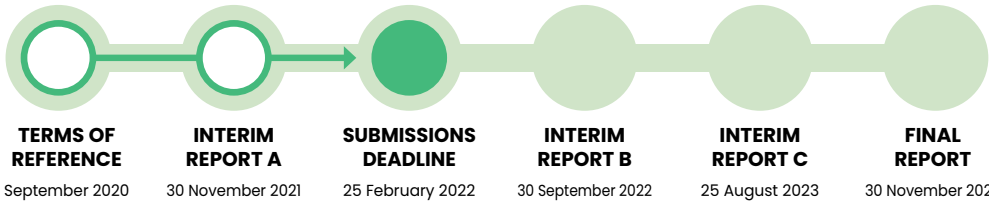
proposals, and questions. The ALRC's recommendations will therefore have implications for legislative design beyond Chapter 7 of the *Corporations Act*.

1.7 Over the past 13 months, the ALRC has undertaken 83 consultations (meetings and roundtables on an individual and group basis) with 137 organisations and individuals, including: key participants in the financial services industry; government agencies (including Treasury, ASIC, APRA, and OPC); the legal profession; current and former members of the judiciary; non-profit legal services; consumer groups; and academics.

1.8 **Appendix A** to this Interim Report provides an outline of the preliminary consultations conducted from September 2020 to October 2021. The initial views of stakeholders, together with analysis undertaken by the 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.

1.9 This Interim Report contains recommendations, proposals, and questions. The recommendations are in a form that can be considered for immediate or staged implementation. The ALRC is seeking written submissions in response to the proposals and questions contained in this Interim Report until 25 February 2022. Submissions, together with further consultations, workshops, and seminars, will form part of the evidence base for subsequent interim reports and the Final Report due to the Attorney-General on 30 November 2023.



Making a submission

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

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

1.11 The ALRC seeks submissions from a broad cross-section of the community, as well as those with a special interest in the Inquiry. These submissions are crucial in assisting the ALRC to develop its recommendations. 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.

1.12 Submissions made using the form on the ALRC website are preferred. Alternatively, submissions may be emailed (PDF preferred) to financial.services@alrc.gov.au. It is helpful if comments address specific proposals or questions in this Interim Report, but stakeholders are also welcome to comment on other issues that they consider relevant, and that may not be addressed by particular proposals or questions.

1.13 Stakeholders can make a public or confidential submission to the Inquiry. Public submissions are ordinarily published on the ALRC website. Submissions that are public are preferred.

Impetus for the Inquiry

1.14 The Inquiry is set against the background of the Australian Government's response to the Financial Services Royal Commission and, in particular, the Government's acceptance of the proposition that the law should be simplified so that its intent is met.[6] As the Commission emphasised, the 'more complicated the law, the harder it is to see unifying and informing principles and purposes'.[7]

1.15 The *Corporations Act* is now two decades old. In that time, there have been numerous inquiries and reports relevant to the scope of this current Inquiry, including: the 2014 Report of the Productivity Commission into *Access to Justice Arrangements*; the 2014 Final Report of the Financial System Inquiry; the 2015 Final Report of the Australian Government Competition Policy Review; the 2017 Report of Treasury's ASIC Enforcement Review Taskforce; and the 2019 Final Report of the Financial Services Royal Commission.[8]

1.16 Throughout 2019, the ALRC conducted a national conversation with interested parties to ascertain appropriate topics for future law reform inquiries. The ALRC published its final report on law reform topics in December 2019.[9] Of approximately 100 respondents who answered the relevant question in the ALRC's initial survey, 84% considered there was a high or medium need for reform of financial services legislation.[10] Many submitted that the legislation was too long, complex, and inaccessible. It was said that this detracted from principles of transparency and

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

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

8 For discussion of the historical background to the *Corporations* Act and its predecessor legislation see Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021).

9 Australian Law Reform Commission, *The Future of Law Reform: A Suggested Program of Work 2020–2025* (2019).

10 Ibid [2.42].

facilitated 'abuse' of the law by institutions.[11] There was particular emphasis placed by those who made submissions to the ALRC on the need for Recommendations 7.3 and 7.4 of the Financial Services Royal Commission Final Report to be the subject of an inquiry with a view to their implementation. Those recommendations were in the following terms:

> Recommendation 7.3 – Exceptions and qualifications
>
> As far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated.
>
> Recommendation 7.4 – Fundamental norms
>
> As far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter. [12]

1.17 The Financial Services Royal Commission concluded that the voluminous regulation of financial services can be summarised by six simple requirements: obey the law; do not mislead or deceive; act fairly; provide services that are fit for purpose; deliver services with reasonable care and skill; and, when acting for another, act in the best interests of that other.[13] However, the Commission expressed concern that these principles are reflected in a piecemeal and sometimes contradictory fashion in Australian legislation. Arguably, this makes the legislation difficult to navigate, potentially enables wrongdoers to strategically draw out litigation, and potentially deters regulators from investigating and prosecuting wrongdoing.[14]

Financial services legislative framework

1.18 This section provides a brief overview of the legislative framework that is the core focus of this Inquiry. The Financial Services Royal Commission observed that the recommendations above were examples of steps that needed to be taken in the context of a much wider 'overall task' of simplification of the law. It urged an 'examination of how the existing law fits together and identification of the policies given effect by the law's various provisions'.[15]

1.19 The *Corporations Act,* particularly Chapter 7, together with the *NCCP Act* and *ASIC Act,* are at the centre of financial services regulation in Australia. The

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11 Ibid [2.43].

12 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 7) 496.

13 Ibid 8–9.

14 Australian Law Reform Commission (n 9) [2.47], citing Hui Xian Chia and Ian Ramsay, 'Section 1322 as a Response to the Complexity of the Corporations Act 2001 (Cth)' (2015) 33(6) *Company and Securities Law Journal* 389; Elise Bant and Jeannie Marie Paterson, 'Understanding Hayne. Why Less Is More' *The Conversation* (11 February 2019) <www.theconversation.com/understanding-hayne-why-less-is-more-110509>.

15 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 7) 496.

Corporations Act provides the broad legislative architecture of corporations and financial services regulation, with a number of provisions dedicated to consumer protection. The *ASIC Act* is more specifically focused upon consumer protection, while also containing the provisions dealing with the general functions, operations, and powers of ASIC. Furthermore, the regulation of consumer credit — including in relation to licensing, disclosure, and conduct regulation — occurs pursuant to its own separate regime, which is contained in the *NCCP Act*.

1.20 This legislation is supplemented by numerous additional statutes. In relation to prudentially-regulated entities, the *Banking Act 1959* (Cth), the *SIS Act*, the *Insurance Act 1973* (Cth), and the *Life Insurance Act 1995* (Cth) play fundamental roles in the licensing and regulation of these components of the financial services industry, and in the financial safety of the Australian financial system as a whole. Additionally, the *SIS Act* plays an important consumer protection role in relation to superannuation.[16] Other institutional legislation, such as the *Reserve Bank Act 1959* (Cth) and the *Australian Prudential Regulation Authority Act 1998* (Cth), also plays 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). Statutes such as these are not the subject of detailed consideration in this Inquiry, although awareness of their role and content, and how they interact with the *Corporations Act*, *NCCP Act,* and *ASIC Act*, is critical to the work of the Inquiry.

1.21 In addition, matters relevant to particular types of financial products and services are regulated by parts of the *Corporations Act* outside of Chapter 7. For example, debentures are regulated by Chapter 2L, managed investment schemes are regulated by Chapter 5C, and securities are governed by Chapter 6D.

The Chapter 7 framework

1.22 Chapter 7 of the *Corporations Act*, and the associated delegated legislation, will be the specific focus of Interim Report C. Nevertheless, as noted above, the ALRC is using Chapter 7 as the lens or primary focus for each of the Interim Reports. This enables a consistent and coherent approach to the overall Inquiry.

1.23 Chapter 7 of the *Corporations Act* comprises 19 parts, which constitute Part 7.1 through to Part 7.12 of the *Corporations Act*.[17] The different parts of Chapter 7 can roughly be grouped into the following categories, based on their subject matter and the component of the financial services industry being regulated (although some parts of Chapter 7 are relevant to more than one category):

- financial markets — Parts 7.2, 7.2A, 7.4, 7.5, 7.10;

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16 This is particularly so now that both ASIC and APRA have responsibility for enforcement of the statutory covenants in ss 52 and 52A of the *SIS Act*: see Cindy Davies, Samuel Walpole and Gail Pearson, 'Australia's Licensing Regimes for Financial Services, Credit, and Superannuation: Three Tracks toward the Twin Peaks' (2021) 38(5) *Company and Securities Law Journal* 332, 339–40.

17 See *Corporations Act 2001* (Cth) s 760B.

- clearing and settlement facilities — Parts 7.3, 7.4;
- derivative transactions and derivative trade repositories — Part 7.5A;
- financial benchmarks — Part 7.5B;
- AFS Licensees — Parts 7.6, 7.7, 7.7A, 7.8, 7.9A; and
- financial products — Parts 7.8A, 7.9, 7.9A, 7.10.

1.24 Parts 7.1 (Preliminary), 7.10A (External dispute resolution), 7.11 (Title and transfer), and 7.12 (Miscellaneous) do not easily fit into these categories, as they generally contain provisions more relevant to the operation of the Chapter 7 legislative framework as a whole, and so are organised in a different way.

1.25 Both the structure and the content of the law are the focus of this Inquiry and of critical relevance to the key themes of navigability and coherence. In this Interim Report, which focuses on definitions, the structure and content of the law provide necessary context for understanding the impact of definitions in causing unnecessary complexity in the law.

Navigating the Inquiry and this Interim Report

1.26 The Terms of Reference require the ALRC to consider the use of definitions in corporations and financial services legislation in this Interim Report. In its consideration of definitions, the ALRC has been conscious that any recommendations or proposals it makes in that regard will have inevitable consequences for the coherence of the regulatory design and hierarchy of corporations and financial services laws, and on any reframing or restructuring of Chapter 7 of the *Corporations Act*. To some extent, therefore, this Interim Report necessarily foreshadows the ALRC's consideration of matters that are to be the focus of Interim Reports B and C. Moreover, this Interim Report is an important opportunity for the ALRC to present specific reform proposals for feedback and input from stakeholders. Accordingly, in addition to making certain recommendations, this Interim Report is structured as a Consultation Paper with reform proposals and questions.

1.27 This Interim Report is divided into three parts:

- Context;
- Use of Definitions; and
- Key Concepts in Financial Services.

1.28 *Part One: Context* contains two chapters that provide general context for this Interim Report within the Inquiry as a whole. **Chapter 2** examines the theoretical frameworks for key themes that underpin the Terms of Reference and the Inquiry. **Chapter 3** presents an overview of the original data the ALRC has collected for this Inquiry. The chapter explores the growth in the complexity of the legislation over time. This work has involved a quantitative analysis of:

- defined terms and their definitions across the *Corporations Act*, the *Corporations Regulations,* and other legislative instruments;

- court judgments and AFCA determinations;
- the ways in which the *Corporations Act* and related legislation are modified or supplemented by other sources of law and guidance; and
- the structure and themes of the *Corporations Act* and related legislation.

1.29 *Part Two: Use of Definitions* contains three chapters. **Chapter 4**, **Chapter 5**, and **Chapter 6** explore the principles for when to use defined terms in legislation, consistency of definitions, and the design of definitions. Each chapter assesses those principles against the current use of definitions in corporations and financial services legislation by reference to examples. In view of the volume and prescriptive nature of legislation regulating corporations and financial services in Australia, an understanding of how definitions are used and the role that they play in increasing or reducing complexity is of critical importance to law reform in this area.[18]

1.30 *Part Three: Key Concepts in Financial Services* contains seven chapters that examine how Chapter 7 of the *Corporations Act* establishes the perimeters for the regulation of financial products and financial services. These chapters also explore some key concepts that underpin the regulation of financial services:

- **Chapter 7** of this Interim Report analyses two key defined terms that set the perimeters for significant parts of the regulatory framework: 'financial product' and 'financial service';
- **Chapter 8** outlines the nature and structure of the ASFL regime, including its relevance in delineating who is licensed or authorised to provide financial services, and examines particular aspects of the regime that create complexity and challenges to navigability;
- **Chapter 9** explores the use of definitions and concepts in determining the application and content of financial services and product disclosure requirements;
- **Chapter 10** proposes a legislative architecture to better accommodate exclusions from defined concepts and exemptions from obligations, and to remove the need for notional amendments;
- **Chapter 11** analyses the definition of 'financial product advice' and the underlying definitions of 'general advice' and 'personal advice', which act as a gateway for the application of a number of provisions, including a range of conduct and disclosure obligations;
- **Chapter 12** analyses the definitions of 'retail client' and 'wholesale client', which are pivotal in determining the application of a range of obligations; and
- **Chapter 13** examines the conduct obligations imposed on AFS Licensees and others who participate in the corporations and financial services sector through multiple pieces of legislation that are often duplicative and inconsistent.

1.31 This Interim Report also contains five appendices, which include: details of preliminary consultations and primacy sources; additional figures and tables;

18 For a discussion of taxonomy, including as relevant to definitions, see **Chapter 2**.

information concerning data methodology; and prototype legislation prepared for the purposes of the analysis in Part Three of this Interim Report.

1.32 Although this Inquiry is essentially a technical review, the ALRC has engaged with policy in the relevant chapters for the purpose of determining whether the policy settings are clear and, if so, whether they are appropriately expressed in the definitions and concepts used.

1.33 The analysis in this Interim Report is underpinned by research that has been published by the ALRC in a series of Background Papers:

- FSL1 (Initial Stakeholder Views) summarises stakeholder views as expressed to the ALRC in consultations during the initial eight months of the Inquiry;
- FSL2 (Complexity and Legislative Design) explores the drivers and metrics of legislative complexity, and considers how legislative complexity can be managed and reduced through legislative design;
- FSL3 (Improving the Navigability of Legislation) discusses the concept of 'navigability' and illustrates a number of tools that can improve the navigability of legislation (including as relevant to definitions); and
- FSL4 (Historical Legislative Developments) outlines key stages in the historical development of legislation regulating corporations and financial services, including the constitutional framework underpinning current legislation.

1.34 The analysis in this Interim Report of the use of definitions and concepts throughout corporations and financial services legislation, together with public submissions on the proposals and questions, will provide a springboard for rethinking the regulatory design and hierarchy of legislation to enhance the coherence and navigability of that legislation. This will be the focus of Interim Report B.

1.35 Once the ALRC has settled on proposals for the most appropriate regulatory design of corporations and financial services legislation, it will ultimately turn its attention to how the provisions of Chapter 7 of the *Corporations Act* could be reframed or restructured. The ALRC will consider whether the provisions of Chapter 7 should be incorporated into other legislation or into a standalone Act, and whether the regulation of credit and of financial products and financial services should be consolidated. These issues will be the focus of Interim Report C.

1.36 The ALRC is mindful of the potential for changes to occur in the financial advice sector following the Quality of Advice Review that Treasury proposes to conduct in 2022. Such changes may result in a significant shift in government policy concerning the regulation of that sector. The ALRC's current approach to Chapter 7 of the *Corporations Act* is based on existing policy settings.

Overarching principles

1.37 Throughout the preparation of this Interim Report, the ALRC has been guided by the principles below, which are based upon the Terms of Reference. The ALRC anticipates these principles will be reflected in its ultimate recommendations in the Final Report. The principles respond to, and are informed by, the problems outlined above.[19]

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

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

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

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

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

Principle One: Clear, coherent, effective, and accessible law

1.38 In referring to the need for law to be 'clear, coherent and effective', this principle is consistent with the language of the Terms of Reference concerning the third stage of the Inquiry; namely, how Chapter 7 of the *Corporations Act* and the *Corporations Regulations* could be reframed or restructured so that the legislative framework for financial services licensing and regulation 'is clearer, coherent and effective'. A key question in this regard is whether legislation is transparent or opaque in respect of the substance and intent of the law.

1.39 The ALRC's data analysis reveals that the *Corporations Act* comprises 3,539 sections, in 30 chapters, 242 parts, 382 divisions, 262 subdivisions, and 3 schedules. It is accompanied by the *Corporations Regulations,* which comprise 1,418 regulations, in 25 chapters, and 198 parts, 193 divisions, 74 subdivisions, and 29 schedules.[20] Together, these two pieces of legislation are situated within a complex and diverse regulatory ecosystem comprising over 270 legislative

19 See problems outlined at [1.8].

20 This is based on a computational analysis of the legislation that treats Chapters as the highest level of the Act, Parts as the second-highest, and so on. This means that what is counted as a Part in the computational analysis may not be called a Part in the legislation itself. For the computational analysis, Parts are those elements that appear second in the hierarchy, regardless of their name. See further **Chapter 3** and **Appendix D**.

instruments (2,800 pages) made under the *Corporations Act* by 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).

1.40 Adding to the overall challenges in terms of the clarity and coherence of the legislative framework, the *Corporations Act* has approximately 1,349 unique defined terms, some of which are defined differently for the purposes of different sections and chapters. More than 550 sections refer to the *Corporations Regulations*, with 1,449 references within those sections. Obligations in the *Corporations Act* are numerous and widely dispersed. Approximately 1,913 sections contain words that denote an obligation, comprising 5,453 references to obligations-related terms. Standards of reasonableness are used in 500 sections, with 933 references. Sections of the *Corporations Act* include 1,721 references to offences, 820 references to administrative discretions, and 187 references to legislative instruments.

1.41 Further, over 100 legislative instruments have notionally amended the *Corporations Act*, some of which change fundamentally the import and intent of provisions of the Act. In consultations for this Inquiry, stakeholders frequently identified the inaccessibility of the law, particularly notional amendments to the *Corporations Act* and the *Corporations Regulations*, as a key challenge.

1.42 The following proposals and questions respond to these issues:

Proposals/Questions	Relevant Area
Questions A2 Proposals A3–A6 and A13–A15	Defined terms and definitions
Proposals A9, A10 and A12 Question A11	Exclusions, exemptions, and notional amendments
Proposal A22	Repeal of provisions

Principle Two: Fundamental norms should be identified

1.43 The fundamental norms of behaviour referred to in the Terms of Reference include those identified by the Financial Services Royal Commission as noted above.[21]

1.44 These norms are reflected in the general obligations of AFS Licensees under the *Corporations Act*, the general obligations of holders of an Australian credit licence under the *NCCP Act*, the provisions of the *ASIC Act*, the obligations of registrable superannuation entity licensees under the *SIS Act*, and in the obligations of utmost

21 See discussion above at [1.17].

good faith on both insureds and insurers under the *Insurance Contracts Act 1984* (Cth) and the *Marine Insurance Act 1909* (Cth).

1.45 The Financial Services Royal Commission described the fundamental norms as 'fundamental precepts'. It observed that 'statutes have often given legislative expression to fundamental precepts with little textual elaboration'.[22] Examples include: 'A contract of marine insurance is a contract based on the utmost good faith…',[23] and 'a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive'.[24]

1.46 If fundamental norms of behaviour are to be specifically identified in the law, a question arises as to the role or purpose of fundamental norms within the legislative structure. To identify them simply as 'fundamental precepts' does not necessarily assist. One question that arises is whether a fundamental norm or precept imposes a legal duty that, if breached, entitles an affected person to a remedy (such as damages) or enables a regulator (such as ASIC) to take enforcement action. One example of how a fundamental norm or precept in legislation operates differently from rules is s 23 of the *Marine Insurance Act 1909* (Cth).[25] While that section is often said to embody the 'duty' of utmost good faith, breach of that duty does not sound in damages.[26] Rather, a contract will be void because the fundamental precept of utmost good faith, the basis upon which the contract was made, has been shown not to exist. The contract therefore cannot stand.

1.47 A misunderstanding of the role or purpose played by the fundamental norms can lead to suspicion or distrust about the practical relevance or operability of those norms. For example, does the fundamental norm 'to act fairly' impose some immeasurable concept of fairness as between a financial services provider and a consumer? Is fairness to be judged from the point of view of the consumer, or of the provider, or of some third party? Is conduct unfair if the consumer does not achieve the financial gain expected from the product, or should fairness be measured in some other way?

1.48 In a contractual context, fundamental norms do not necessarily apply just as an implied contractual term and can apply as an implied duty or principle. The importance of this distinction, using good faith as an example, has been explained by the Hon Chief Justice JLB Allsop AO:

> The most crucial distinction to be drawn out is between the recognition of good faith as being an independent *implied term* of the disputed contract, and the

22 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 7) 495.

23 *Marine Insurance Act 1909* (Cth) s 23.

24 *Trade Practices Act 1974* (Cth) (repealed and now embodied in s 18 of the *Australian Consumer Law*).

25 For a discussion about taxonomy, see **Chapter 2**.

26 *Re Zurich Australian Insurance Ltd* (1999) 2 Qd R 203, per Chesterman J: 'in each instance the relationship, that of good faith, is not expressed in terms of an obligation but is the basis for implying a more specific duty'.

> recognition of good faith as being an *implied duty* or *principle*, in the sense that it becomes part of the 'orthodox techniques of solving contractual disputes' and is applicable to the performance and enforcement of all contracts and dealings. While the content and meaning of the phrase 'good faith' may be the same in both scenarios (to act honestly and with a fidelity to the bargain; and to act reasonably and fairly in dealings), the implications and connotations are fundamentally different. If good faith is simply a term implied in fact (which can itself be construed and applied, and found a separate head of damages), then the concern of various courts as to whether the principles of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings (BP Refinery)* have been satisfied, or whether 'entire agreement' clauses operate to the exclusion of good faith can be understood. If, however, good faith is recognised as an informing but binding principle or duty — a means by which the courts can recognise and give effect to an expected standard of behaviour (linked, but not limited to honesty) — then there is no debate as to whether or not the principle is applicable; it is simply a basic assumption of all contractual dealings.[27]

1.49 Articulating fundamental norms in corporations and financial services legislation would inform contractual dealings and would mean that all parties (investors, consumers, financial services providers, and the broader community) expect that: the law will be obeyed; the parties will not mislead or deceive one another; they will act fairly; they will provide services fit for purpose; they will deliver services with reasonable care and skill; and they will, when acting for another, act in the best interests of that other. Put differently, articulating those norms in the legislation will ground the expectations of parties to their contractual dealings and statutory obligations.

1.50 The fundamental norms of behaviour are, therefore, properly understood as the legislative expression of a standard of commercial behaviour expected by the community that builds on the principles and values of the common law and equity.[28] It is therefore important to consider what prominence should be given to those norms in corporations and financial services legislation.

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27 The Hon Chief Justice JLB Allsop, 'Conscience, Fair-Dealing and Commerce – Parliaments and the Courts' in Tim Bonyhady (ed), *Finn's Law: An Australian Justice* (Federation Press, 2016) 92, 124 (emphasis added, citations omitted).

28 Ibid.

1.51 The following proposals and questions respond to these issues:

Proposals/Questions	Relevant Area
Proposal A8	Outcomes-based standard of disclosure
Questions A18 and A19	Norms in objects clauses
Proposals A21–A23	Conduct obligations

Principle Three: Legislative design should promote meaningful compliance with the substance and intent of the law

1.52 Prescription, detail, and tailoring have become features of the current legislation governing corporations and financial services. Legislative definitions often reflect such a prescriptive approach, incorporating long lists of items to which particular provisions do, and do not, apply (often supplemented by further lists in various pieces of delegated legislation). Arguably, this has largely been a consequence of policy developments combined with intense lobbying by particular sectors within the broader industry.[29] It has led to a raft of exceptions to otherwise generally applicable norms of conduct.

1.53 The Financial Services Royal Commission observed that exceptions and limitations encourage literal application of the law and focus on 'boundary-marking' and 'categorisation', which may promote uncertainty:

> Removing exceptions and limitations encourages understanding and application of the law in accordance with its purpose. That is 'its intent is met, rather than merely its terms complied with'. Like cases are more evidently treated alike. Uncertainty may be reduced.[30]

1.54 Similarly, Chief Justice Allsop has observed:

> Certainty is rarely, if ever, the product of intricate sharply drawn rules. Prolix rule making, not necessarily based on a reflection of honest common-sense and of the reasonable expectation of honest people, is likely to engender as much uncertainty as certainty.[31]

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29 See Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 7) 495: 'Lobbying for prescription, detail and tailoring has been a significant contributor to the current state of the law', citing a submission by Treasury to the Interim Report of the Royal Commission.

30 Ibid 44, citing a submission by Treasury to the Interim Report of the Royal Commission.

31 Chief Justice Allsop (n 27) 101.

1.55 These issues will be considered in greater detail in Interim Report B. In this Interim Report, the following proposals and questions respond to these issues:

Proposals/Questions	Relevant Area
Proposals A3–A6	Definitions of 'financial product' and 'financial service'
Questions A16 and A17	Definitions of 'retail client' and 'wholesale client'
Proposal A8	Outcomes-based standard of disclosure
Question A24	Conduct obligations

Principle Four: Effectively conveying how the law applies

1.56 As it currently stands, the *Corporations Act* fulfils numerous functions. It provides for, inter alia:

- the law relating to the life cycle of a corporate entity;
- the law relating to insolvency;
- regulation of capital markets;
- licensing of financial services providers;
- conduct obligations on a variety of actors within the financial sector;
- civil liability provisions, civil penalty provisions, and criminal offences; and
- consumer protection provisions for consumers of financial products and services.

1.57 However, it is not the only statute concerned with consumer protection. Consumer protection is an important function of the *ASIC Act* and its almost parallel provisions. Some uncertainty arises, however, about the role of the *Australian Consumer Law* in this regard (despite its opaque carve-out in respect of financial services and financial products).[32]

1.58 There are competing policy objectives within the *Corporations Act* and across financial services legislation. That tension is most acute in respect of the considerations relevant to promoting, on the one hand, 'the confident and informed participation of investors and consumers in the financial system',[33] while on the other hand 'facilitating efficiency, flexibility and innovation in the provision of [financial] products and services',[34] and 'maintain[ing], facilitat[ing] and improv[ing]

32 *Competition and Consumer Act 2010* (Cth) s 131A.
33 *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2)(b). See also *Corporations Act 2001* (Cth) s 760A(a).
34 *Corporations Act 2001* (Cth) s 760A(a).

the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy'.[35]

1.59 These issues will be considered in greater detail in Interim Report C. In this Interim Report, the following proposals and questions respond to these issues:

Proposals/Questions	Relevant Area
Proposals A3–A6	Definitions of 'financial product' and 'financial service'
Proposals A9, A10 and A12 Question A11	Exclusions, exemptions, and notional amendments
Proposals A22 and A23	Conduct obligations

Principle Five: Flexibility to address unforeseen circumstances and unintended consequences

1.60 Initial views provided to the ALRC by some stakeholders suggest that the growth in the length and complexity of corporations and financial services legislation is widely considered to be attributable to policy developments and the very many occasions of 'special pleading' that have been made to government and regulators both prior and subsequent to the promulgation of the relevant Act or legislative instruments.

1.61 To date, Acts of Parliament have contained objects, principles and norms, and high-level obligations and their scope. They typically create offences and civil penalty provisions and provide for the broad infrastructure of the relevant industry they are designed to regulate. Acts also provide for the establishment of necessary regulatory bodies and the nature and scope of any enforcement powers.

1.62 Regulations typically contain exclusions and exceptions to the general rules provided for in the primary legislation and the detail necessary for determining the application of the primary legislation and its general functioning.

1.63 It is not uncommon for thematically consolidated legislative instruments to contain the prescriptive rules that are frequently modified or supplemented to clarify detail, to deal with atypical or unforeseen circumstances, or to address unintended consequences of existing regulatory provisions.

35 *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2)(a).

1.64 Currently, there is no cohesive or consistent legislative hierarchy within corporations and financial services legislation such as to enable ready access to the most authoritative state of the law on any given issue.[36]

1.65 These issues will be considered in greater detail in Interim Report B. In this Interim Report, the following proposals and questions respond to these issues:

Proposals/Questions	Relevant Area
Proposals A9, A10, and A12 Question A11	Exclusions, exemptions, and notional amendments

Cohesion

1.66 In formulating the recommendations, proposals, and questions in this Interim Report, the ALRC has considered the issue of cohesion in terms of: how well the recommendations, proposals and questions interrelate with each other, and form a coherent and persuasive whole; and how well they anticipate and support possible recommendations or proposals in Interim Reports B and C. The former type of cohesion can be referred to as 'horizontal cohesion' and the latter form of cohesion can be referred to as 'vertical cohesion'.

Horizontal cohesion

1.67 The Terms of Reference for this Interim Report require the ALRC to consider the use of definitions in corporations and financial services legislation by reference to a number of elements, three of which are relevant to the question of horizontal cohesion.

1.68 First, the ALRC is asked to consider the circumstances in which it is appropriate for concepts to be defined in legislation. Implicit in this element is that it may sometimes be appropriate for concepts not to be defined. This is not just a reference to concepts that are capable of bearing an ordinary or everyday meaning; it is also a reference to legal concepts where the 'definition', or parameters of the concept, are provided by the general law, and not by legislation. An example is unconscionability under s 20 of the *Australian Consumer Law*, which prohibits a person from engaging in conduct that is unconscionable 'within the meaning of the unwritten law from time to time'. The interaction of statute and general law is a theme that is explored in **Chapter 13** of this Interim Report. The question of when a legislative term should be defined is considered in **Chapter 4**.

1.69 The reference to the circumstances in which it is appropriate for concepts to be defined is qualified by the need, as stated in the Terms of Reference, for definitions

36 See **Chapter 3** for a discussion of the complexity that has arisen in this regard.

to be 'consistent with promoting robust regulatory boundaries, understanding and general compliance with the law'. This speaks to the extent to which the *Corporations Act* and, in particular, Chapter 7 of the *Corporations Act* use definitions as a 'switch' for applying various regimes. A key definition in this regard is the definition of 'financial product', which is examined in **Chapter 7** of this Interim Report. Preliminary feedback from stakeholders and the ALRC's analysis to date suggest that this definition, which began as a functional definition but subsequently has become overladen with inclusions and exclusions, has detracted from coherence and navigability and also from the promotion of robust regulatory boundaries. Also relevant in this regard are the definition of 'personal advice' (discussed in **Chapter 11**) and the definition of 'retail client' (discussed in **Chapter 12**).

1.70 The second element is 'the appropriate design of legislative definitions'. This speaks to the question of coherence and consistency in the use of definitions, which is examined in Part Two of this Interim Report. It also speaks to the importance of navigability, a theme that is examined in **Chapter 8** on licensing, **Chapter 9** on disclosure, and **Background Paper FSL3** (Improving the Navigability of Legislation).

1.71 The third element is the consistent use of terminology to reflect the same or similar concepts. This is a theme that is examined in several chapters of this Interim Report, including **Chapter 13** which considers the use of terminology in the context of conduct obligations. A related question is whether the same concept is the subject of two or more different (and potentially confusing) definitions, thereby adding to the complexity of the current framework and presenting challenges for navigability. An example in this regard is the difficulty, from a consumer perspective, of distinguishing between the way the concept of 'advice' is used in each of the defined terms 'personal advice' and 'general advice', both of which are examined in **Chapter 11**. This Interim Report identifies opportunities for the standardisation of definitions as they apply within and across legislation in the area of corporations and financial services regulation.

1.72 Horizontal cohesion may also be considered by reference to the various categories to which the recommendations, proposals, and questions in this Interim Report belong and whether these categories cover all of the relevant areas of reform. Although categorisation is not an exact science, **Table 1.1** below sets out four suggested categories for this purpose.

Table 1.1: Categorisation of recommendations, proposals, and questions

Categories	Recommendations	Proposals	Questions
Tidy-up	1, 2, 4, 13		
Navigability	3, 5–12	A9, A10, A12	A2, A11, A16
Consistency and coherence		A3–A6, A7, A9, A10, A12–A15, A20–A23	A11, A18, A19
Policy and the 'intent of the law'		A8	A16–A19, A24

1.73 As indicated above, the recommendations relate to tidy-up and navigability issues; the proposals primarily relate to consistency and coherence issues; and the questions consider policy and the 'intent of the law' in addition to the categories covered by the proposals. Tidy-up recommendations comprise those that are designed to resolve drafting anomalies and to remove redundant defined terms. Navigability proposals and questions relate to the ease with which the law can be found and understood within each level of the regulatory framework. They also include navigability and coherence as between the different levels of regulation, an area that is subject to detailed examination in **Chapter 10** of this Interim Report. Consistency and coherence proposals and questions relate to the consistent use of definitions and coherence in the defined terms and concepts. Finally, proposals and questions concerning policy and the 'intent of the law' relate to ensuring that policy settings are clearly or appropriately reflected in definitions.

Vertical cohesion

1.74 When the Terms of Reference in respect of Interim Reports B and C are considered alongside those for this Interim Report, it can be seen how the three stages of the Inquiry are interrelated and form an integrated whole. As previously noted, this Interim Report necessarily foreshadows the ALRC's more detailed consideration of matters that are to be the focus of Interim Reports B and C. A key question therefore is whether the recommendations, questions, and proposals in this Interim Report appropriately anticipate and support those that may be identified in Interim Reports B and C.

1.75 The following are examples of areas in this Interim Report that relate to areas that will be examined in Interim Reports B and C:

- the role that defined terms play in terms of the legislative hierarchy; namely, how the content of the law is allocated between Acts and delegated legislation. This is a key theme that is explored in **Chapter 10** (exclusions, exemptions, and notional amendments) and anticipates the examination of legislative design and legislative hierarchy in Interim Report B;
- the possibility of consolidating statutes, or parts of statutes, for the purpose of appropriately managing complexity over time (Interim Report B), and effectively conveying how the legislation applies to consumers, regulated entities, and sectors (Interim Report C). This theme is foreshadowed in several chapters including **Chapter 7** (definitions of 'financial product' and 'financial service'), **Chapter 8** (licensing), and **Chapter 9** (disclosure);
- the examination of policy settings and the intent of the law, as reflected in the definitions of 'personal advice' and 'general advice' in **Chapter 11** and 'retail client' and 'wholesale client' in **Chapter 12**, which anticipates areas to be examined in Interim Report C; and
- the questions relating to the inclusion of conduct norms as an objects clause in **Chapter 13** as a means of giving effect to the fundamental norms of behaviour being pursued, as required by the Terms of Reference for Interim Report C.

PART ONE: CONTEXT

2. Theoretical Frameworks

Contents

Introduction

2.1 This chapter summarises the theoretical underpinnings for key themes in this first Interim Report, and more broadly in this Inquiry. The issues raised in the chapter are explored in more concrete and specific ways in other chapters, and inform the recommendations, proposals, and questions.

2.2 This chapter first outlines key terms and concepts that are raised by the Terms of Reference for this Inquiry, and explains how the ALRC understands and has used those terms and concepts.

2.3 Next, it explores the complex relationship between legislative simplification and underlying policy, recognising that this Inquiry is to be conducted 'within existing policy settings'. The challenges and opportunities this presents have been significant factors in the ALRC's approach to the Inquiry.

2.4 Thirdly, the chapter examines the concept of legislative design, and in particular sets out relevant aspects of regulatory theories, and the appropriate use of the legislative hierarchy.

Key concepts

2.5 This section sets out the ALRC's interpretation and use of a number of key concepts contained in this Interim Report and in the Terms of Reference for this Inquiry. The discussion of each concept is intended to give an outline of some key

elements of each concept that the ALRC considers most relevant in the context of this Inquiry.

2.6 'Legislative complexity' is a concept at the heart of this Inquiry. It is discussed at length in **Background Paper FSL2** and frames **Chapter 3**. This analysis recognises that a certain level of complexity is necessary in all legislation. The ALRC has consequently sought to identify aspects of legislation that are *unnecessarily* complex, and to propose simpler ways of achieving the underlying policy objectives. Legislative simplification, in this sense, is quite different from deregulation, and does not involve watering down obligations or weakening consumer protections. Similarly, simplification does not mean banning complex products or stifling innovation. Instead, the aim of this Inquiry is to express and implement existing policy settings in a clearer and more coherent way.

Legislative terminology

2.7 **Table 2.1** below lists a number of words relating to legislation and the way in which the ALRC has used those words in this Interim Report.

Table 2.1: Legislative terminology

Term	Meaning
Act	An Act of Parliament.[1]
delegated legislation	Any document of legislative character, the authority for which has been delegated by a parliament. In Commonwealth legislation, this includes legislative instruments, and potentially some notifiable instruments.[2]
exclusion	A 'carve-out' of particular products, services, categories of products and services, or circumstances, to change the scope of application of particular provisions.
exemption	A 'carve-out' from an obligation. Obligations attach to persons, so a person may be exempted from an obligation.
law	Includes any or all elements of the law (such as legislation, instruments, and potentially also 'soft law' that is not binding).
legislation	Acts and delegated legislation.

1 This Interim Report does not use the terms 'primary law' or 'primary legislation' for Acts, because the *Legislation Act 2003* (Cth) defines 'primary law' to include 'an Act or an instrument made under an Act'. This Interim Report only rarely uses the terms 'statute' and 'statute book', because those terms can be ambiguous as to whether they include only Acts of Parliament, or also delegated legislation.

2 This Interim Report does not use the phrases 'subordinate legislation', 'secondary law', or 'secondary legislation', which can be ambiguous.

Term	Meaning
legislative instrument	As defined in the *Legislation Act*: this includes regulations, ASIC class orders, and any other document that meets the criteria in the Act. The *Legislation Act* also defines 'notifiable instrument'; relatively few have been made that regulate corporations and financial services. Some other types of (non-legislative) instruments may also affect rights and obligations, including administrative instruments and individual relief instruments. Other instruments, such as regulatory guidance and some codes of conduct, may not be binding, and are sometimes called 'soft law'.
provision	Any structural element of legislation. For example, as defined in the *Corporations Act*, provision includes: a subsection, section, Subdivision, Division, Part, Chapter, Schedule, or an item in a Schedule.
regulation	Any system that seeks to control or direct conduct.
regulations	Delegated legislation made by the Governor-General-in-Council and described as 'regulations' in the enabling provision.

Adaptivity, efficiency, and navigability

2.8 The Terms of Reference highlight the importance of an 'adaptive, efficient and navigable' legislative framework. The ALRC's understanding of these terms is outlined below.

Adaptivity and robustness

2.9 An 'adaptive' legislative framework is one that adapts to change. Adaptive regulation should 'evolve with the financial system and not become an obstacle to innovation'; for example, regulation should not create barriers to entry or discourage new business models, and obsolete rules should be removed or revised.[3]

3 Prasanna Gai et al, *Regulatory Complexity and the Quest for Robust Regulation* (Advisory Scientific Committee Report No 8, European Systemic Risk Board, June 2019) 3 (Principle One: 'adaptability').

2.10 Laws can be adaptive in the sense that they are designed in such a way as to remain appropriate in their existing form despite changing circumstances. For example, laws drafted in a technologically neutral manner may be less likely to require amendment to accommodate new technologies.[4] Further, laws that express high-level principles may be less likely than prescriptive laws to require amendment over time.[5] Thus, the theme of adaptability is relevant to all three sub-topics of this Inquiry: the use of definitions; legislative design and hierarchy; and the structure of Chapter 7 of the *Corporations Act*.

2.11 Laws may also be considered adaptive if appropriate powers and mechanisms are in place to enable necessary and appropriate amendments to be made in a timely manner. In this sense, the theme of adaptivity is closely linked with the topics of legislative design and hierarchy, which are the focus of Interim Report B.

2.12 Adaptivity is closely linked with another phrase used in the Terms of Reference for this Inquiry, namely that the use of defined terms should be 'consistent with promoting robust regulatory boundaries'.

2.13 'Robust' financial sector regulation may also mean regulation that is 'able to preserve its effectiveness when confronted with hard-to-predict developments and innovations', and that can 'maintain its core functions in the face of unexpected perturbations or disturbances'.[6] Robustness recognises the problem of 'Knightian uncertainty' in finance: that future contingencies and their probabilities are difficult or impossible to determine.[7]

2.14 Arguably, regulation has limited capacity to 'address in detail every possible manifestation' of risk,[8] such that robust regulation should not seek to 'offer the best-tailored response to each specific phenomenon',[9] but rather should employ a 'deliberate lack of subtlety in method'.[10] Accordingly, achieving robustness in this way may be closely aligned with principles-based regulation.

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4 The Australian Government has a current project to 'modernise business communications', including 'improving technology neutrality of Treasury Portfolio laws'. See, eg, Department of Prime Minister and Cabinet (Cth), 'Modernising Business Communications' <deregulation.pmc.gov.au/priorities/modernising-business-communications>. See also **Chapter 6**.

5 See discussion of principles-based regulation at [2.79]–[2.107].

6 Gai et al (n 3) 3.

7 David Cowan, 'Knightian Uncertainty' in David Cowan (ed), *Frank H. Knight: Prophet of Freedom* (Palgrave Macmillan UK, 2016) 27, 63.

8 Gai et al (n 3) 34.

9 Ibid 3.

10 Patrick Honohan and Joseph E Stiglitz, 'Robust Financial Restraint' in Gerard Caprio, Joseph E Stiglitz and Patrick Honohan (eds), *Financial Liberalization: How Far, How Fast?* (Cambridge University Press, 2001) 31, 31. Honohan and Stiglitz go on to explain (at 37): '*Subtle* regulation based on a precise model of bank and financial system behavior could prove counterproductive if the model does not correspond to reality.'

2.15 Treasury submitted to the Financial Services Royal Commission that

> principles are adaptive. They do not require frequent changes to the overarching statute. When a principle is correctly distilled there is little need for ongoing legislative amendments, particularly when contrasted with more prescriptive granular approaches.[11]

2.16 Professor Gai and others have argued that robustness could improve the cost-effectiveness of regulation while reducing its complexity. They have developed 'seven principles in the design and reform of financial regulation' that could assist to achieve robustness; the first principle (which has the greatest relevance in this Inquiry) is 'adaptability' (a closely related word to 'adaptivity').[12]

2.17 Reform of legislative definitions could potentially contribute to the robustness of regulatory boundaries in a number of ways, including:

- reducing (unnecessary) duplication and overlap between concepts;
- reducing ambiguity as to the meaning of defined terms; and
- increasing clarity as to the application of legislative provisions.

Efficiency

2.18 An 'efficient' legislative framework is one that facilitates desired outcomes in a manner that imposes as few burdens and impediments as possible. Achieving efficiency involves minimising negative externalities and other costs, and maximising benefits for consumers, businesses, and others. Comprehensively evaluating the efficiency of legislation would require considering direct financial costs of implementation and compliance, all negative effects of the legislation, as well as the extent to which the goals of the legislation have been achieved.[13] A number of different theoretical methods (based on adaptations of economic concepts of efficiency) can be used to analyse costs and benefits and determine what proposed legislative action is the most efficient.[14]

2.19 In the context of this Inquiry, costs and benefits would need to be considered in relation to each of government, regulators, businesses, consumers, and the general public (at least). The ALRC does not have the expertise or data available to estimate the financial cost of existing legislation or proposed legislative reforms. However, the ALRC has received feedback from government and the regulated community in particular about the significant (and increasing) costs of administering

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11 Department of the Treasury (Cth), Submission to the Financial Services Royal Commission (Interim Report)*, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (undated) 7.

12 Gai et al (n 3) 3. 'Adaptive' can mean 'characterised by adaptation', and 'adaptable' can mean 'able to adapt'. The distinction does not appear significant in the context of this Inquiry.

13 See Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Taylor & Francis Group, 2008) 7.

14 Ibid 8.

and complying with existing laws.[15] One aim of simplifying the legislative framework is to reduce those costs, without producing negative externalities or other costs. In this sense, the ALRC is confident that legislative simplification will contribute to its overall efficiency.

Navigability

2.20 A 'navigable' legislative framework is one that enables readers to locate relevant provisions with sufficient ease. Navigability has been identified as an important aspect of the law's accessibility, and as a way of ensuring the law's message is delivered effectively.[16] The navigability of a legislative framework may be affected by, for example, its length, its structure, and whether it indicates effectively to readers which other provisions and documents need to be read to understand the ultimate effect of the law. The concept of navigability is consequently of relevance to all aspects of this Inquiry. **Background Paper FSL3** is dedicated to the topic of navigability specifically, and **Chapter 6** of this Interim Report contains recommendations regarding the navigability of definitions in corporations and financial services legislation.

Coherence and meaningful compliance

2.21 The Terms of Reference for this Inquiry refer to notions of coherence in the law and meaningful compliance with the law.

Coherence

2.22 The ALRC is tasked with examining 'the coherence of the regulatory design and hierarchy of laws' in Topic B of this Inquiry, and with making the framework of Chapter 7 of the *Corporations Act* 'clearer, coherent and effective' in Topic C of this Inquiry. The notion of coherence has also significantly influenced the ALRC's consideration of definitions and concepts in this Interim Report.

2.23 A legislative framework is coherent 'if it hangs or fits together, if its parts are mutually supportive, if it is intelligible, if it flows from or expresses a single unified viewpoint'.[17] Conversely, incoherent law is 'unintelligible, inconsistent, ad hoc, fragmented, disjointed, or contains thoughts that are unrelated to and do not support one another'.[18] As a result, coherence needs to be assessed by reference to both the individual components of legislation and to legislation as a whole.

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15 See also CPA Australia, *CPA Australia's Regulatory Burden Report: The Impact of Complex Regulatory Frameworks* (2019).

16 Maria Mousmouti, *Designing Effective Legislation* (Edward Elgar Publishing, 2019) 79–80.

17 Ken Kress, 'Coherence' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2nd ed, 2010) 521, 521.

18 Ibid.

Meaningful compliance

2.24 The Terms of Reference for this Inquiry acknowledge the need to ensure 'meaningful compliance with the substance and intent of the law'. In relation to Topic A, the Terms of Reference also suggest that definitions should be used in a way that promotes 'general compliance with the law'. The ALRC understands 'general compliance' to refer to the *extent* of compliance to be achieved (that is, compliance with the law generally). In contrast, the phrase 'meaningful compliance' refers to the *nature* of compliance to be achieved. In this regard, the ALRC understands meaningful compliance as a counterpoint to 'tick a box' compliance, particularly as discussed in the Financial Services Royal Commission.[19]

2.25 The Financial Services Royal Commission identified that meaningful compliance requires the regulated community to apply

> intellectual drive, honesty and rigour. It demands thought, work and action informed by what has happened in the past, why it happened and what steps are now proposed to prevent its recurrence.[20]

2.26 Meaningful compliance requires the regulated community to accept responsibility for determining how to achieve compliant conduct, rather than seeking to shift that responsibility to a regulator.[21] For example, it may be more 'meaningful' for a financial adviser to comply with the law by actively inquiring into and assessing the suitability of financial products for their clients, rather than by simply following a list of prescriptive procedural requirements, or by blindly complying with regulatory guidance.[22] Principles of meaningful compliance underpinned a number of recommendations of the Financial Services Royal Commission. The ultimate goal is that the intent of the law is met, 'rather than merely its terms complied with'.[23]

2.27 Meaningful compliance does not imply that compliance with the law should only be required or enforced when a particular provision or activity is considered meaningful, whether by the regulated entity or a regulator. The goal is that all of the law is complied with — both its intent and its terms. This requires that both the intent and terms of the law are clear, coherent, and navigable.

Taxonomy

2.28 **Figure 2.1** below suggests an example of a concept, principle, norm, rule, and standard, in the context of the disclosure requirements in Chapter 7 of the *Corporations Act*. Each of these key terms, including how it might be understood by reference to the other terms, is then explored further below in this section.

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19 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019) 177.

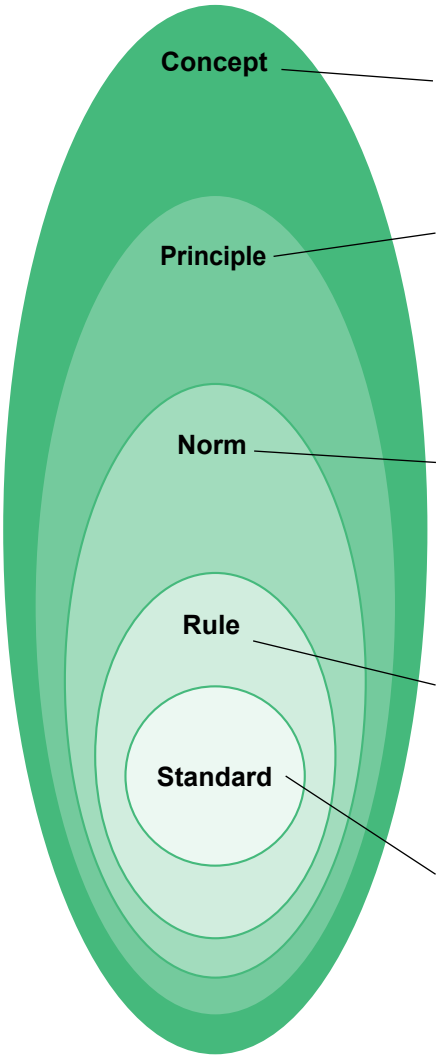
20 Ibid 391.

21 Ibid 495–6.

22 Ibid 177.

23 Ibid 44, quoting from the submission by the Department of the Treasury (Cth) to the Interim Report of the Royal Commission.

Figure 2.1: Taxonomy



Examples

Concept	Disclosure (see Parts 7.7 and 7.9 of the *Corporations Act*).
Principle	Consumers should have access to information that enables confident and informed decision making (see the 'object' of Ch 7 of the *Corporations Act* as set out in s 760A(a)).
Norm	Providers of financial services and financial products should disclose correct and complete information for consumers to make financial decisions (see the Financial Services Royal Commission's second norm of conduct: 'do not mislead or deceive').
Rule	A regulated person must give a retail client a Product Disclosure Statement for a financial product in specified circumstances (see ss 1012A, 1012B, 1012C of the *Corporations Act*).
Standard	The information included in a Product Disclosure Statement must be worded and presented in a 'clear, concise and effective' manner (see s 1013C(3) of the *Corporations Act*).

2.29 The analysis below outlines literature concerning the above terms. It should be acknowledged that their meaning and usage can overlap in different contexts and that the process of drawing distinctions between these terms may ultimately depend more on pragmatic than theoretical factors. The ALRC has therefore taken a pragmatic approach to develop a working model of each of the categories explored below, in anticipation of their practical application in subsequent chapters of this Interim Report.

Definitions and concepts

2.30 The foundation of this Interim Report is the use of 'definitions' in legislation. The topic includes consideration of when 'it is appropriate for *concepts* to be defined',

and 'consistent use of terminology to reflect the same or similar *concepts*' (emphasis added). This wording in the Terms of Reference reflects that defined terms are commonly used in legislation as a method of describing or labelling underlying concepts.[24]

2.31 Legislative definitions include 'dictionary' provisions (such as s 9 of the *Corporations Act* and s 5 of the *ASIC Act)*, which set out alphabetical lists of defined terms, and specify their meaning for the purposes of the legislation. Similarly, 'interpretation' provisions, including sections, divisions, and parts of legislation that are dedicated to explaining and delineating concepts (such as most of Parts 1.2 and 1.2A of the *Corporations Act*) are within scope. Drafting techniques such as 'tags' that create a short-hand label in a narrative style for the purposes of enhancing readability in a single section (such as 'Legislative Instruments commencement day' in s 5C of the *Corporations Act*) are another way of expressing concepts in legislation. Furthermore, rules affecting the interpretation of legislation (such as Part 1.2 Div 8 of the *Corporations Act*, and the *Acts Interpretation Act* more generally), must also be considered.

2.32 In addition, operative provisions — namely, provisions that deal with substantive content such as requirements and obligations — can be another method by which legislation describes or labels concepts. This aspect is explored further in **Chapter 13**, which analyses an array of conduct obligations relevant to various financial services providers. In this way, a number of operative provisions across Commonwealth legislation ultimately aim to describe similar types of conduct, but do so in different terms. These provisions use different terminology 'to reflect the same or similar concepts', and an analysis of their potential simplification is included within this Interim Report.

2.33 The term 'concept' can have a very broad meaning, as 'a tool of thought'.[25] Influential US legal academic Professor Roscoe Pound gave it a more precise meaning in the context of legal theory, describing concepts as 'more or less exactly defined types', by which cases can be classified, and to which legal consequences attach.[26] Toy has described corporations, contracts, trusts, estoppel, and others as examples of legal concepts in this sense.[27] Concepts may contain standards, principles, norms, outcomes, or other elements (see **Figure 2.1** above). For example, Paton considered 'negligence' to be a legal concept in a broad sense, as a category of legal thought, and simultaneously to be a 'standard',[28] because what is considered to be negligent 'depends on an idea of what is reasonable'.[29]

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24 See, eg, Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [65]; Victorian Law Reform Commission, *Plain English and the Law: The 1987 Report Republished* (2017) 122; Office of the Parliamentary Counsel (UK), *Drafting Guidance* (2020) [4.1.2].

25 George Paton, *A Textbook of Jurisprudence* (Clarendon Press, 1946) 177.

26 Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale University Press, 1922) 116.

27 Peter Toy, 'An Examination of Legal Values in Statutory Unconscionable Conduct' (2020) 48(5) *Australian Business Law Review* 406, n 49.

28 See [2.45]–[2.49].

29 Paton (n 25) 177–8.

Principles

2.34 Pound described legal principles as 'general premises for judicial and juristic reasoning'.[30] Principles can be used 'to supply new rules, to interpret old ones, to meet new situations, to measure the scope and application of rules and standards and to reconcile them when they conflict or overlap'.[31]

2.35 Professor Black and others have noted the term 'principles' may be used to refer to 'general rules', or rules that are 'implicitly higher' in a hierarchy of norms, and which express 'the fundamental obligations that all should observe'.[32]

2.36 Paton described principles as 'the broad reason which lies at the base of a rule of law' and 'the means by which the law lives, grows, and develops'.[33] He argued that a principle should have 'reasonable elasticity', but not to the point of becoming merely a 'confused statement':

> The most accurate expression of a principle may still leave its application to particular circumstances in doubt, but that is a characteristic inherent in the nature of all principles.[34]

2.37 Principles should give cohesion to a particular branch of the law by explaining the majority of cases. An example principle cited by Paton is that those who exercise a public calling should not take unfair advantage of their position.

Norms

2.38 German academic Hans Kelsen described a legal norm as something that the law says 'ought to be'. A norm may command (often by use of the term 'must'), empower (by use of 'can'), permit (by use of 'may'), or derogate from another norm (by declaring that particular conduct is not obligatory in particular circumstances).[35]

2.39 A normative law functions as 'a standard of value applied to actual behaviour' and a decision whether or not particular behaviour conforms to the applicable standard is a value judgment declaring whether or not the behaviour is as it 'ought to be'.[36]

2.40 The term 'norm' can also have a more general meaning beyond the law, to describe behaviour that is ordinarily expected, or considered acceptable, by society at large. In this way, a norm may reflect or express the purpose or intent of the law. The Financial Services Royal Commission commented that six fundamental norms underpin much of the law regarding misconduct in financial services. The Commission described these norms as 'well-established, widely accepted, and

30 Pound (n 26) 116.
31 Ibid.
32 Julia Black, Martyn Hopper and Christa Band, 'Making a Success of Principles-Based Regulation' (2007) 1(3) *Law and Financial Markets Review* 191, 192.
33 Paton (n 25) 176.
34 Ibid.
35 Hans Kelsen, *General Theory of Norms*, tr Michael Hartney (Oxford University Press, 1991) 2–3.
36 A helpful summary of Kelsen's work is contained in Toy (n 27) 415.

easily understood', but considered their reflection in existing law to be 'piecemeal'.[37] It suggested that legislation should make explicit the connections between particular rules and the fundamental norms to which the rules give effect, to explain better the purpose behind particular rules.[38] The Terms of Reference for this Inquiry require the ALRC in Interim Report C to consider how the legislative framework might better give effect to 'the fundamental norms of behaviour being pursued'. **Chapter 13** of this Interim Report discusses how conduct norms might best be reflected in legislation.

Rules

2.41 Pound described 'rules' as 'definite, detailed provisions for definite, detailed states of fact … employed chiefly in situations where there is exceptional need of certainty'.[39] The role of rules is 'precisely determining what shall take place upon a precisely detailed state of facts'.[40] Accordingly, rules have 'detailed, authoritatively fixed content'.[41]

2.42 Toy has described a rule as a

> statement of a legal obligation or prohibition, which contains the factual matters that are the conditions of its application. For example … a person must not supply a particular kind of product without a particular licence.[42]

2.43 Toy describes the application of rules as a mechanical process of fitting the facts to the requirements of the rule. Toy is of the view that rules work well when the rule-maker is clear about the desired content of the relevant obligation or prohibition. However, in areas of law that require 'an aggregate set of many rules in order to cover the field', regulating by rules alone may lead to the law becoming

> very large, excessively detailed and very complex (in the sense of rules being subtly interrelated with each other). There are high costs on the rule-maker in maintaining aggregate sets of rules. The simplicity of a particular rule can also be deceptive. Over time rules can be shown to be over-inclusive and under-inclusive of what needs to be regulated and this creates pressure on the rule-maker to legislate exceptions and deemed inclusions.[43]

2.44 The relationship between prescriptive rules-based legislation and the proliferation of inclusions, exclusions, and exemptions in Chapter 7 of

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37 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 19) 9–11.

38 Ibid 17, 494–6, rec 7.4. Similarly, in the context of corporate governance, Langford has suggested that including purpose statements in company constitutions could play a 'motivating, connecting, and signalling role': Rosemary Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43(3) *University of New South Wales Law Journal* 954, 955.

39 Pound (n 26) 115.

40 Ibid 116.

41 Ibid 119.

42 Toy (n 27) 413.

43 Ibid, citing Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer Law & Business, 9th ed, 2014).

the *Corporations Act* in particular is analysed further in **Chapter 10** of this Interim Report.

Standards

2.45 Pound described 'standards' as 'measures of conduct'. He cited requirements to act in 'good faith', or 'reasonably', or 'prudently', or 'diligently', or 'fairly', as examples of standards. Standards are commonly expressed as a rule that a person's conduct must meet the requirements of the standard, but the 'fixed rule' is less significant than 'the margin of discretion involved in the standard and its regard for the circumstances of the individual case'.[44] Standards 'involve a certain moral judgment upon conduct', and call for 'common sense about common things' rather than legal expertise. Standards are not absolute, but are 'relative to the times and places and circumstances', recognising that 'each case is to a certain extent unique'.[45]

2.46 Toy has argued that standards are best understood in direct contrast to rules. Standards are expressed in 'broad and flexible language'. For example, a rule might state that a person 'must not drive in excess of the prescribed speed limit'. In contrast, a standard might take the form of a prohibition on 'driving dangerously', or of an obligation to 'exercise reasonable care' when driving. Applying the normal rules of statutory interpretation to a standard usually provides 'only a high-level meaning that is not determinative of the facts that are conditions for its application'.[46]

2.47 Toy has commented that the value of standards lies in the flexibility courts have to examine both facts and values (the 'fact-value complex') when assessing a specific case. In his view,

> rules do not work as well if it is 'behaviour' or 'conduct' that needs to be regulated. It is practically impossible to set up rules of detailed factual states for every way in which the same ends can be achieved by human behaviour. For example, how many ways can a corporation mislead or deceive a consumer? Broad and flexible standards are required to deal with such conduct.[47]

2.48 Toy noted in particular the following comments of Middleton J:

> Commercial law must keep up with the development of commerce, and hard and fast rules may readily become out of date. As many contemporary judges have stated, commercial values, norms and community expectations evolve over time. Rigid rules (as distinct from general principles) are often unable to withstand the pressure of change. … no legislator can predict every individual dispute situation, and must resort to legislating in a proactive manner.[48]

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44 Pound (n 26) 117.
45 Ibid 118.
46 Toy (n 27) 413.
47 Ibid 414.
48 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 [403].

2.49 Examples of standards include the obligation on AFS Licensees to act 'efficiently, honestly and fairly' in s 912A of the *Corporations Act* (discussed in **Chapter 13**), and the requirement for PDSs to be 'clear, concise and effective' in s 1013C of the *Corporations Act* (discussed in **Chapter 9**).

Policy and legislative simplification

2.50 The Terms of Reference require this Inquiry to be conducted 'within existing policy settings'. Topic C of the Terms of Reference also refers to ensuring that 'the intent of the law' is met. The ALRC understands this to mean that the Inquiry is to be primarily technical in nature, recommending how existing policies and the intent of Parliament might be reflected in the law more simply and effectively, rather than recommending changes to the policies underpinning the law. 'Policy' in the context of legislation has been described as 'decisions about what legislation is supposed to deal with and the way in which those things are to be dealt with', while 'technical' matters relate primarily to the formulation and implementation of policy.[49]

2.51 This aspect of the Terms of Reference has enabled the ALRC to consider a broad range of legislation from the perspective of achieving simplification, rather than resolving the potentially limitless range of policy issues raised across the legislation. However, a technical review must necessarily identify the existing policy settings underpinning the legislation, and determine the extent to which those policy settings are coherent and reflected in the legislative framework. This has presented a number of challenges:

- First, it is not always easy to identify the policy settings underpinning complex law. Furthermore, understandings of those policy settings and their relative priorities will be subject to change over time.
- Secondly, there may be multiple policy goals underpinning any one area of law, and there may not be any clear guidance on how those goals should be reconciled in the event of any tension or inconsistency between them. Identifying the general purpose of a piece of legislation may not assist in identifying the point at which a balance has been struck or a political compromise has been reached between potentially inconsistent purposes. Large and frequently amended legislation such as the *Corporations Act* will inevitably have been the vehicle for a number of differing policy objectives over the years since its introduction.[50]
- Thirdly, there is a degree of circularity in endeavouring to identify underlying policy by reference to existing legislative text, and then considering what changes to the legislative text might better reflect that policy.
- Fourthly, policy settings often comprise multiple layers or levels. For example, Professor Taylor has distinguished between 'fundamental policies' on the one

49 John Keyes and Dale Dewhurst, 'Shifting Boundaries between Policy and Technical Matters in Legislative Drafting' [2016] (1) *The Loophole* 23, 24.

50 The Hon Murray Gleeson AC, 'Statutory Interpretation' (Justice Hill Memorial Lecture, Taxation Institute of Australia, Sydney, 11 March 2009) 12–13.

hand, and 'policies that are consequences of the operational rules chosen to achieve a more fundamental policy objective' on the other. [51]

- Fifthly, there are significant limits on the extent to which legislative drafting, and other technical aspects of legislation, can remedy complexity that exists in underlying policy.
- Sixthly, any change to the drafting, construction, or design of legislation arguably changes in some way the substantive effect of the legislation, such that the underlying policy is affected.

2.52 The fifth and sixth points above are explored in more detail in the following paragraphs.

Complexity in underlying policy

2.53 In the context of Australian tax legislation, Professor Cooper has argued that simplification of legislative language or drafting without 'fixing' underlying policy is of little value. He cites 'regime duplication and overlap (typically by legislative accretion)' as example aspects of policy that could helpfully be 'fixed'.[52] Similar criticisms have been made in relation to aspects of corporate and financial services regulation.[53]

2.54 In support of his argument, Cooper cited a 2015 Discussion Paper from Treasury:

> While useful in addressing a particular aspect of complexity, the overall value of simplifying the drafting of legislation without any change in underlying outcomes is questionable. Simplifying language can only do so much if the underlying policy remains highly complex. In many cases, it will simply make the complexity of the policy more apparent and, in practice, only benefits the very small section of society using the tax legislation itself or related guidance material.[54]

2.55 The Productivity Commission observed in 2014 that in 'many cases, it is the underlying policy that contributes to the complexity of the law. Drafting techniques will do little to make the law more accessible in these cases'.[55] It cited OPC guidance from 2011, the current version of which states: 'Complex policy is generally difficult to express and results in many provisions.'[56]

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51 C John Taylor, *Beyond 4100: A Report on Measures to Combat Rising Compliance Costs through Reducing Tax Law Complexity* (Taxation Institute of Australia, 2006) 15–6. See, eg, **Chapter 12** of this Interim Report regarding the multiple layers of policy underpinning the definition of the term 'retail client'.

52 Graeme Cooper, 'Fixing the Defective Jigsaw' (2021) 45(1) *Melbourne University Law Review* (advance).

53 See, eg, **Chapter 9**.

54 Department of the Treasury (Cth), 'Re:Think: Tax Discussion Paper' (Discussion Paper, March 2015) 176, cited in Cooper (n 52).

55 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Australian Government, 2014) 184.

56 Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (Document Release 2.1, June 2016) [2.2.1].

2.56 Similarly, Taylor has argued that 'merely simplifying the language in which the law is expressed does little to improve' overall simplicity, and has instead advocated for 'a reduction in the number of operational rules'.[57] In his view, a change in operational rules 'will not necessarily involve a change in the policy behind the law', because there may be a range of alternative rules from which to choose, 'each of which achieves the fundamental purpose' of the legislation.[58] Consequently, it may be possible to choose an alternative, simpler, set of rules without changing existing policy settings.

2.57 In this vein, the ALRC has previously commented on 'the over-proliferation of offences' in Commonwealth law, noting for example that there are almost 100 different offences in the *Corporations Act* that essentially relate to defective disclosure, or misleading and deceptive conduct.[59] The ALRC ascribed this proliferation to the 'level of minutiae' and 'excessive specificity' in the law, which increases complexity and reduces the effectiveness of the regulatory regime.[60]

2.58 Similarly, Professors Bant and Paterson have catalogued the many overlapping provisions in which the core prohibition on misleading and defective conduct is 'repeated and replicated, in more or less similar formats, across literally dozens of general and specific pieces of legislation' in Australia.[61] They have described the resulting mix of rules as 'complicated, confused, conflicting and costly'.[62]

2.59 In the context of this Inquiry, these arguments highlight the potentially limited benefits of an overly narrow approach to the simplification of legislation. The ALRC has therefore identified in this Interim Report some opportunities for simplification that may have implications for underlying policy, noting that it is a matter for government to confirm its policy intent in this regard. **Chapter 9** and **Chapter 13** of this Interim Report in particular explore ways in which multiple overlapping obligations and prohibitions might be rationalised and consolidated in relation to disclosure regimes and conduct obligations respectively.

Drafting, design, and policy

2.60 Professor Marcello has observed that the legislative drafter is sometimes considered a 'policy-neutral player', but he has argued that the drafter is instead an 'important policymaker'. Similarly, in his view the activity of legislative drafting is not a 'technical, value-neutral enterprise', but rather is 'inherently political', 'inescapably demands policy choices', and has 'ethical and political implications'.[63] For example,

57 Taylor (n 51) 15.
58 Ibid.
59 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, 2020) 78–9.
60 Ibid.
61 Elise Bant and Jeannie Paterson, 'Evolution and Revolution: The Remedial Smorgasbord for Misleading Conduct in Australia' (2020) 14(1) *FIU Law Review* 25, 28.
62 Elise Bant and Jeannie Paterson, 'Developing a Rational Law of Misleading Conduct', *Unravelling Corporate Fraud* <www.unravellingcorporatefraud.com/developing-a-rational-law-of-misleading-conduct/>.
63 David Marcello, 'The Ethics and Politics of Legislative Drafting' (1996) 70(6) *Tulane Law*

drafting does not merely reflect the intent of the legislation's proponent, but rather is a method of *developing* the proponent's intent and 'almost every word chosen … reflects a policy choice'.[64] In Australia, legislative drafters routinely collaborate closely with their instructing agencies.[65] Accordingly, government departments play a crucial role in managing policy issues raised during the drafting process.

2.61 Furthermore, Marcello has argued that decisions ordinarily made by legislative drafters, such as the decision where to locate a new law in the statute book (and where within a particular piece of legislation), may carry 'significant jurisprudential baggage' because the interpretation of the new law will in part depend on its context.[66] The degree of 'precision' (a concept Marcello contrasts with 'vagueness') with which provisions are drafted can also have 'substantial political implications'. Ultimately, in Marcello's view, 'substance and form cannot be functionally divorced'.[67]

2.62 Professor Keyes and Associate Professor Dewhurst have similarly observed that the traditional 'dividing line' between policy (ultimately the domain of elected representatives) and technical drafting matters (determined by professional legislative counsel) has been the subject of uncertainty, change, and debate. They categorise as 'policy' all decisions as to what results are sought to be achieved, and 'at least some decisions' regarding how those results are to be achieved — including whether to legislate at all. They identify two factors determining whether a particular matter might be considered 'policy' or 'technical': the extent to which a matter can be resolved 'by recourse to technical considerations' rather than political judgement, and the extent of public interest in the matter. Each of these factors is a question of degree and some subjectivity. Importantly for the purposes of this Inquiry, the authors consider 'clarification' (as distinct from determination) of legislative objectives to be a legitimately technical endeavour.[68]

2.63 In addition, Associate Professor Godwin and others have observed that legislation and policy have a 'mutually reinforcing and generative nature' that can make them difficult to separate.[69]

2.64 Nevertheless, distinctions between matters of policy and technical matters can be of significant consequence in Commonwealth legislation. For example, the Commonwealth Legislation Handbook provides that the level of ministerial authority required for the content of a Bill differs depending on the associated policy implications. Four categories are set out, relating to Bills with: 'significant policy

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Review 2437, 2439.

64 Ibid 2440–1, quoting Robert Martineau, *Drafting Legislation and Rules in Plain English* (West Publishing, 1991) 65.

65 Office of Parliamentary Counsel (Cth), *OPC's Drafting Services: A Guide for Clients* (6th ed, 2016) esp [23], [44], [53], [59]–[63].

66 Marcello (n 63) 2448.

67 Reed Dickerson, *The Fundamentals of Legislative Drafting* (Little, Brown, 2nd ed, 1986) 61, quoted in Marcello (n 63) 2449.

68 Keyes and Dewhurst (n 49) 26.

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

implications'; 'minor policy implications'; 'technical amendments within existing policy'; and 'technical corrections' to existing legislation.[70] The Handbook does not further explain the distinctions between these categories.

2.65 An OPC publication states that legislative drafters 'do not make policy', but rather focus on ensuring the policy measures proposed by instructing agencies are 'legally effective'. Nevertheless, drafters will draw on their experience and expertise to work together with instructing agencies to solve 'problems identified in the drafting process'.[71]

2.66 Professor Arnold has suggested that the strict separation of legislative drafting from policy and administration roles, and OPC's status as an independent agency, are 'partly responsible for absurdly complicated' legislation.[72] In response, Professor Stewart has argued that there are benefits to retaining OPC's independence, while agreeing that legislative drafters should be engaged 'from the earliest stages of policy formulation'.[73]

2.67 Arguably, language is inherently limiting, such that whenever legislative drafters attempt to express particular policy settings in words, the result is inevitably that the policy is limited to some extent by the language that is used. Accordingly, it may be impossible to reflect policy decisions in any 'pure' way in legislation, even if the drafter uses words that are clear on their face. Instead, the choice of language in the drafting process will inevitably affect the meaning attributed to the legislation, and so will affect the policy settings that are reflected in the legislation.

2.68 Australian judicial authorities have long established that a 'change' in language in legislation may indicate a change in the intended meaning of the legislature, although this will not always be the case.[74] The type of 'change' most frequently cited in such case law is a difference in language between provisions appearing within the same Act, which may indicate that each provision is intended to be interpreted differently in some way. However, the same logic may apply to a 'change' in language between different points in time, such as a change effected by an amendment to a legislative provision. Consequently, any provisions that are amended by Parliament for the purpose of simplification in accordance with recommendations of this Inquiry may be interpreted as having a different substantive effect — ultimately altering policy settings in some way. Case law suggests that courts will be particularly inclined to infer that legislatures intend a different substantive meaning when new provisions 'abandon a long-established form of words known to import a body of law'.[75] The

70 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [3.1].
71 Office of Parliamentary Counsel (Cth) (n 65) [32].
72 Brian Arnold, 'The Process of Tax Policy Formulation in Australia, Canada and New Zealand' (1990) 7(4) *Australian Tax Forum* 379, 387–9.
73 Miranda Stewart, 'Consultation in Business Tax Reform: Towards an Effective Tax Policy Network' in Graeme Cooper (ed), *Executing an Income Tax* (Australian Tax Research Foundation, Conference Series No 25, 2008) 249, 273–4.
74 See, eg, *Scott v Commercial Hotel Merbein* [1930] VLR 25; and the discussion in Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) [4.6]–[4.9].
75 *LM v K Lawyers (No 2)* [2015] WASC 245 [18].

ALRC has been particularly conscious of this principle when examining, for example, key conduct obligations in the *Corporations Act* and the *ASIC Act*.

2.69 Since 1987, section 15AC of the *Acts Interpretation Act* has provided that a change in language may not evince an intention to change the effect of a provision in circumstances where a 'later Act appears to have expressed the same idea in a different form of words [than an earlier Act] for the purpose of using a clearer style'. This new provision may have been in response to the 'plain language movement' that was gaining momentum in Australian law around that time. However, Pearce has highlighted that courts must still 'grapple with the question' whether a particular new provision in fact seeks to express 'the same idea', or rather a different idea, and this may not always be a straightforward matter.[76] If explanatory materials accompanying any Bill proposing simplification of particular provisions clearly state the purpose of the amendments, this may assist courts to identify that the 'same idea' as the original legislation is sought to be expressed. In addition, if the language that is introduced in a particular provision is 'sufficiently clear', then presumptions about variations in language will be 'of very slight force'.[77]

2.70 Corporations and financial services legislation contains a large number of exclusions, exemptions, and other types of 'carve-outs'. The Final Report of the Financial Services Royal Commission suggested that the number of carve-outs should ultimately be reduced.[78] The ALRC agrees there would be benefits in reducing carve-outs generally, and notes that consideration of the merits of particular exceptions are ordinarily matters of policy, and beyond the scope of this Inquiry. In the context of tax law, Treasury previously came to a similar view that removing or altering the scope of established concessions is a matter of policy simplification, rather than legislative simplification.[79] In **Chapter 12**, certain exceptions to the definition of the term 'retail client' are examined from the perspective of restoring the fundamental policy settings, rather than determining or changing the fundamental policy. Nevertheless, any changes to those exceptions would inevitably have policy implications.

Legislative design

2.71 The remainder of this chapter explores some theoretical issues related to legislative design. Dr Mousmouti has described legislative design as

> the process of making strategic choices about legislation as an instrument that intervenes in social and legal reality, the required elements and their role. It is the process of designing the 'formula' according to which the law will intervene. The process of design involves thinking, reflecting, analysing and coming up with a strategy on how the law will change the status quo. Design allows the

76 Pearce (n 74) [4.10].
77 *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579, 590.
78 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 19) 16.
79 Department of the Treasury (Cth), *Report on Aspects of Income Tax Self Assessment* (2004) 65.

> elements of the final product (the law) to make sense and to have, at least conceptually, the potential to produce results.[80]

2.72 Given the parameters of this Inquiry, the ALRC is focused on aspects of legislative design that relate to how the law is presented, constructed, and organised, rather than the design of the underlying substantive policy. Godwin and others have identified a number of legislative design choices relevant to simplification of corporations and financial services legislation, including: the extent of detail that the law should contain; the allocation of law between different levels of the legislative hierarchy; alternative regulatory models; and alternative legislative styles.[81] These design choices are examined in relation to regulatory theories and legislative hierarchy.

Regulatory theories

2.73 The approach taken to a project of legislative simplification will likely reflect a particular view about the appropriate form of regulation in general, or for a particular sector.

2.74 Regulation, in a broad sense, can be understood as 'sustained and focused control exercised by a public agency over activities that are valued by the community'.[82] Consequently, regulation can involve a number of different mechanisms, including 'standard setting, information-gathering and behaviour modification'.[83] This Inquiry is focused on legislation, which is a method of standard setting. In the context of corporations and financial services regulation, 'information-gathering' and 'behaviour modification' may take the form of supervision and enforcement, for example. Black has argued that the success of principles-based regulation largely 'depends on how it is implemented and the institutional context which surrounds it'.[84] For example, principles-based regulation can work well if there is close engagement between regulators and regulated entities based on mutual trust, if regulators communicate outcomes and goals clearly, and if the enforcement regime is predictable.[85] Some commentators also advocate for 'responsive' approaches to the implementation of regulation.[86]

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80 Mousmouti (n 16) xiii.

81 Godwin, Brand and Teele Langford (n 69).

82 Philip Selznick, 'Focusing Organizational Research on Regulation' in Roger Noll (ed), *Regulatory Policy and the Social Sciences* (University of California Press, 1985) 363, 363, quoted in Christel Koop and Martin Lodge, 'What Is Regulation? An Interdisciplinary Concept Analysis' (2017) 11(1) *Regulation & Governance* 95, 95–96.

83 Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 26, quoted in Koop and Lodge (n 82) 96.

84 Julia Black, 'Forms and Paradoxes of Principles-Based Regulation' (2008) 3(4) *Capital Markets Law Journal* 425, 427.

85 Ibid.

86 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32(2) *Law & Policy* 181; Christine Parker, 'Twenty Years of Responsive Regulation: An Appreciation and Appraisal' (2013) 7(1) *Regulation & Governance* 2.

2.75 The ALRC is not tasked with reform of supervision and enforcement strategies, but notes that all aspects of regulation are interconnected, such that any decision to alter the approach to legislative design should be accompanied by consideration of the appropriate approach to supervision and enforcement.[87]

2.76 This section outlines by way of context some relevant regulatory theories, including rules-based, principles-based, outcomes-based, and risk-based regulation. The ALRC is pragmatic, rather than dogmatic, about the efficacy of each model of regulation. What constitutes appropriate and effective regulation will often be specific to a particular context and require a combination of approaches. Furthermore, the Financial Services Royal Commission warned against descending into debates about whether particular reforms fall into one or other theoretical category.[88] Indeed, terminology is not always used consistently in academic and other literature.

2.77 Arguably any system of regulation combines, and so exists somewhere along the spectrum of, these styles. Accordingly, any reform may have the effect of moving the law along the spectrum in one or other direction, rather than replacing one style with another.[89] There will be implicit trade-offs in any choice to pursue any one style more than another. All rules, whether expressed prescriptively or in principles, have inherent limitations. For example, rule-makers cannot be sure what situations will arise in the future, nor how the rules will be interpreted and applied. In addition, rules will never be 'perfectly congruent with their purpose', but rather will inevitably be over-inclusive or under-inclusive.[90] Indeed, 'any regulatory strategy can fail' and selection of the right regulatory tool or approach is not all that is required for regulatory success; 'regulation is a complex and multi-dimensional activity'.[91]

2.78 The theories outlined below will be further analysed and applied in future publications in this Inquiry.

Prescription, rules, and principles

2.79 One lens through which it can be helpful to analyse legislation is the level of prescription and detail it contains. Highly prescriptive legislation is sometimes referred to as 'rules-based' regulation. Alternatively, legislation that is expressed in a more general manner can be described as 'principles-based' regulation.

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87 See generally Sharon Gilad, 'It Runs in the Family: Meta-Regulation and Its Siblings' (2010) 4 *Regulation & Governance* 485; Cary Coglianese and David Lazer, 'Management-Based Regulation: Prescribing Private Management to Achieve Public Goals' (2003) 37(4) *Law & Society Review* 691.

88 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 19) 495.

89 See, eg, the commentary referred to in Australian Law Reform Commission, *The Future of Law Reform: A Suggested Program of Work 2020–2025* (2019) 33–4.

90 Black, Hopper and Band (n 32) 194.

91 Julia Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75(6) *Modern Law Review* 1037, 1061–2.

2.80 It is likely that no legal system or individual Act is purely rules-based or principles-based. Rather, legal systems, individual pieces of legislation, and even individual provisions routinely contain a combination of broad principles and narrow rules. In this sense, it can be helpful to refer to 'principles-based drafting' or 'prescriptive drafting' being exhibited in a particular provision.[92]

2.81 The ALRC's preliminary examination of Commonwealth corporations and financial services legislation, and the literature addressing its complexity, demonstrates that, in general, it is highly prescriptive, or rules-based. Of particular relevance for this Interim Report is the inclusion of significant detail in legislative definitions. Detail and prescription may have been introduced into the legislation in an attempt to prevent or respond to regulatory arbitrage, or 'gaming' of the system. However, arguably, the level of prescription may incentivise further regulatory arbitrage, as industry may design or adapt products and situations so as to fit them within a more convenient (or less burdensome) prescribed category. An example that consultees have highlighted to the ALRC during this Inquiry is that a service provider may leverage the highly prescriptive definition of a 'retail client' to structure a transaction in such a way that the client can instead be classified as a 'wholesale client', in order to reduce the compliance burden on the service provider.[93]

2.82 Prescription may also be relevant to objectives identified in the Inquiry's Terms of Reference, such as the ability of legislation to adapt to the 'continuing emergence of new business models, technologies and practices', and the 'need to ensure there is meaningful compliance with the substance and intent of the law'.

2.83 The ALRC is therefore considering whether a less prescriptive approach to legislation in general, and in particular to Acts of Parliament, may assist to simplify the legislative framework.

What is principles-based regulation?

2.84 Black and others have described principles-based regulation as: 'moving away from reliance on detailed, prescriptive rules and relying more on high-level, broadly stated rules or Principles to set the standards by which regulated firms must conduct business'.[94]

2.85 Black has noted that principles-based regulation has sometimes been misinterpreted as meaning 'light-touch regulation', and consequently the expression suffered a 'reputational blow' during the global financial crisis (particularly in the UK).[95] However, in her view, principles-based regulation is a much more complex

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92 Daniel Lovric, 'Principles-Based Drafting: Experiences from Tax Drafting' [2010] (3) *The Loophole* 16.

93 See further **Chapter 12**.

94 Black, Hopper and Band (n 32) 191.

95 Julia Black et al, 'Regulatory Styles and Supervisory Strategies' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015) 217, 230.

concept, and in substance it is 'alive and well' in the design of rule systems at the global level.[96]

2.86 In a previous report in 2008, the ALRC considered the application of principles-based regulation in the area of privacy law. The ALRC recommended that the *Privacy Act 1988* (Cth) be restructured, focused on high-level principles of general application, and be supplemented by delegated legislation in relation to specific fields of application. It further recommended that a set of privacy principles be included in legislation, and this recommendation has since been adopted.[97]

Benefits of each of prescription and principles

2.87 Black has described the relative benefits of principles and detailed rules as follows:

> The potential benefits claimed of using Principles are that they provide flexibility, are more likely to produce behaviour which fulfils the regulatory objectives, and are easier to comply with. Detailed rules, it is often claimed, provide certainty, a clear standard of behaviour and are easier to apply consistently and without retrospectivity. However, they can lead to gaps, inconsistencies, rigidity and are prone to 'creative compliance', to the need for constant adjustment to new situations and to the ratchet syndrome, as more rules are created to address new problems or close new gaps, creating more gaps and so on.[98]

2.88 Professor Gilad has argued that prescriptive approaches may reduce the regulated community's 'normative commitment and internalization of regulation', 'leave little room for innovation', and do not cope well with 'heterogeneous and fast-moving industries'. [99]

2.89 Lovric has described advantages of principles-based legislative drafting as including: increasing breadth and flexibility; allowing greater readability; avoiding loopholes; and often more closely reflecting original policy decisions. Disadvantages can include:

- introducing uncertainty (noting rules-based drafting 'at least provides certainty in the situations it deals with');
- privileging expert users of legislation, who are more familiar than occasional users with how the principles are ordinarily applied;
- not accommodating legislative schemes based on 'historical practice or political compromise';
- being more time consuming to develop 'good principles' than it is to develop black letter rules; and

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96 Ibid 247.

97 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, 2008); Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth).

98 Black, Hopper and Band (n 32) 193.

99 Gilad (n 87) 485, 495.

- requiring 'a fairly high level of policy expertise and drafting expertise'.[100]

2.90 Godwin and others have noted that principles-based regulation may more readily facilitate the expressive function of the law, in that the norms and values underpinning the law might be clearer, and consequently more likely to influence industry action and behaviour.[101]

2.91 Bant and Paterson have advocated for a more principles-based approach to the design of Australian legislation regulating misleading and deceptive conduct in particular, supplemented by soft law guidelines regarding the operation of principles in specific contexts. They argue that it is a 'cleaner and clearer' approach with a greater ability to respond to 'fundamental harms', and recognises the capacity of courts to advance the policy objectives underlying the legislative regime. Furthermore, it could promote 'coherence across both statutory and common law contexts' rather than 'fracturing' statutory treatment of the topic.[102] These themes will be explored further in **Chapter 13** in relation to conduct obligations on financial services providers.

2.92 Black has suggested ultimately that debates about advantages and disadvantages of principles-based regulation are 'stale', and a more helpfully nuanced understanding of any regulatory regime can be gained by appreciating a number of 'paradoxes':

> Paradox 1: The interpretative paradox: principles can be general yet precise. …
>
> Paradox 2: The communicative paradox: principles can facilitate communication but can also hinder it. …
>
> Paradox 3: The compliance paradox: principles provide scope for flexibility in compliance yet can lead to conservative and/or uniform behaviour by regulated firms. …
>
> Paradox 4: The supervisory and enforcement paradox: principles need enforcement to give them credibility but over-enforcement can lead to their demise. …
>
> Paradox 5: The internal management paradox: PBR [principles-based regulation] can provide flexibility for internal control systems to develop but can overload them. …
>
> Paradox 6: The ethical paradox: PBR [principles-based regulation] can facilitate a more ethical approach but it could result in an erosion of ethics. …

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100 Lovric (n 92) 24–5.

101 Godwin, Brand and Teele Langford (n 69) 287, citing Cass Sunstein, 'On the Expressive Function of Law' (1996) 144(5) *University of Pennsylvania Law Review* 2021 and Thomas McGinn, 'The Expressive Function of the Law and the Lex Imperfecta' (2015) 11 *Roman Legal Tradition* 1.

102 Elise Bant and Jeannie Paterson, 'Misleading Conduct Before the Federal Court: Achievements and Challenges' in Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law* (Federation Press, 2018) 167.

> Paradox 7: The trust paradox: PBR [principles-based regulation] can give rise to relationships of trust, mutuality and responsibility but these are the very relationships which have to exist for it to be effective.[103]

2.93 Black has described principles-based regulation as 'vulnerable' due to these paradoxes. However, she has emphasised that these paradoxes are not resolved in regimes with highly detailed rules, and that principles-based regulation can be effective, durable and resilient despite these paradoxes.[104]

Precision, clarity, and simplicity

2.94 A key debate regarding prescriptive and principled legislation is the degree to which each approach is capable of achieving 'precision', 'clarity', and 'simplicity'.

2.95 Some consultees in this Inquiry acknowledged that industry has arguably broadcast mixed messages about the desirability of principles-based regulation. On one level, industry is attracted to the greater simplicity that could be achieved through the expression of more general principles, but at the same time industry often seeks more precise guidance for assurance regarding compliance. Potentially these conflicting messages reflect the different perspectives and priorities of licensees, company directors, and compliance managers and the extent to which these perspectives and priorities can converge and diverge over time.

2.96 The Productivity Commission observed that principles-based drafting may make legislation easier to understand, less complex, and shorter, but sacrifices 'certainty' by allowing for greater interpretative scope over unspecified scenarios.[105]

2.97 In Turnbull's view, the goals of precision and simplicity need not conflict, but may conflict when 'concepts are extremely complex, or extra detail is necessary to avoid ambiguity, or the policy is so complex that it cannot be broken down into a series of simple statements without making the law disjointed and absurdly long'. In the event of a conflict, 'precision must prevail over simplicity' in order to produce a law that has the desired effect.[106]

2.98 Similarly, Stark has suggested that a legislative drafter's 'loyalty toward the legislative branch of government' militates in favour of drafting more specific legislation, especially for a 'battleground' subject such as tax.[107] Arguably, corporate and financial services regulation is another 'battleground' subject, given its significant micro- and macro-economic impacts, and the high level of professional involvement (such as accountants and lawyers) in its application.

2.99 The Victorian Law Reform Commission has argued that precision and clarity are not competing goals, and that 'a document which is precise without being clear

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103 Black (n 84) 446–56.
104 Ibid 457.
105 Productivity Commission (n 55) 184.
106 Ian Turnbull, 'Legislative Drafting in Plain Language and Statements of General Principle' (1997) 18(1) *Statute Law Review* 21, 25.
107 Jack Stark, 'Tools for Statutory Drafters' [2012] (2) *The Loophole* 51, 55.

is as dangerous in that respect as one which is clear without being precise. In its true sense, precision is incompatible with a *lack* of clarity.'[108]

2.100 Thornton has expressed caution that: 'The blind pursuit of precision will inevitably lead to complexity; and the complexity is a definite step along the way to obscurity' and that 'neither precision nor simplicity should be sacrificed at the altar of the other'.[109]

2.101 Black and others have argued that 'certainty' of rules does not depend on whether they are expressed in a detailed or a general way, but rather whether those applying the rule (including courts, regulators, and regulated entities) agree on what the rule means.[110]

2.102 In the context of private law, Professors Bigwood and Dietrich have acknowledged that certainty is an important legal objective, for example to ensure the exercise of judicial power remains predictable. However, they have categorised common complaints that particular legal concepts are too uncertain as 'assertion or speculative fear'.[111] In their view, much law comprises 'concepts that unavoidably generate a level of uncertainty in their application', and such concepts are 'an important part of the legal toolkit'.[112]

2.103 In a recent review of national security legislation, requests for 'clarity and certainty' in the law were given short shrift:

> NIC [National Intelligence Community] agencies, at times, sought absolute clarity and certainty in the law. The law can rarely provide the complete certainty that agencies have requested. But it does, sensibly, set down the limits and restraints and give effect to the principles that govern NIC agencies. Agencies must act within those limits and in accordance with those principles, but to do so must understand them. Agencies need initiative, drive and flexibility, guided by principles of legality and propriety. They do not need legislation to spell out exactly what they should do in all circumstances. That asks the impossible of Parliament. And it leads to laws that are complex, prescriptive and impenetrable to both agencies and the public.[113]

Suggested models

2.104 Black has argued that detailed rules should not be 'banished' from principles-based regulatory regimes, but rather a 'tiered approach' should be adopted, such

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108 Victorian Law Reform Commission (n 24) 34 (emphasis in original).

109 GC Thornton, *Legislative Drafting* (Butterworths, 3rd ed, 1987) 49, quoted in Victorian Law Reform Commission (n 24) 34.

110 Black, Hopper and Band (n 32) 194.

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

112 Ibid.

113 Dennis Richardson, *Comprehensive Review of the Legal Framework of the National Intelligence Community: Volume 1* (December 2019) [3.18].

that principles are underpinned by detailed rules in some areas, and the principles can 'thwart strategies' to exploit gaps and inconsistencies in those detailed rules.[114]

2.105 The Hon Chief Justice JLB Allsop AO has suggested that legislation concerned with 'morality' or proper conduct should be expressed at 'a requisite level of generality'. Legislation should provide for 'values and considerations' to inform decisions regarding the general norm, but should not seek to 'define' the general norm by reference to those considerations, nor over-particularise 'human, relational, moral values' by transforming them into a 'deconstructed checklist'.[115]

2.106 Bant and Paterson have also argued in favour of more principles-based legislation, with a greater role for 'soft law' sources (such as codes of conduct) to set out more detail about how the principles should be applied in practice.[116]

2.107 Former First Parliamentary Counsel (Cth) Peter Quiggin PSM QC has observed that Commonwealth drafting styles have varied over time and in relation to different subject matters. Quiggin expressed a preference to draft in a principles-based style 'where it is appropriate', such as when:

- additional detail would unduly increase the length of the legislation (in his view, in some cases a 'truly black-letter' approach would require so much additional legislation as to be 'impossible, or almost impossible');
- there is a coherent principle in the policy that the policy proponents are willing to have expressed;
- there are not 'so many add-ins and carve-outs that the general principle will be of little use in determining the law' (noting that policy proponents may prefer to avoid expressing a general principle in order to downplay the extent to which carve-outs depart from the principle);
- policy proponents are sufficiently willing to accept the 'risk and uncertainty' that a particular policy outcome may not be ensured in particular cases 'at the edge' (noting that the alternative of including more and more detail can be 'an almost never-ending process');
- those affected by the legislation (and their professional advisers) are willing to accept a degree of 'uncertainty' in return for greater 'simplicity';
- it is appropriate to provide in legislation for discretionary decision-making by a public body (such as a regulator);
- policy proponents perceive that courts will take 'a reasonable and purposive approach to interpretation' of legislation; and

114 Black (n 84) 429.

115 The Hon Chief Justice JLB Allsop, 'Statutes and Equity' (Kenneth Sutton Lecture, 12 November 2019).

116 Elise Bant and Jeannie Paterson, 'Statutory Interpretation and the Critical Role of Soft Law Guidelines in Developing a Coherent Law of Remedies in Australia' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 301.

- in the case of amendments to existing legislation, the existing legislation is already drafted in a principles-based style.[117]

2.108 The many references in the above dot points to 'policy proponents' highlight the extent to which the style used by legislative drafters may be dependent on the preferences and priorities of instructing agencies.

Application to the financial services sector

2.109 Treasury has previously identified a high level of prescription in corporations and financial services legislation as a significant cause of complexity, and advocated a more principles-based approach to legislation.[118]

2.110 Although Treasury acknowledged a level of prescription and complexity 'may be inherent and necessary to support effective regulation of the sector', it identified unnecessary prescription resulting from 'the piecemeal evolution of the legal framework' and 'requests by financial firms for greater clarity and certainty of their obligations'. It suggested some regulated entities sought to use prescriptive laws to 'shift risk by being able to point to a specific exemption or safe harbour, or by relying on literal compliance with the rules instead of complying with their intent'.

2.111 The resulting effects of increasing prescription include a legal framework that is 'compendious' and 'convoluted', with 'disparate, unclear and arguably conflicting' elements.

2.112 Treasury suggested instead that, 'where possible', Acts of Parliament should 'set the enduring framework and principles', and that necessary detail should be located in other instruments that can be amended more easily. This effectively represents a combination of principles-based and rules-based regulation, using different elements of the legislative hierarchy to distinguish between aspects of the approach. Treasury identified a number of 'attractions' of a principles-based approach, including 'simplicity and efficiency'. Because principles are more 'adaptive' than rules, 'there is little need for ongoing legislative amendments'. Instead, principles-based approaches require regulated entities to exercise 'professional judgement in both the design of compliance processes and in applying the rules to novel or more difficult cases'.

Tax law context

2.113 In the context of tax law, Treasury has described the level of detail it contains as a key design choice adding to length and complexity.[119] Some decades ago, Sir Robert Garran described tax legislation as a 'literary monstrosity' as a result of an ongoing 'battle of wits', in which 'crafty taxpayers' sought to reduce their tax

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117 Peter Quiggin, 'The Spectrum of Drafting — from Black Letter to Coherent Principles' in Graeme Cooper (ed), *Executing an Income Tax* (Australian Tax Research Foundation, Conference Series No 25, 2008) 59, 60–3.

118 All quotes in this section are from: Department of the Treasury (Cth) (n 11).

119 In this and the following paragraph, all quotes are from: Department of the Treasury (Cth) (n 79) 65–6.

assessments, and detail was increasingly added to the law 'to keep the wily taxpayers from slipping through'. Treasury has commented that introducing a specific rule to address a particular circumstance may increase certainty in an individual case, but that overall 'introducing more boundaries between the legal concepts, potentially [increases the] scope for ambiguity and uncertainty'.

2.114 In addition, including detail in legislation may be increasingly problematic, because 'laws designed in this way can never anticipate all the relevant circumstances'. Consequently, Treasury acknowledged the relative benefits of 'high level principles, rather than black-letter approaches, to draft the tax law. These principles synthesise the detail that would otherwise be set out in black-letter rules, to achieve the essential effect of the measure.'

2.115 The relationship between principles-based drafting, durability of legislation, and patterns of litigation has been examined in the context of tax law by Davies and Stewart. They have observed that provisions concerning 'ordinary income' and 'allowable deductions' in tax legislation were early examples of principles-based drafting, and have remained largely unchanged for over 80 years. These provisions have also generated the largest proportion of litigation regarding tax law, although the rate of litigation concerning those concepts has significantly decreased in recent decades, suggesting that court decisions have settled 'at least some aspects' of the provisions.[120]

2.116 Arguably, a principles-based approach to legislation facilitates purposive construction of legislation by courts,[121] more easily enabling the courts to consider the purpose of the legislation in order to give effect to Parliament's legislative intention.[122] In contrast, some provisions of tax legislation are described as being more rules-based, 'highly complex', 'not infrequently flawed', and even 'close to incomprehensible', making it difficult to apply a purposive approach to their interpretation.[123]

Outcomes-based regulation

2.117 Professor Grantham and others have argued that, in recent years, company law in particular has become increasingly 'proceduralised'.[124] By way of explanation:

120 Rachel Davies and Miranda Stewart, 'The Gatekeeper Court: For the Revenue or for the Taxpayer?' in Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future* (The Federation Press, 2018) 213, 224–5.

121 The Hon Michael Kirby AC CMG, 'The Never-Ending Challenge of Drafting and Interpreting Statutes: A Meditation on the Life of John Finemore QC' (2012) 36(1) *Melbourne University Law Review* 140, 152.

122 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 423.

123 Davies and Stewart (n 120) 224–5.

124 See, eg, Ross Grantham, 'The Proceduralisation of Australian Corporate Law' (2015) 43(2) *Federal Law Review* 233; Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20(4) *Oxford Journal of Legal Studies* 597; Gilad (n 87).

> Broadly, this means that instead of directly prescribing the policy goals or desired outcomes … mechanisms now used to implement corporate regulation focus on the process of decision-making and the creation of largely internal governance procedures as the means of regulating the behaviour of the participants in the corporate enterprise.[125]

2.118 In contrast, outcomes-based regulation focuses more on the outcomes that are sought to be achieved than on the processes that the regulated population should follow to achieve those outcomes. Outcomes-based approaches are therefore often contrasted with 'behavioural standards' and 'standards of conduct'.[126] Black and others have noted the 'compelling' logic of outcomes-based regulation, namely that firms and their managers are 'better placed than regulators to determine what processes and actions are required' (and are most efficient) to achieve regulatory objectives.[127]

2.119 It is important to note that outcomes-based regulation does not require that clients be completely protected against sub-optimal financial outcomes in relation to any particular financial decision. For example, outcomes-based regulation does not require that a financial investment must generate a particular level of return to demonstrate compliance on the part of investment managers, product issuers, and financial advisers. Rather, in recognition that financial decisions carry a level of unavoidable risk, outcomes-based regulation seeks to articulate appropriate outcomes in the context of the interaction between regulated entities and consumers.

2.120 Analogies can be made to general consumer protection, where the law does not seek to eliminate all risks in respect of the supply of goods, but rather to ensure that goods are fit for purpose. For example, a car manufacturer is not required to guarantee that the car will never break down, but rather to guarantee that the car is of 'acceptable quality' (amongst other things).[128]

2.121 An example in financial sector regulation is the six 'consumer outcomes' the UK Financial Conduct Authority states that firms should strive to achieve to ensure fair treatment of their customers:

> Outcome 1: Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture.
>
> Outcome 2: Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.
>
> Outcome 3: Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.

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125 Ross Grantham, 'The Privatisation of Australian Corporate Law' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 27, 28.
126 Black, Hopper and Band (n 32) 192.
127 Ibid.
128 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 s 54 ('*Australian Consumer Law*').

> Outcome 4: Where consumers receive advice, the advice is suitable and takes account of their circumstances.
>
> Outcome 5: Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.
>
> Outcome 6: Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

2.122 In addition, the UK Financial Conduct Authority is proposing to introduce a new Consumer Duty, which would require firms to 'consistently focus on consumer outcomes', for example by considering what outcomes consumers should be able to expect from their products and services, and acting to enable (rather than hinder) those outcomes.[129] This proposal is at least partly in response to feedback from some stakeholders that the Authority's approach has been 'too rules-based and not sufficiently outcomes-focused'.[130]

2.123 The concept of 'financial wellbeing' might be instructive in developing outcomes-based regulation of financial services.[131] Financial wellbeing indicators for an individual could include objective factors (such as debt levels, insurance coverage, income, and savings) as well as subjective factors (such as how a person feels about their financial situation).[132] The concept is increasingly being mentioned in industry statements and codes. For example, the Commonwealth Bank of Australia has stated that its purpose is 'to improve the financial wellbeing of our customers and communities', and the bank is collaborating with researchers working to define and measure financial wellbeing.[133]

2.124 According to Black, a 'focus on outcomes rather than technical compliance is shared by a number of regulators around the world, and is emphasized by the global standard-setters as the hallmark of good regulation'.[134]

2.125 In the context of Australian tax law, Lovric has highlighted the potential benefits to providing for particular outcomes, rather than prescribing the means of achieving those outcomes, and so avoiding 'masses of complicated detail' that would otherwise be necessary.[135]

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129 Financial Conduct Authority (UK), *A New Consumer Duty* (Consultation Paper 21/13, 2021) [1.1]–[1.2].

130 Ibid [2.5].

131 C Breidbach et al, *FinFuture: The Future of Personal Finance in Australia* (University of Melbourne, 2019) 22.

132 Ibid.

133 Commonwealth Bank of Australia, 'Financial Wellbeing Scales' <www.commbank.com.au/personal/newsroom/financial-wellbeing-scales>. See also Australian Banking Association, *Banking Code of Practice* (Revised 5 October 2021) 3.

134 Black et al (n 95) 245.

135 Lovric (n 92) 23. Lovric uses the term 'results-based drafting' to describe narrowly defined outcomes, rather than more broadly principled outcomes. He cites s 301–35(2) of the *ITA Act 1997* as an example.

2.126 Professor Willis has in effect advocated for outcomes-based approaches to consumer disclosure laws under the rubric of 'performance-based regulation'.[136] Others have used the terminology of 'goal-based regulation'.[137]

2.127 Some recent financial services regulatory reforms in Australia appear to signify a shift towards more outcomes-based regulation, such as the introduction of Design and Distribution Requirements and Product Intervention Orders.[138]

2.128 These issues will be discussed further in **Chapter 9**.

Risk-based regulation

2.129 The term 'risk-based regulation' can be used in several different ways, ranging from a 'loose' or ad hoc collection of methodologies to a more comprehensive and systematic approach.[139]

2.130 First, in a general sense, it can refer to regulation of identified risks to a society, such as risks to health, safety, or financial wellbeing. In this general sense, it is used to decide whether or not a particular activity should be regulated, and what preventive measures firms should take. Secondly, in a more specific sense in the context of financial prudential regulation, it refers to the use of a bank's internal risk models to determine the amount of capital that the bank should set aside.

2.131 Thirdly, and most relevantly for this Inquiry, it can refer to a systemised framework to manage risks that a regulator (in a broad sense) will not achieve its objectives. It involves decision-making frameworks and procedures to determine priorities for regulatory activities and the deployment of resources. Decisions must be made as to the circumstances in which to err on the side of caution (assuming a situation is risky when it may not be), or err on the side of risk (assuming a situation is safe when it may not be). For example, when drafting legislation or setting standards for corporations and financial services, should regulation err on the side of protecting consumers or favouring service providers in a particular instance?[140] Black has argued that risk-based regulation is 'becoming increasingly adopted by a number of financial regulators' despite its 'mixed success'.[141]

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136 Lauren E Willis, 'Performance-Based Consumer Law' (2015) 82 *University of Chicago Law Review* 1309, 1330.

137 Christopher Decker, *Goals-Based and Rules-Based Approaches to Regulation* (Research Paper Number 8, Department for Business, Energy & Industrial Strategy (UK), May 2018).

138 *Corporations Act 2001* (Cth) pts 7.8A, 7.9A; *National Consumer Credit Protection Act 2009* (Cth) pt 6-7A.

139 Bridget Hutter, 'The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation' (CARR Discussion Paper No 33, London School of Economics, March 2005) 3.

140 Julia Black, 'Risk-Based Regulation: Choices, Practices and Lessons Being Learnt' in *Risk and Regulatory Policy: Improving the Governance of Risk* (OECD Reviews of Regulatory Reform, 2010) 185, 187–8.

141 Black et al (n 95) 243.

2.132 Decisions made under a risk-based framework are very much based on substantive policy. Consequently, the ALRC has not adopted a risk-based framework in determining questions of legislative simplification for this Inquiry. However, risk-based approaches are likely to have informed policy choices underpinning corporate and financial services regulation. For example, the choice to define 'financial product' in the *Corporations Act* in an over-inclusive way, rather than in an under-inclusive way, potentially reflects a policy decision to err on the side of caution and the protection of consumers (see **Chapter 7** of this Interim Report).

Legislative hierarchy

2.133 The coherence of the 'hierarchy of laws' will be a particular focus of Interim Report B in this Inquiry. Nevertheless, issues relating to legislative hierarchy are of central importance across all aspects of this Inquiry. In particular, in this Interim Report, the way in which key definitions in the *Corporations Act* are notionally amended by delegated legislation is a significant driver of complexity, and is a focus of the ALRC's proposals for simplification.[142]

2.134 This section sets out some key aspects of legislative hierarchy in order to provide some context for the discussion of particular issues that arise in this Interim Report.

2.135 Acts of Parliament are the original form of legislation, and sit at the top of the legislative hierarchy, representing the will of the people as expressed through their elected representatives, and subject only to limits set down in the *Australian Constitution*.[143] For this reason, Acts of Parliament are sometimes referred to as 'primary legislation'.

2.136 An Act of Parliament can also permit the making of: 'delegated legislation' that determines the law or formulates new rules of general application; and 'administrative' or 'executive' instruments that apply or modify the law in particular cases, such as by granting an exemption or prohibiting an individual from carrying out particular activities. Delegated legislation is sometimes referred to as 'subordinate legislation', but it 'is not an inferior form of legislation — it carries out its maker's commands as effectively as does an Act of Parliament'.[144] Rather, delegated legislation is only 'subordinate' in the sense that the content of delegated legislation must be properly within the scope of the power granted by the Act of Parliament.

2.137 The power to make 'delegated legislation' is delegated by the Parliament to another body: the power to make regulations is delegated to the Federal Executive Council; the power to make other legislative instruments can be delegated to a minister, regulator, or other public body. That delegation of power is accompanied by a level of scrutiny and oversight by Parliament.

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142 See, eg, **Chapter 5** and **Chapter 10**.
143 Pearce (n 74) [1.2].
144 Ibid.

2.138 The range of instruments and other sources of regulation that currently constitute the legislative hierarchy include: ministerial determinations and directions; ASIC instruments; and industry codes of conduct.

The regime established by the Legislation Act

2.139 Under the *Legislation Act*, delegated legislation at a Commonwealth level is either a 'legislative instrument' or a 'non-legislative instrument'.[145] 'Legislative instrument' is defined in s 8 of the *Legislation Act*. Legislative instruments include regulations, instruments registered as legislative instruments on the Federal Register of Legislation, instruments called a legislative instrument in the empowering Act, and instruments that meet the functional test set out in s 8(4) of the *Legislation Act.* Legislative instruments are subject to parliamentary disallowance, consultation requirements, sunsetting after 10 years, registration on the Federal Register of Legislation, and certain interpretive rules provided for under the *Legislation Act*.

2.140 An instrument is a non-legislative instrument unless it is a legislative instrument under s 8 of the *Legislation Act*. Non-legislative instruments are divided into two categories: notifiable instruments (which are subject to registration on the Federal Register of Legislation and other interpretive rules in the *Legislation Act*); and general non-legislative instruments, such as the vast majority of instruments made by administrative decision-makers. A non-notifiable instrument is a general non-legislative instrument. To date, there exists only a small number of notifiable instruments in the area of corporate and financial services regulation.

Use of the legislative hierarchy

2.141 Debate often arises around the proper use of legislative hierarchy. Namely, what kind of content is appropriate to be contained at each level of the legislative hierarchy, and in each type of instrument?

2.142 Guidance from OPC suggests that more detailed material can helpfully be contained in delegated legislation as a way of 'leaving the Act uncluttered to deal with the core policy'.[146] In addition, it may be appropriate to include in delegated legislation provisions that are likely to change over time, to avoid the Act itself being 'tinkered with' (assuming that the provision is 'not a core part of the Act').[147] More pragmatically, some matters may be left to delegated legislation in order to 'mitigate

145 The *Legislation Act 2003* (Cth) is currently under review. The Review Committee is consulting on a number of issues discussed in this Interim Report, including the definition of 'legislative instrument', changes to the Federal Register of Legislation, sunsetting of instruments, and exemptions from the operation of the Act: Sarah Chidgey, Roxanne Kelley PSM, and Peter Quiggin PSM QC, *2021–2022 Review of the Legislation Act 2003* (Discussion Paper, Attorney-General's Department (Cth), November 2021).

146 Office of Parliamentary Counsel (Cth) (n 56) [77]. See also Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.5, Reissued June 2020); Department of the Prime Minister and Cabinet (Cth) (n 70).

147 Office of Parliamentary Counsel (Cth) (n 56) [82].

the effects of a tight timeline on a legislative project' by including only the most essential material in an urgent Bill.[148]

2.143 The Senate Standing Committee on the Scrutiny of Delegated Legislation has played an important role in assessing proper use of delegated legislation. The Committee assesses delegated legislation not in relation to policy decisions regarding the content, but rather against a set of principles relating to compliance with statutory requirements, the protection of individual rights and liberties, and principles of parliamentary oversight.[149]

2.144 Of particular relevance to this Inquiry is principle (j). Guidelines relating to that principle indicate that the primary concerns for the Committee are instruments that:

- establish significant elements of a regulatory scheme (including 'key definitions central to the operation of the regulatory scheme');
- impose significant penalties;
- impose taxes or levies;
- modify the operation of primary legislation or provide an exemption to primary legislation; and
- have a serious impact on personal rights and liberties.[150]

2.145 The ALRC has examined the extent to which delegated legislation establishes significant elements of regulatory schemes, and notionally amends the *Corporations Act*, significantly contributing to legislative complexity. For example, delegated legislation often notionally amends key definitions central to the regulatory regime (see **Chapter 5** and **Chapter 10** of this Interim Report).

2.146 In March 2021, the Committee completed an inquiry into exemptions of delegated legislation from parliamentary oversight and made 11 recommendations aimed at enhancing parliamentary scrutiny of delegated legislation. The report noted:

> The Constitution tasks the Parliament with ultimate lawmaking authority. While in practice the Parliament may delegate some of these powers to the executive, this does not absolve the Parliament of responsibility for laws so delegated. It is the capacity to scrutinise delegated legislation, which constitutes about half the law of the Commonwealth by volume, that preserves constitutional principle. The only substantive way scrutiny of delegated legislation can occur is through the disallowance mechanism. Recent trends in leaving significant policy matters to delegated legislation and exempting delegated legislation from disallowance and thus scrutiny, however, are undermining this mechanism. This has significant consequences for the democratic foundations of our system of government.[151]

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148 Ibid [130].

149 Parliament of Australia, 'Senate Standing Committee for the Scrutiny of Delegated Legislation' <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation>.

150 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines* (Parliament of Australia, 1st ed, 2020) 27.

151 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (2021) xv–xvi.

2.147 Furthermore, Van Geelen has argued that both complexity and rule of law problems can arise due to: the way that the Commonwealth Parliament delegates its legislative power; limitations on the regime for parliamentary scrutiny of delegated legislation; and the way legislative power has been exercised by executive bodies, particularly in relation to disclosure regimes under the *Corporations Act*.[152]

2.148 Other jurisdictions similarly have in place procedures to promote the appropriate placement of regulatory material across the legislative hierarchy.

Victoria

2.149 In 1987, the Victorian Law Reform Commission expressed concerns that there were no 'clear criteria for determining what material should be included in Acts and what should be left to regulations. The development of clear criteria would contribute to better organisation of material and improved clarity.' The Commission observed that:

> Acts regularly state numerous particular and quite narrow rules from which it is extremely difficult to extract the underlying principles. The central message is overwhelmed by a mass of peripheral detail. … One improvement would be to restrict the Act to a statement of the principles of the legislative scheme, the details being transferred either to Schedules to the Act, or to regulations made under it.[153]

2.150 The Commission recommended the development of 'guidelines to assist Ministers, Departments and parliamentary counsel in the allocation of legislative material between an Act and the regulations made under it'.[154] The Commission expected that those guidelines 'might result in a reduction in the material contained in some Acts and a consequent improvement in the communication of its central message'.[155]

2.151 Subsequently, the Victorian Parliament passed legislation empowering the Minister to make guidelines regarding the content of 'subordinate legislation'.[156] The ministerial guidelines currently in force under that Act include that: Acts should deal with 'matters of substance or important procedural matters', and 'matters relating to a significant policy question, including the introduction of new policy or fundamental changes to existing policy'.[157] In contrast, subordinate legislation should deal with 'detailed implementation of the policy reflected in the authorising Act, including standards, principles, and guidelines', as well as forms, fees, and processes for enforcement.[158]

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152 Tess Van Geelen, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296.
153 Victorian Law Reform Commission (n 24) 72.
154 Ibid 74.
155 Ibid.
156 *Subordinate Legislation Act 1994* (Vic) s 26.
157 Victorian Government, *Subordinate Legislation Act 1994 Guidelines* (2020) [16].
158 Ibid [19].

2.152 In addition, the statutory body 'Better Regulation Victoria' has published the following principles relating to subordinate legislation:

> Primary legislation [should be] drafted in general rather than specific terms, with a view to avoiding the need to make frequent changes.
>
> The general rule is that matters of policy and general principle should be reserved for primary legislation, whereas matters of detail likely to change frequently should, where possible, be dealt with by subordinate legislation.
>
> While significant matters should not be included in subordinate legislation, subordinate legislation may deal with the same issue in terms of enforcement or related matters of administration or implementation. Subordinate legislation can complete the details of a legislative scheme, but cannot add new aims or ideas.
>
> [Footnote:] Subordinate legislation cannot alter anything in the Act under which they are made, unless the Act expressly authorises a subordinate instrument to do so. However, in practice, this is a power that is seldom conferred and is not considered desirable.[159]

2.153 In addition, the Chief Parliamentary Counsel (Vic) has published guidance that

> matters of detail subject to frequent change should be dealt with by subordinate legislation rather than primary legislation. Matters of policy and general principle should be dealt with in primary legislation … Statutory rules can complete the details of a legislative scheme but cannot add new aims or ideas unless expressly authorised so to do.[160]

United Kingdom

2.154 Academics in the UK have distilled from reports of the House of Lords Select Committee on the Constitution a set of principles by which that Committee has evaluated Bills before Parliament. Some of these principles relate to the appropriate content of delegated legislation. For example:

- the 'most important aspects of a policy should be included on the face of a bill' and not left to delegated legislation;
- powers enabling Ministers to 'change the statute book' should be avoided when more appropriate alternatives are available;
- delegated legislation should not create regulations that will have 'a major impact on the individual's right to respect for private life';
- delegated legislation should not create new criminal offences, nor contain rights of appeal;

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159 Commissioner for Better Regulation, *Victorian Guide to Regulation - Toolkit: Requirements and Processes for Making Subordinate Legislation* (Victorian Government, 2016) [1.1].

160 Office of the Chief Parliamentary Counsel (Vic), *Notes for Guidance on the Preparation of Statutory Rules* (2017) [1.5].

- delegated legislation should not make consequential amendments to other enactments; and
- delegated legislation should not create 'a significant statutory body, such as a regulator'.[161]

2.155 This Committee has been particularly concerned by 'Henry VIII clauses' that enable delegated legislation made by Ministers or others to effectively amend Acts of Parliament. A number of the identified principles specifically address Henry VIII powers, for example that the scope of any such power 'should be limited to the minimum necessary to meet the pressing need for such an exceptional measure'.[162] Henry VIII clauses have also been criticised more widely in the UK.[163] The extent to which existing provisions in Australian legislation regulating corporations and financial services in effect delegate power to amend Acts of Parliament is examined further in **Chapter 10**.

2.156 A suite of other UK parliamentary committees also scrutinise delegated legislation.[164] The Terms of Reference for the UK House of Lords Secondary Legislation Scrutiny Committee set out grounds on which that Committee may bring a particular piece of delegated legislation 'to the special attention of the House'. However, these grounds do not set out explicit principles regarding what kind of matters should be contained in Acts of Parliament or in delegated legislation. Instead, the grounds relate to more general and procedural aspects of the proposed piece of delegated legislation:

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may imperfectly achieve its policy objectives;

(d) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;

(e) that there appear to be inadequacies in the consultation process which relates to the instrument;

(f) that the instrument appears to deal inappropriately with deficiencies in

161 Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (The Constitution Unit, University College of London, 3rd ed, 2017) [2.3].

162 Ibid [2.1.3].

163 See, eg, Select Committee on the Constitution, House of Lords (UK), *Uncorrected Oral Evidence 18 November 2020: The Constitutional Implications of Covid-19*; Richard Gordon, 'Why Henry VIII Clauses Should Be Consigned to the Dustbin of History', *Public Law Project* (6 November 2015) <www.publiclawproject.org.uk>.

164 See, eg, the House of Lords Delegated Powers and Regulatory Reform Select Committee, the House of Commons Regulatory Reform Committee, and the House of Commons Select Committee on Statutory Instruments.

retained EU law.[165]

2.157 Similarly, the Joint Committee on Statutory Instruments may bring a piece of delegated legislation to the attention of the House on grounds including:

> (a) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any Government department, or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payments;
>
> (b) that it is made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specific period;
>
> (c) that it purports to have retrospective effect where the parent statute confers no express authority so to provide;
>
> (d) that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;
>
> (e) that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where an instrument has come into operation before it has been laid before Parliament;
>
> (f) that there appears to be a doubt whether it is intra vires or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
>
> (g) that for any special reasons its form or purport call for elucidation;
>
> (h) that its drafting appears to be defective;
>
> or on any other ground which does not impinge on its merits or on the policy behind it …[166]

Preliminary comparative analysis

2.158 Some common themes can be identified in the principles developed regarding the appropriate content of delegated legislation in Australia and the UK.

2.159 Elements of policy that are 'significant', 'important', or 'core' should ordinarily be contained in Acts of Parliament, rather than delegated legislation. Similarly, there is broad consensus that matters materially affecting rights, offences, penalties, and taxes, should be contained in Acts.

2.160 Matters that are likely to change frequently over time may be appropriate for delegated legislation, because delegated legislation can be amended more efficiently

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165 UK Parliament, 'Terms of Reference, Secondary Legislation Scrutiny Committee, House of Lords' (October 2020) <committees.parliament.uk>.

166 UK Parliament, *Standing Orders of the House of Lords Relating to Public Business* (HL Paper 232, 22 February 2021) [74].

than Acts. Similarly, detailed provisions regarding the implementation of policies may be better placed in delegated legislation.

2.161 There does not appear to be consensus regarding the extent to which it is appropriate for delegated legislation to effectively alter the operation of an Act of Parliament. However, the guidance in all jurisdictions expresses some reservations about this practice.

2.162 These themes are applied in **Chapter 7** and **Chapter 10** of this Interim Report in relation to the appropriate structure of key definitions in corporate and financial services regulation. Legislative hierarchy, and the design of powers delegating legislative power, will be a central focus in Interim Report B.

3. Empirical Data

Contents

Introduction

3.1 This chapter introduces and analyses a range of data that the ALRC has obtained during the Inquiry. The purpose of this data is to facilitate enhanced understanding of the legislative and regulatory ecosystem for corporations and financial services. This includes identifying drivers and metrics of legislative complexity. The data provides macro- and micro-level views of the corporations and

financial services legislative scheme and is the basis for original insights into the complexity of the legislation and the regulatory ecosystem. This chapter does not contain reform proposals, but rather provides a foundation for proposals in other chapters of this Interim Report, and for future reports in this Inquiry. The chapter includes one question inviting stakeholder input on further data and analysis that would be helpful for the purposes of this Inquiry.

3.2 The data on which this chapter is based is available on the ALRC website or is referenced in footnotes throughout.[1]

Data and the Inquiry

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?

3.3 The ALRC is committed to evidence-based proposals and recommendations. The ALRC has therefore sought to generate, obtain, and analyse various quantitative and qualitative data.

3.4 The ALRC has used data to understand:

a. **Legislative complexity and legislative simplification**: The concepts of legislative complexity and simplification are introduced in detail in **Background Paper FSL2**. The ways in which the ALRC has used data to illuminate the complexity and potential for simplification of the *Corporations Act* and related legislation are summarised below.[2]

1 Australian Law Reform Commission, 'Data Analysis' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/>.

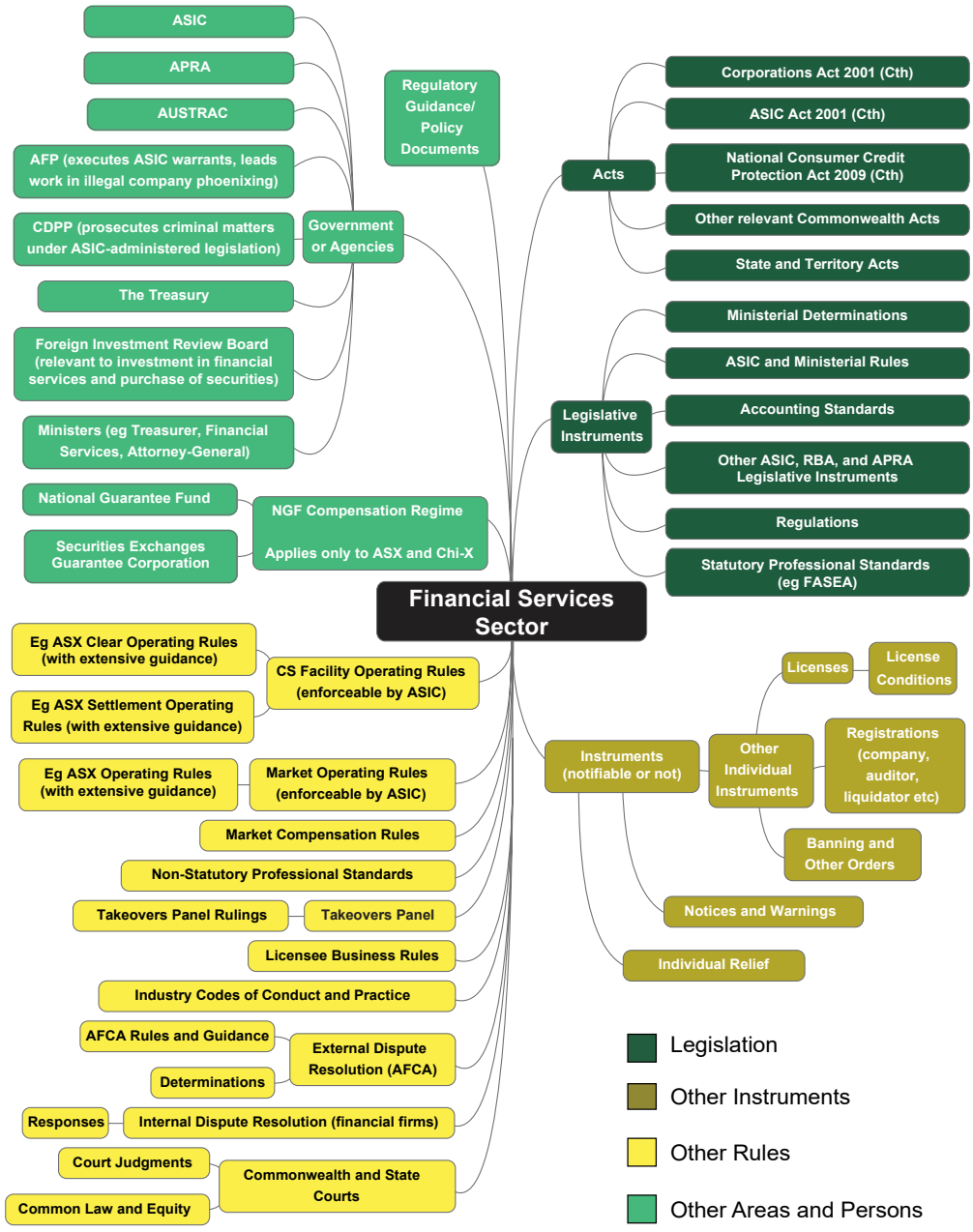
2 See analysis at [3.25]–[3.32].

b. **The regulatory ecosystem for corporations and financial services**: The concept of an 'ecosystem' reflects the fact that regulation is the product of countless actors interacting to produce rules, norms, and principles that guide and shape the behaviour of the regulated population. This includes, for example, Australian Securities Exchange ('ASX') market rules, ASIC guidance, industry codes, licensee business rules, and court judgments. Data has assisted in understanding the participants in, and structure of, this regulatory ecosystem. **Figure 3.1** below is a manually generated visualisation categorising the main sources of regulation for corporations and financial services.

c. **The structure and operation of financial markets and services**: This includes, for example, data on the changing structure of financial markets over the past 30 years, such as the evolving character of market participants and the value and diversity of financial wealth and markets.

3.5 The ALRC welcomes stakeholder suggestions on data that will further assist the ALRC, the Australian Government, and the general public to better understand the ecosystem and its various sources of complexity.

Figure 3.1: Financial services regulatory ecosystem map



Methodology

3.6 The data summarised in this chapter has been obtained using a number of methods. As a by-product of the Inquiry, the ALRC has generated an unprecedented volume of data on legislation and litigation in Australia, including through novel methods that have previously had little or no application in Australia. The first part of this chapter sets out the methodology used to obtain this data. Further information on the methods used to source and analyse the datasets can be found in **Appendix D** and on the ALRC website. In producing the data and analysis for this Interim Report, the ALRC has benefitted from a growing body of literature on data and society, law, and public policy.[3]

3.7 In total, the ALRC produced over 15 gigabytes of textual data from websites, and this data relates to over 13,000 Acts, 5,000 legislative instruments, and 100,000 court judgments.

3.8 The numbers cited throughout this chapter are the product of particular methods that were based on computational analysis of certain texts. This computational analysis was generally based on patterns in the structure of a text or in the HyperText Markup Language ('HTML') of a webpage, such as to identify definitions or elements in a piece of legislation. This means that these figures may not always exactly align with a manual count or with colloquial understandings of certain terms.

3.9 For example, when counting structural elements in legislation, the ALRC's computational analysis looked for levels of headings that indicated different types and levels of elements. The computer program counted all 'Level 1' elements as being chapters or schedules of an Act; all 'Level 2' elements as being parts; and all 'Level 3' elements as being divisions. However, the heading of a Level 2 element in a particular piece of legislation will not always use the word 'Part'. For example, Schedule 8 of the *Corporations Regulations*, anomalously, contains a Level 2 element headed 'Chapter', and a number of Level 3 elements headed 'Part'. The ALRC's program nevertheless relied on the HTML of this text to count the Schedule as a Level 1 element, the Chapter as a Level 2 element, and the parts as Level 3 elements. This means that a person manually counting 'parts' in the *Corporations Regulations* will arrive at a figure that differs to a minor degree from the ALRC's computational analysis. However, such anomalies are rare.

3.10 Similarly, a manual count of the total number of words in a piece of legislation will produce a figure that differs somewhat from those set out in this chapter. The ALRC's word count excludes endnotes and tables of contents, as well as most

3 Specific literature will be referred to throughout, but texts of general interest include: Tara Dawson McGuinness and Hana Schank, *Power to the Public: The Promise of Public Interest Technology* (Princeton University Press, 2021); David Spiegelhalter, *The Art of Statistics: Learning from Data* (Penguin Press, 2020); Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown Publishing Group, 2016); Tim Harford, *The Data Detective: Ten Easy Rules to Make Sense of Statistics* (Riverhead Books, 2021).

provision numbering and lettering. The ALRC's computer program also uses particular automated approaches to 'tokenising' a text (that is, breaking it up into words). These methods rely on patterns in the text to 'tokenise' separate words, which may produce marginally different outcomes from a human reading the same text. ALRC sampling suggests these differences are very minor.

3.11 Lastly, as discussed further below, some data is imperfect at source. For example, HTML in the Federal Register of Legislation can be somewhat inconsistent in some texts. Only a move to 'well-formed' Extensible Markup Language ('XML') would eliminate these inconsistencies (see **Recommendation 11**).

3.12 Understanding the methodology behind the data is important when drawing conclusions from the data. There is inevitably a trade-off when analysing big data — a computer program cannot adapt to the idiosyncrasies of a text like a human, but a human cannot analyse 1,000 Acts in a matter of hours. Moreover, because these methods were applied across large datasets, the overall trends are reliably apparent in the data analysis, even if a manual count of individual pieces of legislation may have produced a result that differs to a minor degree.

3.13 The ALRC expects that its methods, in particular for analysing Federal Register of Legislation texts, will benefit greatly from refinement over the next two years of this Inquiry, and stakeholder feedback is welcomed on the ALRC's exploratory approaches.

Legislative data

3.14 The ALRC wrote a number of computer programs in the 'R' programming language to automatically 'scrape' the HTML of legislation from the Federal Register of Legislation, and the XML of legislation published on official legislation websites for the UK and New Zealand.[4] For Australian legislation, the programs also scraped a range of metadata for each piece of legislation, such as the number of instruments enabled by the legislation and the number of amendments made to the legislation.

3.15 The ALRC obtained the HTML or XML, in addition to various metadata, on the following:

a. Every 'as made' Commonwealth Act ever passed by Parliament (over 13,000 as at 30 June 2021) published on the Federal Register of Legislation. This does not include Act compilations, which include amendments made to an Act subsequent to its making.

b. Every currently in force Principal Commonwealth Act (1,220 as at 30 June 2021) published on the Federal Register of Legislation. References throughout this chapter to 'Commonwealth Acts' are references to Acts contained in this

4 Parliamentary Counsel Office/Te Tari Tohutohu Pāremata (NZ), 'New Zealand Legislation' <catalogue.data.govt.nz/dataset/new-zealand-legislation>; The National Archives (UK) <www.legislation.gov.uk>.

dataset. Principal Acts excludes Acts classified as 'Amending Acts' on the Federal Register of Legislation.

c. The original enactment and every historical compilation of the *Corporations Act, ASIC Act, NCCP Act,* and the *Competition and Consumer Act*. The ALRC's scrape of all Commonwealth Acts 'as made' also obtained the original enactments of the *Corporations Act 1989* (Cth) and *Australian Securities Commission Act 1989* (Cth).

d. The original enactment and every historical compilation of the *Financial Services and Markets Act 2000* (UK).

e. The original enactment and every historical compilation of the *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (NZ); the *Financial Reporting Act 2013* (NZ); the *Financial Markets Supervisors Act 2011* (NZ); the *Financial Markets Conduct Act 2013* (NZ); the *Financial Markets Conduct Regulations 2014* (NZ); the *Financial Markets Authority Act 2011* (NZ); the *Companies Act 1993* (NZ); and the *Companies Act 1993 Regulations 1994* (NZ).

f. Every in force legislative instrument containing 'ASIC' and 'Corporations' in the title published on the Federal Register of Legislation, as well as every legislative instrument appearing on the 'Enables' webpage of the *Corporations Act* series webpage.[5]

3.16 The ALRC then wrote a number of computer programs to computationally analyse the HTML or XML of each piece of legislation. The programs also analysed the text of each piece of legislation, identifying the presence of certain words or phrases. The XML of UK and New Zealand legislation and the HTML of Commonwealth Acts is rich in 'mark-up' that is readable by computers and provides information that is invisible to a human reader. For example, defined terms are marked-up, as are structural elements such as chapters, sections, and paragraphs. The ALRC has been able to analyse more data on Commonwealth Acts than on legislative instruments because Acts have richer and more structured mark-up relative to legislative instruments.

3.17 For reasons explained in the methodology notes in **Appendix D**, the data on Commonwealth Acts is imperfect because not all Acts use the mark-up consistently and reliably. The ALRC's analysis is therefore likely to undercount some legislative data on certain Acts to a minor degree. Well-formed XML, which abides by certain rules and is validated, is a far more structured language than HTML. The data for UK and New Zealand legislation is therefore more reliable. Likewise, the Commonwealth Acts dataset includes some amending Acts, which means there is some double counting because amendments will have been integrated into Act compilations. This necessarily affects any comparative analysis of the *Corporations Act* with other Commonwealth Acts, such as in the proportion of words and definitions that the

5 Federal Register of Legislation, 'Corporations Act 2001 — Enables' <www.legislation.gov.au/Series/C2004A00818/Enables>.

Corporations Act accounts for across all Acts. However, any such effect appears to be minor.

3.18 Several of the ALRC's programs analysed the entirety of each piece of legislation, so as to provide a comparative snapshot of the legislation relative to other legislation. Another program analysed five versions of the *Corporations Act* over time, including the latest, and produced data by chapter, part, and section.

Cases

3.19 The ALRC wrote a number of computer programs in the R programming language to automatically scrape the HTML of the following:

a. Every High Court judgment published between 1 January 2000 and 30 June 2021 (1,284 judgments);

b. Every Federal Court judgment, single judge and Full Court, published between 1 January 2000 and 30 July 2021 (42,266 judgments); and

c. Every New South Wales ('NSW') Supreme Court, NSW Court of Appeal, NSW Court of Criminal Appeal, and NSW District Court judgment published between 1 January 2000 and 2 July 2021 (58,378 judgments).

3.20 The ALRC wrote computer programs to analyse the 'legislation cited' section of each judgment to identify the number of times each section of the *Corporations Act* had been cited in a judgment. The program also analysed the full text of each judgment to identify how many judgments referred to each Commonwealth Act and the *Corporations Regulations*.

Other datasets

3.21 **ASIC publications**: The ALRC wrote a computer program to scrape the PDFs of all ASIC regulatory guidance in force on a certain date; namely, 11 March 2021. The program also scraped the PDFs of all ASIC Reports and Consultation Papers. The ALRC has so far only used this dataset to determine page lengths for certain types of documents and as a way to text search across all ASIC publications, but further analysis of these publications is possible. A commercial qualitative research software program (nVivo) was used to undertake text searches across files.

3.22 **ASIC Gazettes**: The ALRC wrote a computer program to scrape the PDFs of all ASIC Gazettes dating from 3 July 2001 (ASIC1/01) to 22 December 2020 (ASIC 52/2020), covering over 1,400 Gazettes.[6] Gazettes are published as images, and in that format are not readable or searchable by computers. The ALRC used the Tesseract OCR engine in the R programming language to convert them to machine-readable text. The ALRC then computationally analysed these Gazettes. The ALRC's

6 This covers all of the ASIC Gazettes and other Gazettes (except Business Gazettes) published on the ASIC website: Australian Securities and Investments Commission, 'ASIC Gazette' <www.asic.gov.au/about-asic/corporate-publications/asic-gazette>.

program searched the Gazettes for appearances of certain section numbers (from the *Corporations Act*) that authorise ASIC to grant individual relief. However, because the OCR conversion was imperfect, the ALRC's data on the number of instruments authorised by each section is very likely an undercount, and the conclusions drawn by the ALRC from this data have been qualified accordingly.

3.23 **New Zealand Financial Markets Authority exemptions and exclusions**: The ALRC wrote a computer program to scrape all exemptions and exclusions made under the *FMC Act* (NZ). This includes both current and expired exemptions and exclusions.[7]

3.24 **Requests to agencies and publicly available structured data**: Both ASIC and AFCA provided a range of data to the ALRC for use in the Inquiry. This included data on ASIC's role as an administering authority of the *Corporations Act*, breach reports ASIC receives, and comprehensive data on AFCA disputes over the past three years. The ALRC also compiled data from a number of public datasets. This includes data published online by ASIC and the Australian Bureau of Statistics ('ABS'). ABS data principally came from the 'Australian National Accounts: Finance and Wealth' data series.[8] The ALRC used a range of computer software to analyse publicly available structured data and the data provided to the ALRC from external parties. Trends, patterns, and standout metrics are highlighted in this Interim Report, as are the sources on which data is based.

Exploring the complexity of the legislative scheme

3.25 As noted in Chapter 1, the core objective of this Inquiry is to simplify the legislative framework for corporations and financial services in Australia. Key to achieving this objective is understanding and identifying legislative complexity, and distinguishing whether it is necessary or unnecessary complexity. **Background Paper FSL2** explained that legislative complexity is about complexity in understanding legislation. There is an irreducible core of necessary complexity in every piece of legislation, which is the product of various drivers of complexity: real-world, policy, linguistic, structural, and other drivers. However, to the extent that complexity is unnecessary, there may be benefits in reducing complexity.

3.26 The ALRC has observed from consultations with stakeholders over the past year that there is 'a level of consensus … that the law in this area is "too complex" and in need of simplification'.[9] Some stakeholders suggested that not only is the

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7 Financial Markets Authority (NZ), 'Financial Markets Conduct Act Exemptions' <www.fma.govt.nz/compliance/exemptions/current-exemption-notices/financial-markets-conduct-act-exemptions>; Financial Markets Authority (NZ), 'Expired Exemptions' <www.fma.govt.nz/compliance/exemptions/current-exemption-notices/expired-exemptions>.

8 Australian Bureau of Statistics, 'Australian National Accounts: Finance and Wealth' (March 2021) <www.abs.gov.au/statistics/economy/national-accounts/australian-national-accounts-finance-and-wealth/mar-2021>.

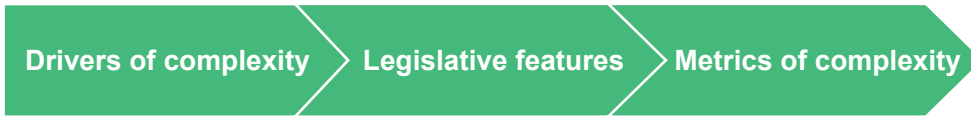
9 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) [5].

overall legislative scheme for financial services and corporations too complex, but particular provisions of the *Corporations Act* are notably complex.[10] ALRC analysis of submissions to the Financial Services Royal Commission also indicated that there was a consensus amongst stakeholders that 'the law and regulatory regime are too complex'.[11]

3.27 However, there remains a lack of comprehensive research into exactly what makes the *Corporations Act* and the wider regulatory regime too complex.

3.28 In **Background Paper FSL2**, the ALRC canvassed relevant literature on the drivers of legislative complexity, legislative features that can exhibit complexity, and relevant metrics of complexity. The ALRC uses these terms as follows:

- **Drivers of complexity:** refers to the social, political, and economic trends that lead to more or less complex legislative features. It also includes drivers such as limited time and resources to develop legislation, and the high-level decisions made during the lawmaking and law design process that can result in complex legislative features.
- **Legislative features:** refers to the features of legislation that can be complex, and that therefore make the legislation more or less complex. Examples include defined terms, exemption and exclusions, and a legislative text's linguistic characteristics (such as an Act's average word length). The complexity of a legislative feature may have particular drivers, such as design decisions or the complexity of the subject matter that the legislation addresses. Many legislative features are inevitable, and the goal should be to reduce and manage their complexity, while some legislative features are inherently complex and arguably undesirable.
- **Metrics:** refers to the potential quantitative measures of the complexity of a legislative feature. For example, relevant metrics relating to the complexity of definitions include the number of defined terms and the number of times they are used in a legislative text.



3.29 As explained in **Background Paper FSL2**, one approach to measuring legislative complexity is to collect data on various metrics of complexity.[12] Measuring legislative complexity should make it possible to identify particularly complex areas of legislation, and potentially to measure the implications of any proposed amendments in terms of reducing (or increasing) legislative complexity. The metrics used by the

10 Ibid [13].
11 Ibid [14].
12 Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [67]–[68].

ALRC to understand sources of complexity in the *Corporations Act* and associated legislative instruments are summarised in **Table 3.1** below.

3.30 In addition to Act-level data that can facilitate comparison across Commonwealth Acts, the ALRC has generated a range of data on each chapter, part, and section of the *Corporations Act* and *Corporations Regulations*. This data offers novel ways to understand legislation in detail, and highlights the exceptional position of Chapter 7 relative to other chapters of the *Corporations Act*. This data also highlights that potential complexity, in terms of definitions, size, cross-references, and use of certain concepts, is a feature of the *Corporations Act* beyond Chapter 7. It also allows comparisons between Chapter 7 and foreign financial services legislation, such as relevant legislation in the UK and New Zealand. This Interim Report offers comparisons between Commonwealth and New Zealand legislation, and subsequent reports will expand the analysis of UK legislation.

3.31 The following sections of this chapter analyse ALRC data in relation to the metrics set out in **Table 3.1**. This data serves to assist with the exploratory analysis of the *Corporations Act* set out in this chapter. The ALRC intends to build on this work in Interim Report B by developing a complexity framework that measures the total complexity of an Act by taking into account different metrics of complexity of legislative features and weighting those inputs accordingly. The ALRC welcomes views on whether the metrics of complexity explored in this chapter appropriately capture relevant aspects of legislative complexity.

Table 3.1: Metrics of legislative complexity

Legislative features	Potential metrics
Length	• Page and word count of a legislative text • Word count per provision (eg chapters, parts, divisions, subdivisions, sections)
Structural elements	• Number of sections, subsections, paragraphs, subparagraphs, and sub-subparagraphs within each structural element
Cross-references	• Number of internal cross-references (ie to provisions within the same legislative text) • Number of external cross-references (ie to provisions in other legislative texts, such as cross-references from an Act to regulations or to another Act)

Legislative features	Potential metrics
Obligations	• Number and location of obligations and prohibitions in a legislative text • Number of provisions that provide for consequences for breaching an obligation or prohibition, such as by creating offences, civil penalties, and infringement notices
Conditional statements	• Number and use of conditional statements in a legislative text (eg 'if', 'where', 'but')
Indeterminate concepts	• Number and use of indeterminate terms in a legislative text (eg 'reasonable', 'fair')
Prescription	• Length of particular provisions, including growth over time • Intricacy of structural elements in a provision • Overall size of provisions relevant to an area of regulation, including in an Act and legislative instruments
Duplication and redundancy	• Number of duplicated or overlapping regulatory regimes (eg multiple licensing regimes serving a similar purpose and with duplicated features) • Number of duplicated or overlapping obligations and prohibitions (eg multiple misleading and deceptive conduct prohibitions) • Number of provisions that are no longer necessary, such as spent transitional provisions
Definitions	• Number of definitions in a legislative text or particular provisions • Number of uses of defined terms within a text or particular provisions • Location of definitions within legislative texts and across legislative schemes (eg in an Act or legislative instrument) • Proportion of all words that are potentially subject to a definition • Number of definitions that have certain characteristics, such as only applying in certain contexts

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

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

a. Litigation- and dispute-related data: Metrics for this include court judgments in relation to different Acts or particular provisions, as well as use of Act-specific dispute resolution regimes such as AFCA.

b. Compliance-related data: Metrics for this include prosecutions and civil enforcement actions, as well as Act-specific processes for identifying breaches. This includes, for example, breach reporting to ASIC in the context of financial services legislation. Large numbers of alleged breaches of particular provisions could potentially identify parts of an Act that may be operating inappropriately or in a manner that makes compliance difficult. Alternatively, they may simply indicate common forms of misconduct, and provisions that regulators, prosecutors, and lawyers perceive as warranting litigation.

c. Regulator-related data: Metrics include the volume of regulatory guidance and the extent to which the efficient operation of the regulatory ecosystem relies on the exercise of discretionary powers by a regulator.

Context to the Inquiry: What is being regulated?

3.33 The following data sheds light on the sectors that the *Corporations Act* seeks to regulate. The data underlines the importance of the *Corporations Act* to the Australian economy, businesses, consumers, legal professionals, and the judiciary. The markets it regulates have grown immensely since the *Corporations Act*'s passage by the Commonwealth Parliament in 2001, and have undergone significant changes in their structure and participants.

Financial wealth, markets, and services in Australia

3.34 The financial markets and total national wealth regulated by the *Corporations Act* and other financial services legislation have changed significantly in recent decades.

Financial markets and services

3.35 The size and diversity of Australian financial markets have increased substantially over the past 30 years. This arguably means that financial services laws have taken on much greater significance during that period, and have had to regulate a much more complex mix of products and participants.

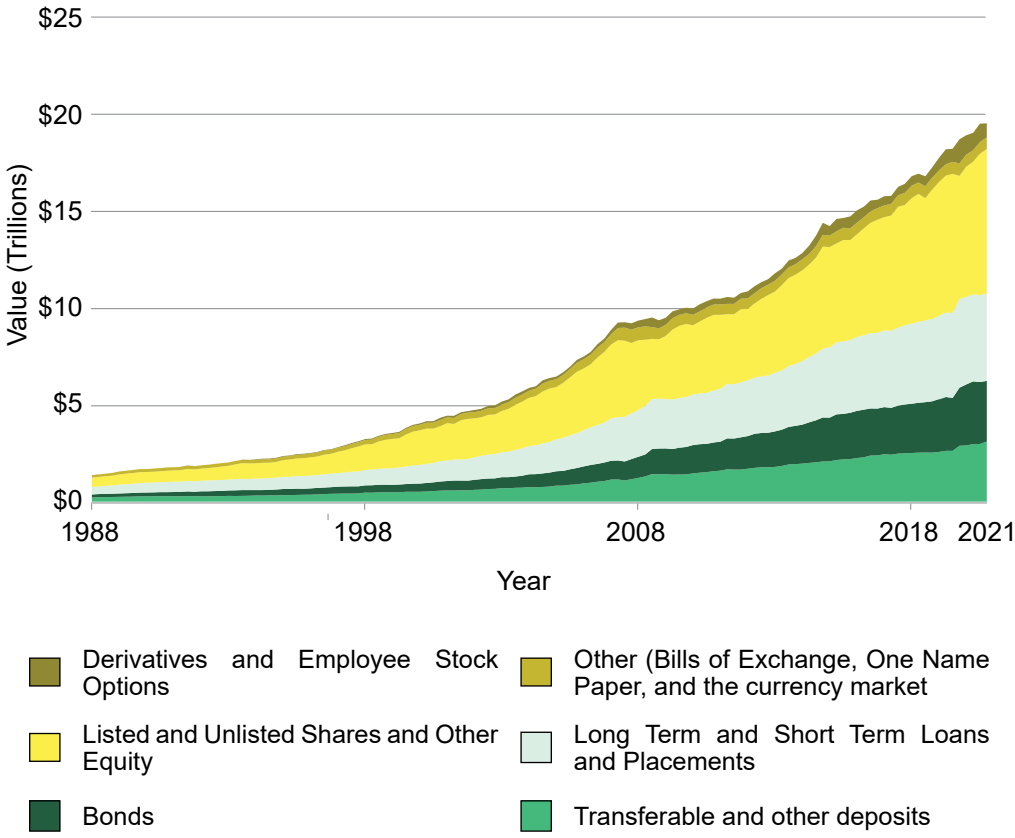
3.36 **Figure 3.2**, based on data from the ABS's Australian National Accounts,[13] illustrates this growth. The total size of financial markets increased from $1.4 trillion in June 1988, to $4.3 trillion in March 2001, and to $19.5 trillion in March 2021. Australia's annual GDP was just under $2 trillion in the 2020–21 financial year.[14]

3.37 Particular financial markets, such as those for derivatives and employee share schemes, have exploded in size, from $121 billion in March 2001 to $728 billion in March 2021, down from $1.2 trillion in March 2020. These markets did not appear in the Australian National Accounts before June 1994. The value of listed shares increased from $697 billion in March 2001 to $2.3 trillion in March 2021, with unlisted shares and other equity increasing from $1.1 trillion to $5.1 trillion in the same period.

13 Australian Bureau of Statistics (n 8) Tables 39–49.

14 Australian Bureau of Statistics, 'Key Economic Indicators' <www.abs.gov.au/statistics/economy/key-indicators>.

Figure 3.2: Financial markets in Australia (June 1988–March 2021)



3.38 These financial markets, and the nature of their participants, are undergoing constant evolution. One example is the dramatic increase in retail trading during 2020 and the COVID-19 pandemic. ASIC data from March 2021 shows that 'in the 2020 calendar year there were 1.67 million active retail accounts in Australia, and approximately 700,000 new accounts that traded for the first time'.[15]

3.39 The rapid growth of particular markets is also illustrated by ASIC research on binary options and contracts for difference ('CFDs'), two types of derivatives. This research shows that the markets expanded dramatically between 2017 and 2019.[16] Gross annual turnover increased from $11 trillion to $22 trillion, and the annual

15 Australian Securities and Investments Commission, 'First-Time Trader? Be Aware of the Risks' (News Item, 16 March 2021) n 2.

16 Australian Securities and Investments Commission, *Product Intervention: OTC Binary Options and CFDs* (Consultation Paper 322, August 2019) [55]. ASIC has now made two product intervention orders in relation to binary options and CFDs: *ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240*; *ASIC Corporations (Product Intervention Order—Contracts for Difference) Instrument 2020/986*.

number of transactions increased from 236 million to 675 million.[17] In 2019, 99% of market participants were retail clients.[18]

3.40 A number of new products and markets have emerged since the introduction of the *Corporations Act* that are financial in nature, but are not currently caught within the *Corporations Act* regime. These include cryptocurrencies and other digital assets, which may or may not be regarded as financial products depending on their characteristics,[19] though they can also be used as the basis of other financial products such as cryptocurrency-linked derivatives.

Household wealth and financial assets

3.41 Household wealth in Australia has increased many times over since the *Corporations Act* came into effect. This potentially means that there is a lot more 'at stake' for those who might be entitled to particular consumer protection measures that apply only to 'retail clients' under Chapter 7 of the *Corporations Act* (see **Chapter 12**). The increasing absolute and relative financial wealth of Australian households has been a potential driver of reforms to the *Corporations Act*, as the Australian Government has sought to manage or reduce some risks of financial loss faced by households.[20]

3.42 Total financial assets of Australian households were valued at over $487 billion in September 1988.[21] Financial assets include securities, insurance, loans, currency, and deposits, but not physical assets such as houses or cars. In March 2001, just before the introduction of the Corporations Bill 2001 into the Commonwealth Parliament, total financial assets had increased to $1.3 trillion. By March 2021, the total wealth of Australian households in financial assets totaled $6.2 trillion, an increase of more than 450% since introduction of the Corporations Bill 2001.

3.43 Household exposure to financial markets has increased significantly over the past thirty years. This may mean that households are exposed to a higher level of financial risk (and potentially greater reward) than previously. Consequently, laws relating to the provision of appropriate financial advice and financial products, and appropriate protections against misconduct and systemic risks, have taken on increased significance for households.

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17 Australian Securities and Investments Commission, *Product Intervention: OTC Binary Options and CFDs* (n 16) Figure 1.

18 Ibid [54].

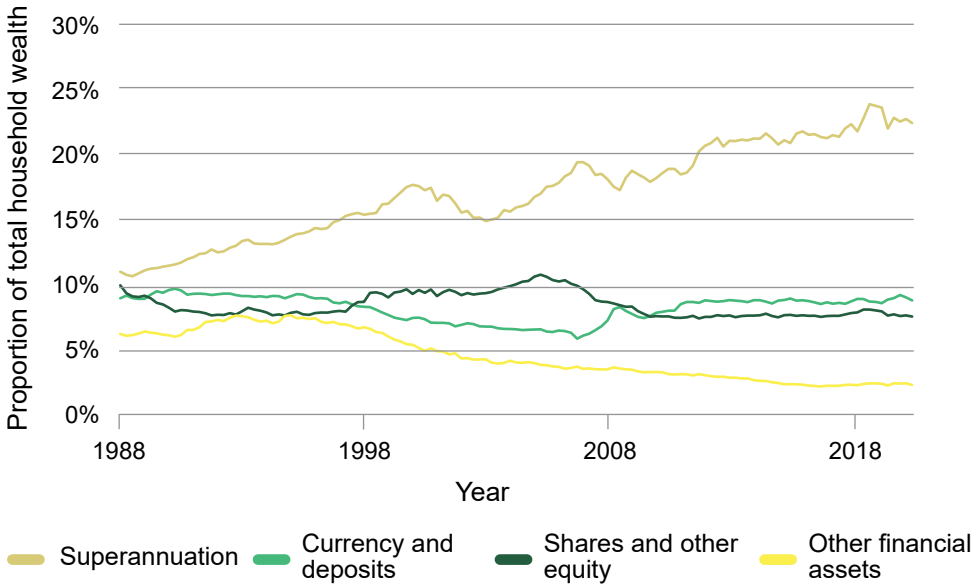
19 See Senate Select Committee on Financial Technology and Regulatory Technology, Parliament of Australia, *Final Report* (October 2021) [6.23]–[6.27].

20 See, for example, the 'MySuper' reforms that introduced default superannuation options under which trustees of superannuation funds had to 'determine a level of investment risk that is appropriate for members of a MySuper product': Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 [1.29]. See, also, ASIC's exercise of its product intervention powers in relation to binary options, which prevents retail clients from acquiring these 'high-risk, speculative financial products': Explanatory Statement, ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240 [39].

21 Australian Bureau of Statistics (n 8) Table 35.

3.44 The Wallis Inquiry reported that households had less than 30% of their total wealth in financial assets in 1980.[22] The proportion of total household wealth held in financial assets increased to 36% in September 1988, to 39% in March 2001, and to 41% in March 2021.[23] **Figure 3.3** paints a picture of the changing structure of household wealth since 1988, with notable increases in the proportion of household wealth in superannuation.

Figure 3.3: Household wealth in financial assets by type



3.45 As at March 2021, every percentage point increase in the proportion of household wealth held in financial assets is equivalent to an increase of $152 billion. The 5 percentage point increase from 1988 to 2021 therefore means individuals have $760 billion more in financial assets than would have been the case if the proportion of wealth in financial assets remained the same as in 1988. The 11 percentage point increase since 1980 is equivalent to $1.67 trillion.

Regulated entities

3.46 The *Corporations Act* regulates the conduct of over 2.9 million companies in Australia,[24] up from 1.2 million on passage of the *Corporations Act* in 2001.[25] A

22 Stan Wallis et al, *Financial System Inquiry* (Final Report, 1997) 130, Figure 3.6.
23 Australian Bureau of Statistics (n 8) Table 35.
24 Australian Securities and Investments Commission, 'Company Registration Statistics' <www.asic.gov.au/regulatory-resources/find-a-document/statistics/company-registration-statistics>.
25 Australian Securities and Investments Commission, '1999-2002 Company Registration Statistics' <www.asic.gov.au/regulatory-resources/find-a-document/statistics/company-registration-statistics/1999-2010-company-registration-statistics>.

net total of almost 100,000 companies were registered in the six months between January 2021 and July 2021, underlining the ever-growing number of entities subject to the *Corporations Act's* provisions, and ASIC's ever-growing workload.[26]

3.47 The financial markets and services provisions of the *Corporations Act* regulate the conduct of a range of licensees. These include 22 domestic and 29 foreign financial market licensees,[27] in addition to a number of markets that have been exempted from the market licensing requirements.[28] It also includes 6,226 AFS Licensees,[29] and their 59,161 authorised representatives.[30] This figure includes 19,387 financial advisers providing personal financial product advice,[31] a decrease from over 26,000 in 2018.[32] Over the past twenty years, the *Corporations Act* has regulated a total of over 201,000 authorised representatives, including 39,103 financial advisers.[33]

3.48 The *NCCP Act* regulates 4,762 Credit Licensees,[34] and their 39,769 credit representatives.[35] ALRC analysis suggests that 372 entities hold both a credit licence and a financial service licence.[36] The ALRC has also identified 5,825 persons who are both credit representatives and authorised representatives. These persons are subject to both the *Corporations Act* and *NCCP Act*. However, licences may be held by different corporations under a single parent entity, so the figure for dual licensees likely undercounts the number of conglomerates and representatives required to hold both AFS and credit licences.

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26 Australian Securities and Investments Commission, '2021 Company Registration Statistics' <www.asic.gov.au/regulatory-resources/find-a-document/statistics/company-registration-statistics/2021-company-registration-statistics>.

27 Australian Securities and Investments Commission, 'Licensed Domestic Financial Markets Operating in Australia' <www.asic.gov.au/regulatory-resources/markets/market-structure/licensed-and-exempt-markets>; Australian Securities and Investments Commission, 'Licensed Overseas Financial Markets Operating in Australia' <www.asic.gov.au/regulatory-resources/markets/market-structure/licensed-and-exempt-markets>. These numbers were current as at 22 October 2021

28 Australian Securities and Investments Commission, 'Exempt Markets' <www.asic.gov.au/regulatory-resources/markets/market-structure/licensed-and-exempt-markets/exempt-markets>.

29 Australian Securities and Investments Commission, 'Australian Financial Services Licensee Dataset' (1 October 2021) <www.data.gov.au/data/dataset/asic-afs-licensee>.

30 Australian Securities and Investments Commission, 'Australian Financial Services Authorised Representative Dataset' (14 October 2021) <www.data.gov.au/data/dataset/asic-afs-authorised-representative>.

31 Australian Securities and Investments Commission, 'Financial Advisers Dataset' (14 October 2021) <www.data.gov.au/data/dataset/asic-financial-adviser>.

32 Aleks Vickovich, 'Financial Adviser Workforce Set to Halve by 2023', *Australian Financial Review* (12 April 2021).

33 These figures remove instances where a representative or adviser has changed licensee. The figures therefore represent the number of unique persons regulated under the *Corporations Act*.

34 Australian Securities and Investments Commission, 'Credit Licensee Dataset' (1 October 2021) <www.data.gov.au/data/dataset/asic-credit-licensee>.

35 Australian Securities and Investments Commission, 'Credit Representative Dataset' (1 October 2021) <www.data.gov.au/data/dataset/asic-credit-representative>.

36 Australian Credit Licence and AFS Licence numbers are the same for a single person, so comparing the lists of licensees by AFS Licence number reveals how many hold both licences.

3.49 The *Corporations Act* also regulates the registration and conduct of liquidators and auditors. There were 646 registered liquidators in March 2021, similar to the figure of 859 in March 2001.[37] There are 3,501 registered auditors regulated by the *Corporations Act*.[38]

Complexity in financial services and corporations legislation

3.50 This section summarises data the ALRC obtained and analysed in relation to corporations and financial services legislation and Commonwealth legislation more generally. The section considers the complexity of corporations and financial services legislation in relation to each legislative feature identified by the ALRC in **Table 3.1** and **Background Paper FSL2**.

Summary of potential complexity

3.51 The data discussed below illustrates the potential complexity of various legislative features of the *Corporations Act* and the legislative scheme for corporations and financial services in Australia. On a variety of metrics, such as length, structural intricacy, obligations, conditional statements, potentially duplicative provisions, prescription, language, and thematic diversity, the *Corporations Act* often stands in a class of its own for potential complexity. The Act has relatively fewer definitions and tagged concepts than many other Commonwealth Acts, but the absolute number of definitions it contains, and the frequency with which it uses defined terms makes it the second-most definitions-dense Commonwealth Act (and well ahead of the third most definitions-dense Act). In addition, the Act has over 14,500 internal cross-references, which is not necessarily excessive relative to other Acts, but 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.

3.52 When considering the extent of reliance on legislative instruments and notional amendments, the *Corporations Act*, and particularly Chapter 7, is among the most complex on the Commonwealth statute book. With more legislative instruments than the vast majority of Commonwealth Acts, and a set of regulations that is itself 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. Over 100 legislative instruments have notionally amended the *Corporations Act*, which is almost 30% of all the instruments that notionally amend any Commonwealth Act.

37 Australian Securities and Investments Commission, 'Insolvency Statistics' <www.asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics>.

38 Australian Securities and Investments Commission, 'Registered Auditor Dataset' (1 October 2021) <www.data.gov.au/data/dataset/asic-registered-auditor>.

3.53 The *Corporations Act* is the third most cited Commonwealth Act in Federal Court judgments.[39] Consequently, the complexity of the *Corporations Act* likely has a significant effect on businesses, consumers, legal professionals, and the judiciary.

3.54 ALRC data on two comparable jurisdictions, the UK 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 the use and overuse of particular legislative features as discussed below.

Length

> Length can be a driver of complexity, as well as a symptom of complexity in legislation.[40] Lengthy legislation, and particularly long provisions such as sections, parts, and chapters, can make legislation more difficult to follow,[41] and can be a sign of structural incoherence or over-prescriptiveness. In addition, the OPC notes that 'overly long sections' can mean 'that the reader struggles to maintain a clear understanding of what a particular section is trying to achieve'.[42]

3.55 The *Corporations Act*, with 805,821 words,[43] is the second longest Act of the Commonwealth Parliament as amended,[44] and, as enacted, represents the longest Act ever passed by the Commonwealth Parliament.[45] **Figure 3.4** illustrates the extent to which the *Corporations Act* and the *ITA Act 1997* stand in a class of their own.

39 The *Migration Act 1958* (Cth) and the procedural *Federal Court of Australia Act 1976* (Cth) represent the first and second most cited Acts respectively.

40 Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (Document Release 2.1, June 2016) [8].

41 Ibid [8]–[11].

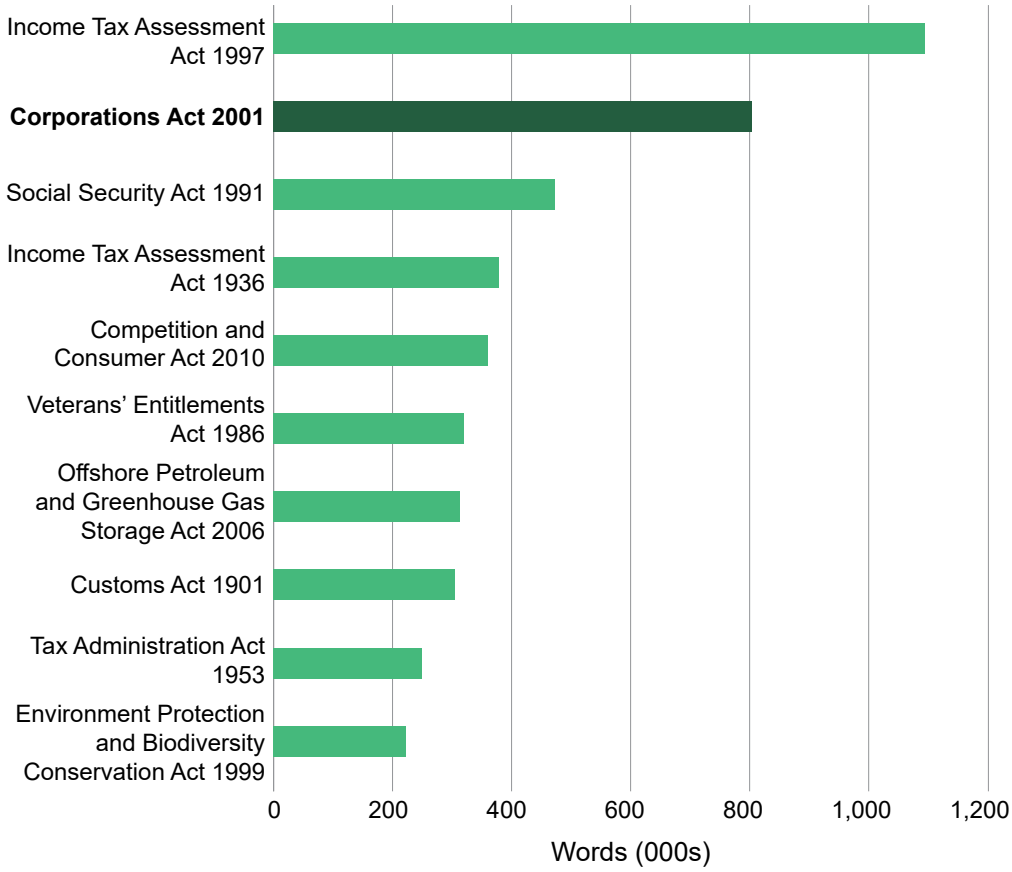
42 Ibid [11].

43 Word counts exclude tables of contents, endnotes, and subsection, paragraph, subparagraph, and sub- subparagraph lettering and numbering.

44 This is based on Act 'compilations', which incorporate amendments that have been made to an Act as initially passed by Parliament.

45 This is based on an analysis of the number of pages in all Commonwealth Acts 'as made' on the Federal Register of Legislation (more than 13,000), which do not incorporate amendments made subsequent to passage of an Act.

Figure 3.4: Top 10 Acts by word length



3.56 The *Corporations Regulations*, with 315,823 words, is equivalent to the eighth longest Commonwealth Act.

3.57 Other Acts related to corporations and financial services account for approximately 6.5% of words in the Commonwealth Acts.[46]

46 *Bankruptcy Act 1966* (Cth); *National Consumer Credit Protection Act 2009* (Cth); *Superannuation Industry (Supervision) Act 1993* (Cth); *Superannuation Act 1976* (Cth); *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth); *Health Insurance Act 1973* (Cth); *Australian Securities and Investments Commission Act 2001* (Cth); *Superannuation Act 1922* (Cth); *Life Insurance Act 1995* (Cth); *Insurance Act 1973* (Cth); *Banking Act 1959* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth); *Foreign Acquisitions and Takeovers Act 1975* (Cth).

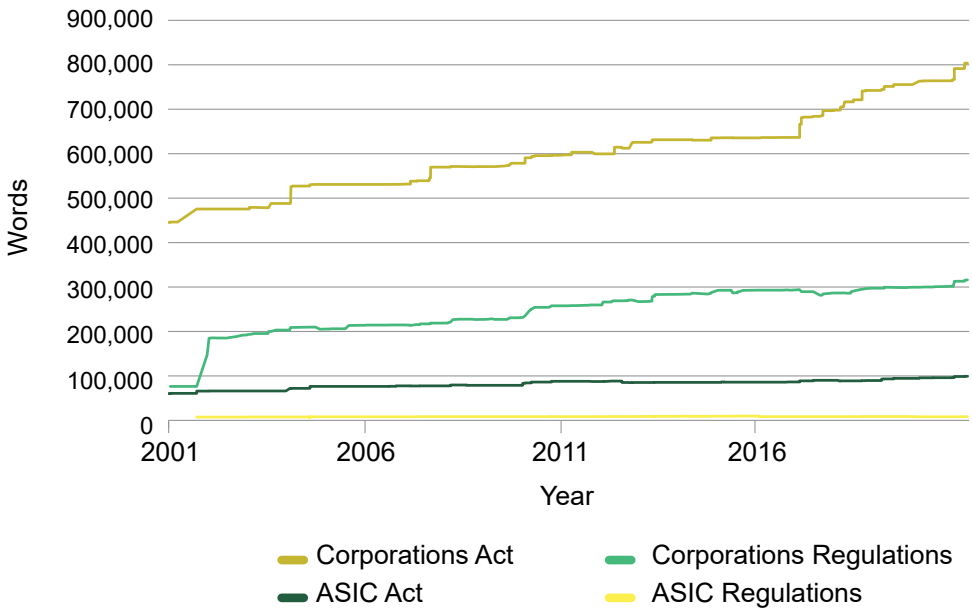
Growth of the Corporations Act and Regulations

3.58 The *Corporations Act* has grown rapidly over the past 20 years. All changes discussed below are net increases to its size and features (for example, counting new words inserted, minus words removed).

3.59 At its enactment, the *Corporations Act 1989* was 1,030 pages and included 415,744 words. The *Corporations Act 2001* was 1,866 pages and comprised 445,993 words on assent. The *FSR Act* commenced in early 2002, which took the *Corporations Act* to 476,079 words and completely altered the content of Chapter 7. The *FSR Act* is the 12th longest Act ever passed by the Commonwealth Parliament.

3.60 The following 20 years have seen a steady increase in the size of the *Corporations Act*, which has accelerated since September 2016.

Figure 3.5: Length of key Inquiry legislation



3.61 The *Corporations Regulations* have increased from 75,269 words at their making in 2001 to 315,823 words today. They doubled in size shortly after passage of the *FSR Act*, reaching 184,578 words by their third compilation on 1 July 2002.

Length within the Corporations Act

3.62 Despite the *Corporations Act*'s remarkable overall size, most of its provisions are not particularly long. The average size of the 33 chapters and schedules in the Act is 24,417 words, with 17 having fewer than 10,000 words. Likewise, 222 parts out of 242 are fewer than 10,000 words, and almost half of the Act's parts are fewer than 1,000 words. A total of 3,481 of the Act's 3,539 sections are fewer than 1,000 words, with 1,234 sections being fewer than 100 words in length. Fifty-eight sections contain more than 1,000 words: these sections are longer than many parts of the Act. Sections have an average length of 224 words.

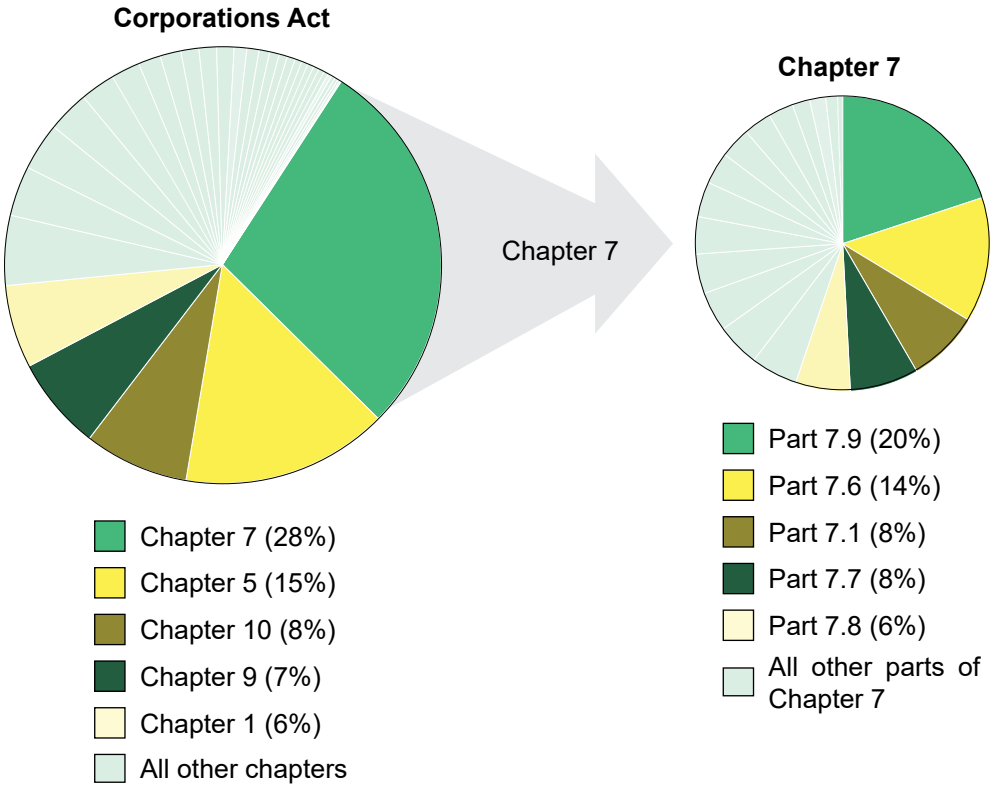
3.63 However, the *Corporations Act* has a number of provisions that are excessively long. Six chapters have more than 40,000 words each,[47] and account in total for almost 70% of its words. Chapter 7 accounts for 28% of the *Corporations Act*, and Chapter 5 accounts for 15% of the Act. Chapter 7 would be the 11th longest Commonwealth Act if it were a separate Act. Twelve parts in Chapter 7 are amongst the 30 longest parts in the Act, with Part 7.9 alone containing 45,347 words. **Figure 3.6** highlights the longest chapters in *Corporations Act* and the longest parts in Chapter 7. Eight sections in Chapter 7 are in the 20 longest substantive sections in the Act.[48]

3.64 While some degree of variability in length between different chapters and parts is expected within any Act, the variance identified above appears excessive. Some longer sections, such as ss 411 and 911A, could potentially be broken down into multiple sections or some of their detail moved to delegated legislation. An example redrafted s 911A that adopts such an approach appears in **Appendix E**. Large chapters or parts could similarly be broken into further chapters or parts.

47 Chapters 1, 2M, 5, 7, 9, and 10.

48 Sections 761G, 911A, 1012DA, 1016E, 1022B, 1043L, 1101B, and 1317E. This excludes definitional sections.

Figure 3.6: Lengthy chapters and parts in the Corporations Act



New Zealand and UK financial services legislation

3.65 The total size of six New Zealand financial services-related Acts is significantly smaller than that of Chapter 7 of the *Corporations Act* and the *ASIC Act*.[49] To some extent, this is because New Zealand appears to place a marginally greater proportion of its financial services law in regulations than in Acts. For example, the *Financial Markets Conduct Regulations 2014* (NZ) include 192,302 words across 994 regulations, while the *FMC Act 2013* (NZ) contains 144,617 words in 902 sections. In Australia, Chapter 7 of the *Corporations Regulations* includes 158,674 words in 703 regulations, with more detail in schedules to the *Corporations Regulations*. However, when ASIC legislative instruments are taken into account, Australian

49 *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (NZ); *Financial Reporting Act 2013* (NZ); *Financial Markets Supervisors Act 2011* (NZ); *Financial Markets Conduct Act 2013* (NZ); *Financial Markets Authority Act 2011* (NZ); *Financial Market Infrastructures Act 2021* (NZ). These Acts comprise a total of 244,018 words; Chapter 7 of the *Corporations Act* comprises 227,546 words and the *ASIC Act* 98,207 words.

financial services-related legislation dwarfs New Zealand's core financial services legislation.[50]

3.66 The size of the *FSM Act* (UK), with 279,339 words and 1,043 sections, is more consistent with Chapter 7 of the *Corporations Act*. But the *FSM Act* (UK) regulates activities that are spread across multiple Acts in Australia, including the *ASIC Act* and the *NCCP Act*. The *FSM Act* (UK) is therefore significantly shorter than the combined equivalent Australian Acts. This is in part because of the amount of delegated legislation that regulates UK financial services: the Financial Conduct Authority's *Handbook* is over 10,000 pages in length.[51]

Structural elements

> Structural elements such as chapters, parts, sections, and subsections 'can highlight the level of intricacy present in a given [legislative] architecture'.[52] The number of chapters, parts, divisions, and subdivisions in an Act may indicate the diversity (or breadth) of subject matter with which it deals, while the number of sections, subsections, paragraphs, and subparagraphs may indicate the level of detail (or depth) it contains. The number of subsections, paragraphs, and subparagraphs per section may be a metric for establishing relative complexity between Acts, in addition to the number of sections per chapter, part, division, or subdivision.

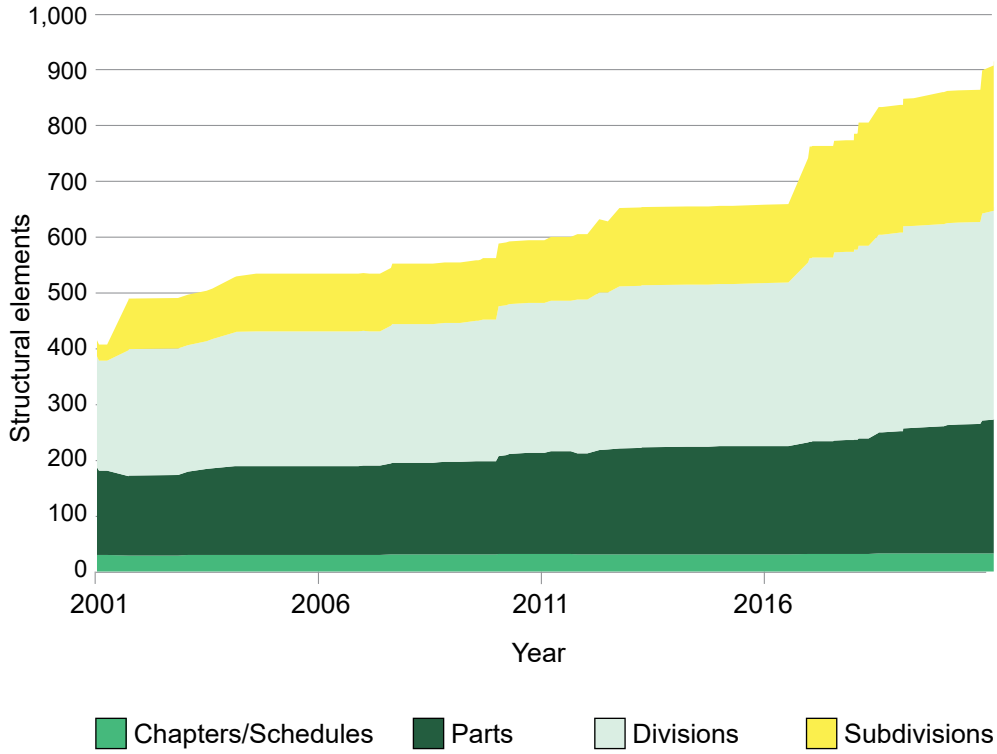
3.67 **Figure 3.7** shows that the number of structural elements in the *Corporations Act* has grown substantially. The average chapter today has over seven parts, compared to approximately five in 2001. The average part today has more than 20% more divisions and five times as many subdivisions as in 2001.

50 ASIC Rules (218,621 words) and legislative instruments made under s 926A(2) (162,798 words) alone account for 381,419 words.

51 Financial Conduct Authority (UK), *FCA Handbook*.

52 JB Ruhl and Daniel M Katz, 'Measuring, Monitoring, and Managing Legal Complexity' (2015) 101 *Iowa Law Review* 191, 215.

Figure 3.7: Corporations Act — Higher-level structural elements



3.68 Structural elements in the *ASIC Act* and the *NCCP Act* have undergone similar growth. The *ASIC Act's* structural elements have almost doubled since 2001, having increased from 2,836 to over 5,000.[53] The *NCCP Act's* structural elements have increased by more than 50% in just ten years, from 5,023 to 7,847.

3.69 The *Corporations Act* has more chapters than any other Act, suggesting it covers a remarkably wide subject matter even relative to other broad regulatory Commonwealth Acts. It also has far more parts and divisions than any other Act, and has more subdivisions than all other Acts except the *ITA Act 1997* and the *Taxation Administration Act 1953* (Cth). The *Corporations Act* has almost as many structural elements as the *ITA Act 1997,* despite being 300,000 words shorter.

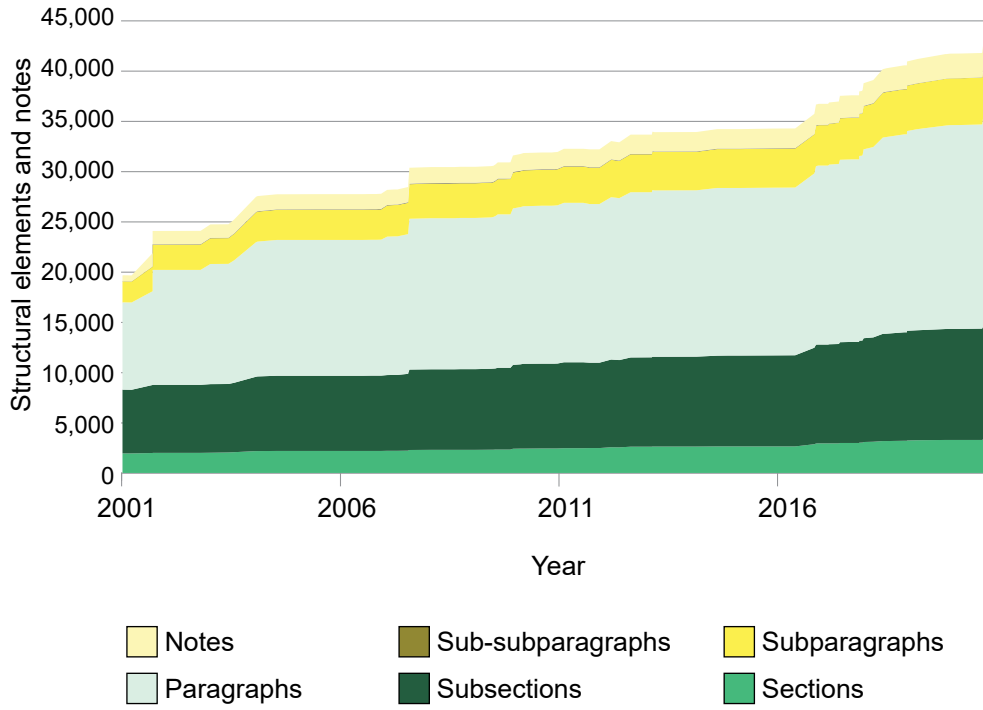
3.70 The number of chapters and schedules in the *Corporations Regulations* has more than tripled since 2001, having increased from 17 to 54. The *Corporations Regulations* now also contain many more parts, divisions, and subdivisions. The number of regulations has more than quadrupled, increasing from 332 to 1,418. The

53 This includes both higher-level and lower-level structural elements, such as chapters, parts, divisions, subdivisions, and sections.

total number of structural elements at the level of regulation or below (for example, sub-paragraphs) has increased almost seven-fold, from 2,590 to 17,936.

3.71 **Figure 3.8** illustrates the increasing number of lower-level structural elements (section or below) in the *Corporations Act.*

Figure 3.8: Corporations Act — Lower-level structural elements



3.72 The average number of lower-level structural elements (section or below) in each chapter and schedule of the *Corporations Act* is 1,262, suggesting exceptional intricacy. In contrast, parts in the *FSM Act* (UK), which are equivalent to chapters in Australia, include on average just 131 lower-level structural elements each. Parts in the *FMC Act* (NZ), equivalent to chapters in Australia, have an average of 306 lower-level structural elements each. The *Corporations Act* also has more lower-level structural elements per chapter than the vast majority of other Commonwealth Acts.

3.73 Chapter 7 of the *Corporations Act* has far more lower-level structural elements than any other chapter of the Act (12,269). The parts in Chapter 7 each contain on average 646 lower-level structural elements. The parts in Chapter 5 each contain on average 454 lower-level elements, and the parts in Schedule 2 each contain on average 405 lower-level elements.

Cross-references

> Cross-references are an indication of interdependence in legislation, which can increase complexity. Interdependence refers to the extent to which the operation of one provision depends on information contained in another provision. This interdependence can be internal (cross-references to other provisions in the same legislation) or external (cross-references to provisions in other legislation). Definitions are also a form of cross-referencing, with each use of a defined term requiring that a reader have regard to the definition of that term, which is usually contained in a different provision. Data on internal and external cross-references, and the number of times defined terms are used in a piece of legislation, can illuminate the degree of interdependence present in a legislative text.

3.74 The *Corporations Act* contains more internal cross-references (14,534) than any other Commonwealth Act except the *ITA Act 1997* (17,806). However, the *Corporations Act* ranks 163rd out of 1,220 Acts for the number of internal cross-references it contains per 100 words.

3.75 In addition, the *Corporations Act* contains 1,466 external cross-references to other Acts. This places it fourth among Commonwealth Acts, and navigating this number of cross-references can present a significant challenge for readers. However, it ranks 1042nd when counting external cross-references per 100 words, suggesting its use of external cross-references is low compared to other Acts.

3.76 Internal and external cross-references in the *Corporations Act* have increased in number over time, both absolutely and relative to the Act's size. The *Corporations Act 1989* contained just 74 external cross-references, equivalent to 0.02 per 100 words. Both the relative and absolute numbers of external cross-references more than tripled in the initial enactment of the *Corporations Act 2001*, and then rose even more dramatically. As of 2021, there are 1,466 external cross-references, or 0.18 per 100 words. Over 140 Acts are referred to in the *Corporations Act*. Internal cross-references have more than tripled since 1989: from 4,499 (1.08 per 100 words) to 14,534 (1.80 per 100 words), mostly attributable to the *FSR Act*.

3.77 Financial services legislation in the UK and New Zealand contains a similarly large number of cross-references.[54] Because legislation in those jurisdictions is published in XML format,[55] many (UK) or all (New Zealand) cross-references are hyperlinked, which assists navigability.

3.78 The *Corporations Act* makes more references to 'regulations' than any other Commonwealth Act. This reflects the Act's reliance on the *Corporations Regulations*

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54 *FMC Act* (NZ) contains 4,048 cross-references; *FSM Act* (UK): 4,990 cross-references; Chapter 7 of the *Corporations Act*: at least 4,201. This is an undercount for the UK and Australia because a single reference to a word such as 'section' can include multiple section cross-references (eg 'sections 9, 761A, 911A').

55 See **Chapter 6** on the design of definitions and Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [139]–[170].

for purposes such as exemptions, notional amendments, and prescription of detail. It also reflects that powers to create delegated legislation are scattered throughout the Act, rather than consolidated. It ranks 358th out of 1,220 Acts for references to 'regulations' per 100 words. References to regulations have increased from 331 in 2001 to 1,454. Chapter 7 contains a disproportionate number of references to 'legislative instruments' and 'regulations'. More than half of all references to regulations appear in Chapter 7 (764 references). This reflects the extent to which Chapter 7 is embedded within a broader legislative scheme including hundreds of ASIC legislative instruments and more than half of the *Corporations Regulations*.

Obligations

> The number and location of obligations and prohibitions in an Act may be a cause of complexity. These are critical components of any legislative scheme, as are the civil penalties, offences, and other consequences that may flow from breaching them. OPC notes that if the 'important concepts in a legislative measure are not stated as its central elements, but are obscured by other material such as procedural detail, overly complex provisions are likely to result'.[56] Although Acts are rarely read sequentially and completely, making obligations and the consequences of breaching them clear is important to minimise complexity and achieve meaningful compliance.

3.79 Reflecting its purpose and size, the *Corporations Act* contains more obligations-related terms in total (such as 'must' and 'shall not') than any other Commonwealth Act (5,461). It contains almost twice as many obligations-related terms than the second ranked Commonwealth Act. It ranks 394th for use of these terms per 100 words.

3.80 The *Corporations Act* has by far the most references to 'strict liability' of any Commonwealth Act in total (598), and the second-most references to 'offences'. It ranks 49th for 'strict liability' and 168th for 'offences' in terms of references per 100 words. It ranks fourth for the absolute number of 'civil liability' references, and 104th for references to 'civil liability' per 100 words. It ranks first for total references to 'contraventions'-related terms, and 65th for references to such terms per 100 words.

3.81 The number of obligation-related terms has increased much more quickly than the overall size of the *Corporations Act* has increased over the same period. For example, the number of references to 'civil liability' has grown almost seven-fold, from 52 in 2001 to 355 in 2021. 'Offence' references have increased more than five-fold: from 331 in 2001, to 1,117 immediately after commencement of the *FSR Act*, and to 1,754 in 2021.

3.82 Chapter 7 contains a disproportionate number of obligations-related terms. For example, Chapter 7 comprises 28% of the *Corporations* Act, but contains 35%

56 Office of Parliamentary Counsel (Cth) (n 40) [36].

of obligations-related terms, 44% of 'civil liability' references, and 31% of offence-related references.

Conditional statements

> Conditional statements contain words such as 'if', 'except', 'but', 'provided', 'when', 'where', 'whenever', 'unless', and 'notwithstanding'. Each of these words indicates a fork in the road for a reader of legislation. For example, a particular rule may apply 'if' a requirement is satisfied, but might be subject to a 'but' that means the rule does not apply in certain circumstances. Conditional statements contribute to complexity, but are an inevitable feature of legislative design. It could therefore be argued that concern should only arise when their use becomes excessive or they are used in particularly complex ways.

3.83 The *Corporations Act* contains 10,527 conditional statements, compared to 15,657 in the *ITA Act 1997* and 7,065 in the third-ranked *Social Security Act 1991* (Cth). The *Corporations Act* ranks 177th for conditional statements per 100 words, putting it firmly in the top quintile of Acts. The number of conditional statements has almost doubled since 1989, which is in line with growth in the overall size of the Act: from 5,557 in 1989, to 6,121 in 2001, to 7,955 in 2010, and to 10,527 in 2021. The *Corporations Regulations* include 3,588 conditional statements, more than quadruple the 801 they contained in 2001. Conditional statements are concentrated in Chapter 7 of the Act, which contains 2,954 (28%), though this is proportionate to the size of the Chapter. Conditional statements in Chapter 7 per hundred words (1.3) are higher than in the *FMC Act* (NZ) (1.1) and the *FSM Act* (UK) (1.2).

3.84 Conditional statements are sometimes used in particularly complex ways in the *Corporations Act*. For example, disclosure and licensing provisions contain many 'if' statements with cascading series of thresholds and exemptions that determine whether a particular provision or regime applies.[57]

Indeterminate concepts

> The use of indeterminate terms may be a source of legislative complexity.[58] These terms are open-ended in nature and context-dependent. Indeterminate terms are used to ensure that a law or rule applies in a variety of cases, and often rely on courts to develop their application. Examining the use of such terms, in consultation with stakeholder feedback, can potentially identify indeterminate terms that unnecessarily contribute to legislative complexity.

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57 See, for example, the various conditional statements used in the application provisions for PDSs: Australian Law Reform Commission, 'Map of the Product Disclosure Statement (PDS) Disclosure Regime under the *Corporations Act 2001* (Cth)' (2020) <www.alrc.gov.au/wp-content/uploads/2021/03/A1.-PDS-regime-consolidated-charts.pdf>.

58 Bernhard Waltl and Florian Matthes, 'Towards Measures of Complexity: Applying Structural and Linguistic Metrics to German Laws' in Rinke Hoekstra (ed), *Legal Knowledge and Information Systems* (IOS Press, 2014) 153, 159–160.

3.85 The *Corporations Act* contains terms such as 'reasonableness', 'misleading conduct', 'good faith', 'honesty', and 'unfairness' more than any other Commonwealth Act. Per 100 words, it ranks 183rd for its use of 'reasonableness'-related standards, 78th for 'misleading conduct'-related concepts, 112th for 'good faith', 47th for 'honesty', and 18th for 'unfairness'-related concepts. These are potentially indeterminate terms, and their use has expanded significantly since 2001. For example, references to 'reasonableness' increased from 284 in 1989, to 410 in 2001, and to 933 in 2021. References to 'dishonesty' increased from 9 in 1989 to 17 in 2001, and to 45 in 2021.

3.86 As discussed in **Background Paper FSL2**, indeterminate terms do not necessarily lead to greater complexity. Stakeholder views and analysis of case law may illustrate the extent to which indeterminate terms contribute to complexity.

Prescription

> Prescription can refer to either: the imposition of detailed rules and requirements in a certain regulatory area; or the breadth of regulatory areas that are subject to detailed rules and requirements. Identifying prescription and the degree of complexity it introduces requires both quantitative and qualitative analysis. Quantitative analysis can identify provisions which are particularly long, which have grown longer over time, and which have a large number of lower-level structural elements. It can also identify multiple obligations that contain similar phrases. Qualitative analysis can assist to understand the degree of prescription and whether it is necessary. Prescription may be unnecessary where 'the fineness of the distinctions a rule makes' is excessive,[59] or where rules are 'numerous and encompassing' in a way 'which causes them to collide and conflict with their animating policies with some frequency'.[60]

3.87 The *Corporations Act* is constantly evolving. Provisions are regularly added and amended (usually to include more detail), but are rarely removed. Only 105 sections that were in the 11 March 2002 compilation no longer appear in the 5 April 2021 compilation; the other 1,975 sections remain in the Act. Of those 1,975 sections, just 112 sections have decreased in size, while 550 have increased in size (and 1,313 have remained the same size). In addition, a further 1,566 new sections appear in the 2021 compilation. This data suggests prescription has steadily increased over time.

3.88 The data discussed in relation to length and structural elements above highlights potentially prescriptive areas in the *Corporations Act*, where simplification may bring particular benefits. Every part of Chapter 7 of the Act that was in the 11 March 2002 compilation has grown longer. Notable in particular are the growth of Part 7.6 (AFSL regime: 150%), Part 7.8 (other conduct obligations: 45%), and Part 7.9 (financial product disclosure: 59%). Part 7.1, containing definitions, has increased

59 Peter H Schuck, 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42 *Duke Law Journal* 1, 4.

60 Ibid 3.

by 41%. Part 7.6 contains over 31,000 words, and related parts of the Regulations contain a further 13,000 words. Part 7.6 covers a relatively confined subject matter in great detail (though it has grown more diverse with new provisions relating to professional standards for providers of personal advice).[61] Part 7.7 (financial services disclosure: 17,164 words in the Act and 14,812 in the Regulations) and Part 7.9 (financial product disclosure: 45,347 words in the Act and 42,620 in the Regulations) are in total longer than more than 90% of Commonwealth Acts, even with regulations made under each Part excluded.[62] In addition, a large number of ASIC legislative instruments have been made under Part 7.6 and Part 7.9 of the Act, as discussed further below.[63]

3.89 Qualitative analysis of prescription and complexity in licensing and disclosure regimes is included in **Chapter 7** and **Chapter 8**. Further analysis will be included in subsequent reports. The ALRC welcomes views on how quantitative analysis could best identify prescription beyond the methods identified above.

Duplication and overlap

> Duplicated and overlapping provisions contribute to legislative complexity. Consolidating provisions may simplify the law. Consolidation would likely also reduce other legislative features that contribute to complexity. For example, consolidating overlapping provisions may reduce the number of concepts, obligations, and prohibitions in legislation.

3.90 Consolidating duplicated and overlapping provisions could simplify the *Corporations Act* by reducing its length and improving its structure, as well as reducing the number of obligations which must be navigated and understood. Computational analysis can identify potential duplication and overlap by identifying repeated patterns in phrasing that can then be analysed qualitatively.

Table 3.2: Potential duplication and overlap

Phrase	Number of instances in sections of the *Corporations Act*
'notify ASIC'	104
'give' and 'lodge'	30
'ASIC may'	641
'ASIC must'	465

61 *Corporations Act 2001* (Cth) pt 7.6 divs 8A, 8B, 8C.

62 With 119,943 words (including regulations), the Parts would rank as the 33rd longest Commonwealth Act. Excluding regulations (62,511 words), the Parts would rank as the 73rd longest Commonwealth Act.

63 See [3.121]

Phrase	Number of instances in sections of the *Corporations Act*
'court may'	566
'court must'	98
'must' in relation to an AFS Licensee	38
'must' in relation to a person	230
'commits an offence'	115

3.91 The ALRC will conduct further quantitative and qualitative analysis to identify duplicated and overlapping provisions that could be consolidated.

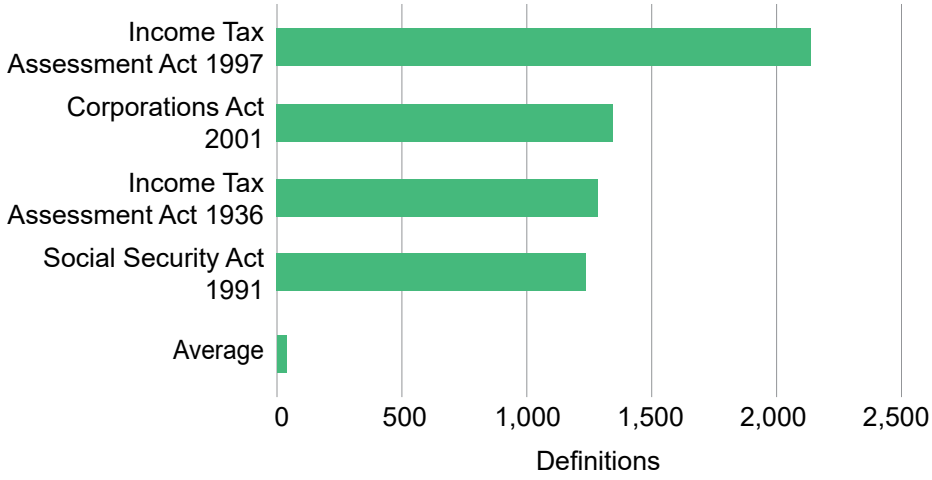
Definitions

> Defined terms and their use can contribute to legislative complexity. OPC notes that a 'large number of concepts within a single scheme can be difficult for a reader to bear in mind and can therefore lead to complexity'.[64] However, 'for inherently complex schemes, large numbers of concepts might be unavoidable'.[65] Definitions can also reduce complexity by achieving consistent interpretation of terms and by reducing the need for repetition of text. Data on the number and use of defined terms can assist in understanding and addressing complexity.

3.92 The *Corporations Act* and the *Corporations Regulations* contain a large number of definitions, and defined terms are used remarkably frequently. The Act contains 1,349 definitions of 1,077 unique terms (some terms have multiple definitions). The *Corporations Regulations* contain an additional 455 definitions (definitions contained in the Act ordinarily apply to the Regulations as well).

64 Office of Parliamentary Counsel (Cth) (n 40) [41].
65 Ibid.

Figure 3.9: Number of definitions in Commonwealth Principal Acts



3.93 Relative to its size, the *Corporations Act* does not have an unusual number of definitions. The Act contains one definition for every 597 words. On average, Commonwealth Acts contain one definition every 488 words, and the *Corporations Act* is placed 823rd for number of words per definition among the 1,003 Acts that have been analysed.[66]

3.94 The frequency with which defined terms appear in provisions of the *Corporations Act* is exceptional. Over 242,000 words that appear in the *Corporations Act* are defined somewhere in the Act.[67] Accordingly, over 30% of words in the Act are potentially defined,[68] which ranks the Act second among Commonwealth Acts (just behind the *Aboriginal and Torres Strait Islander Land and Sea Future Fund Act 2018* (Cth), in which 32% of words are potentially defined). In an average Commonwealth Act that contains definitions, 9% of words are potentially defined. Across the 20 longest Commonwealth Acts, the average percentage of words that are potentially defined is 16%. As discussed in **Chapter 4**, Acts relating to financial services use a higher proportion of defined terms than most Commonwealth Acts, though the *Corporations Act* and *Corporations Regulations* remain outliers even among financial services legislation.[69]

66 The ALRC could not obtain data on defined terms in 217 Commonwealth Acts. This could be because they do not have any or because the terms were not 'marked-up' during the drafting process.

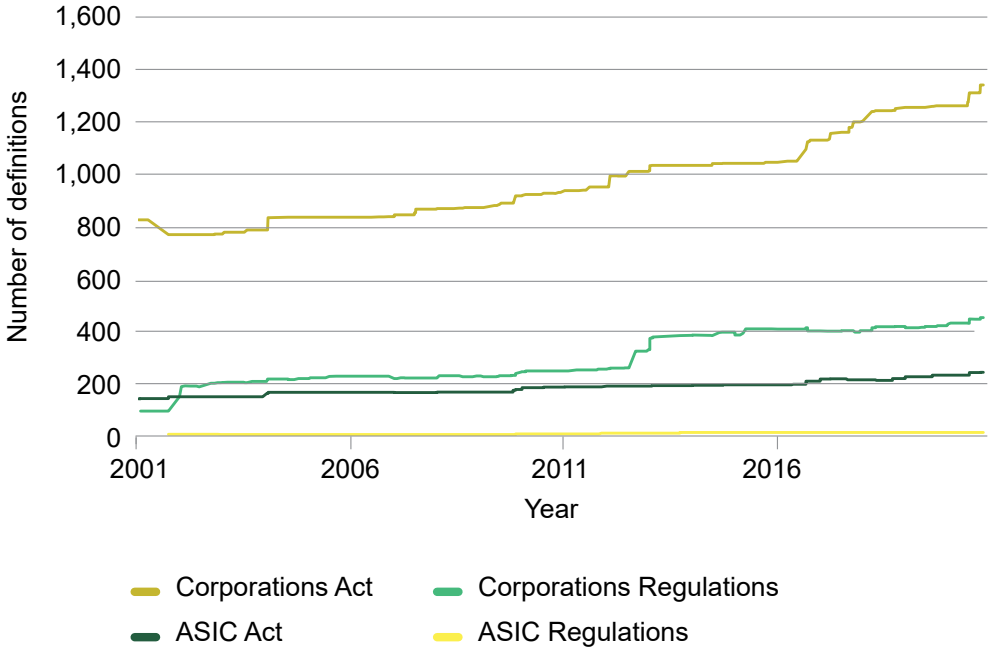
67 For example, the word 'of' is defined in the *Corporations Act* and appears over 36,000 times in the Act.

68 For computational analysis purposes, the computer program assumes that all definitions apply across the whole Act, and counts every defined term whenever they appear (even when they are not being used in their defined sense).

69 See **Figure 4.2** in **Chapter 4**.

3.95 The number of definitions in the *Corporations Act* has risen slowly over the past 20 years, increasing by 62% over that time: from 831 definitions at enactment to 1,349. The proportion of words that are potentially defined has varied over time, ranging between 27.5% and 31.5%. In contrast, the number of definitions in the Regulations has increased almost five-fold: from 96 to 455. **Figure 3.10** illustrates the growth in the number of definitions over time.

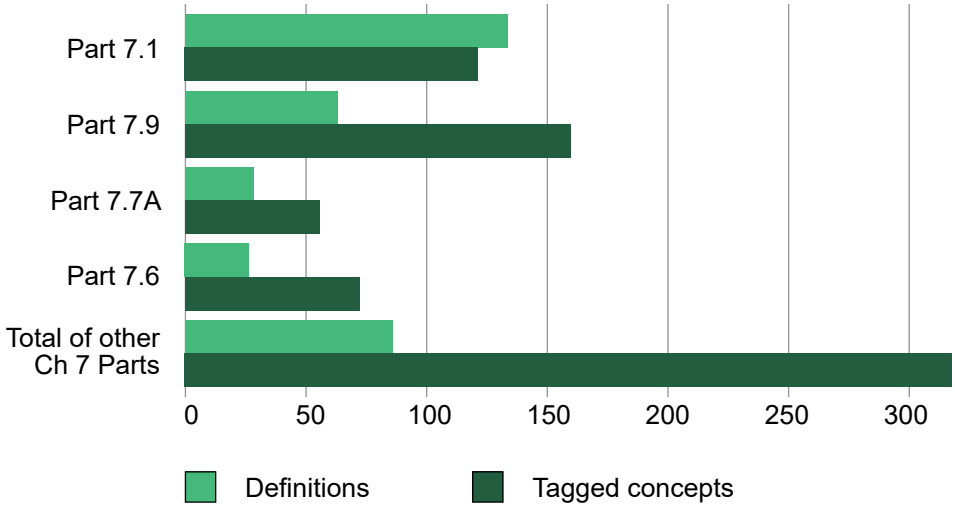
Figure 3.10: Definitions in key Inquiry legislation over time



Defined terms in the provisions of the Corporations Act

3.96 Definitions appear across the *Corporations Act*, as discussed in detail in **Chapter 4**. Just over 600 appear in Chapter 1, which includes s 9, and 341 appear in Chapter 7. A further 400 appear in other chapters of the Act. Definitions in Chapter 7 are particularly dispersed, as are tagged concepts that are generally relevant only to the section in which they are introduced. **Figure 3.11** shows the location of definitions and tagged concepts in Chapter 7.

Figure 3.11: Parts in Chapter 7 of the Corporations Act with the most definitions and tagged concepts



3.97 All chapters and schedules of the *Corporations Act* use defined terms extensively, with just three using potentially defined terms for less than 25% of their words. Chapter 2N and Schedule 4 use defined terms most frequently, at almost 35% and almost 34% respectively. Part 10.37 of Chapter 10 uses defined terms less frequently than any other part of the Act, but even in that Part over 18% of words are potentially defined, which is higher than most Commonwealth Acts.

3.98 The *FMC Act* (NZ) contains 697 definitions and the 991 *FSM Act* (UK). Just 18% of words in the *FMC Act* (NZ) and 17% of words in the *FSM Act* (UK) are potentially defined, a significantly lower proportion than in the *Corporations Act*.

Types of defined terms

3.99 The ALRC conducted a mixed manual and computational analysis of the text of definitions in the *Corporations Act*. This analysed a total of 1,488 definitions, a database of which is published on the ALRC website.[70] In the *Corporations Act*, a total of 631 definitions (43%) are prefaced with the phrase 'unless the contrary intention appears' or similar. A total of 318 definitions (21%) are relational, in the sense that they operate 'in relation to' a particular context only. Approximately 30 definitions state that the defined term 'does not include' particular things.

70 Australian Law Reform Commission, 'Legislative Data' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/legislative-data>.

3.100 A total of 353 definitions (24%) are 'signposts' to other provisions where the definition is set out in full. Signpost definitions ordinarily include words such as 'has the meaning' and 'has a meaning'.

3.101 A small number of definitions (27) include the phrase 'in respect of'. Similarly, a small number of definitions (52) include the phrase 'affected by'. A very small number of definitions (5) refer specifically to the general law. The definitions of 'liabilities' and 'property' in s 413 explicitly expand the equivalent concepts that are recognised in the general law; and the definitions of 'general law' in s 9, 'law' in s 601RAA, and 'financial services law' in s 761A include references to the general law.

3.102 One hundred definitions are contained in sections titled 'Meaning of…'.

3.103 The ALRC has also analysed the application of definitions throughout the *Corporations Act*. Definitions operate at all levels of the Act, such that readers constantly have to consider which definitions apply to the particular provisions they are considering. This issue, and other issues relating to the application and design of definitions across the Act, are discussed in **Chapter 5**.

Language used

> The language used in a text is a well-recognised potential source of legal and legislative complexity. An impression of the degree of linguistic complexity in Act can be ascertained by measuring vocabulary size, 'readability', 'Shannon entropy', and a range of other linguistic features.

3.104 The *Corporations Act* has the third largest vocabulary of any Commonwealth Act. This appears largely to be a product of the Act's length and the diversity of the subject matter with which it deals. The size of the Act's vocabulary is small relative to the Act's overall length. It is common for long Acts to use a small vocabulary relative to their length, because there are only so many words from a language perspective that can be used in a text. The *Corporations Act*'s total vocabulary has grown in line with the general growth of the Act, increasing from 3,883 substantive words in 1989, to 4,343 in 2001, and 5,081 in May 2021.

3.105 The vocabulary of the *Corporations Regulations* increased from 2,740 in 2001 to 4,288 in 2021. Like the *Corporations Act*, the size of the Regulations' vocabulary is largely a product of its size and diversity of subject matter. The large vocabulary of the Act and Regulations may contribute to legislative complexity, as people reading the Act have to grapple with a vast range of concepts and terms, in addition to the definitions introduced throughout.

3.106 The vocabulary of Chapter 7 of the *Corporations Act* (3,110 words) is larger than the *FMC Act* (NZ) (2,809 words), but smaller than the *FSM Act* (UK) (3,293 words).

3.107 The *Corporations Act* also has high 'Shannon entropy'. Entropy is an emerging metric for complexity in legal texts, including legislation. Associate Professor Alschner notes that:

> Shannon entropy helps to quantify the variance of words in a text and can serve as a proxy for complexity under the assumption that texts with more diverse words are more complex than texts with more homogenous terms. It is increasingly used to assess the complexity of legal and policy documents.[71]

3.108 The *Corporations Act* ranks fourth among Commonwealth Acts with an entropy of 9.74, and the *Corporations Regulations* has an entropy of 9.69. The average entropy of Commonwealth Acts is 7.46. The entropy of the *Companies Act 1993* (NZ) is 9.28, while the entropy of the *FMC Act* (NZ) is 9.37. The entropy of the *FSM Act* (UK) is 9.49. Dr McLaughlin and others note that:

> The original English texts of Shakespeare have entropies spanning from 9.01 (*Julius Caesar*) to 9.42 (*King Lear*); the translated works of Goethe have entropies that range between 9.02 (*Wilhelm Meister's Apprenticeship and Travels*, book 6) and 9.42 (*Iphigenia in Tauris*).[72]

3.109 Chapter 7 has the second highest entropy (at 9.27) of any chapter in the *Corporations Act*, ranking somewhat lower than the *FMC Act* (NZ) and *FSM Act* (UK). Chapter 1, with definitions, has an entropy of 9.42, similar to *Julius Caesar*.

3.110 The ALRC has produced Flesch Reading Ease scores for every Commonwealth Act, and the *Corporations Act* ranks 333rd for most difficult to read. However, the particular conventions of punctuation use in legislation likely make these readability scores unreliable. This is because sentences can appear artificially long due to the use of headings without periods (.), which inflates the difficulty of a text when measured by a readability score.

3.111 The *Corporations Act* has an average substantive word length of 8.13 characters, ranking it 494th among Commonwealth Acts. This is very similar to equivalent UK and New Zealand legislation.

Legislative hierarchy

Proliferating legislative instruments

A large number of legislative instruments can make a legislative scheme less navigable and more complex. If a large number of legislative instruments is required, these can be made more navigable by structuring them thematically. For example, APRA conducts much of its prudential regulation through thematically consolidated legislative instruments. Likewise, accounting

71 Wolfgang Alschner, *Validating Readability and Complexity Metrics: A New Dataset of Before-and-After Laws* (Mercatus Working Paper, Mercatus Center, George Mason University, March 2021).

72 Patrick A McLaughlin et al, 'Is Dodd-Frank the Biggest Law Ever?' (2021) 7(1) *Journal of Financial Regulation* 149 172.

> standards in Australia are consolidated thematically and published in over 60 standards that are legislative instruments. UK financial services legislation consolidates exemptions in the *Regulated Activities Order*, while equivalent New Zealand legislation includes only one set of regulations and a limited set of legislative instruments. Each New Zealand instrument operates as a relatively self-contained statement of rules, requirements, and exemptions, rather than as notional amendments to an Act.

3.112 Legislative instruments are a central feature of the corporations and financial services regulatory scheme. Some legislative instruments are made by a minister, and some are made by regulators such as ASIC.

3.113 The *Corporations Act* has 947 instruments linked to it on the Federal Register of Legislation, almost all of which are legislative instruments (some are no longer in force). This ranks the Act sixth among all Commonwealth Acts. The *Competition and Consumer Act* is linked to 297 instruments, while the *ASIC Act* and the *NCCP Act* are linked to 50 and 33 instruments respectively.

3.114 The *Corporations Act* contains 187 references to 'legislative instruments', ranking it fourth among Commonwealth Acts. Most Acts do not contain any references to legislative instruments. Acts that do refer to legislative instruments contain on average 12 references. The *Competition and Consumer Act* includes 108 references, ranking it ninth, and the *ITA Act 1997* includes 50 references, ranking it 23rd. The number of references to 'legislative instruments' in the *Corporations Act* has more than doubled since March 2017, rising from 90 to 187.[73]

3.115 The *Corporations Act* has therefore become ever more deeply enmeshed in a web of delegated legislation, reflected in the growth of the *Corporations Regulations* and the growing body of ASIC and ministerial legislative instruments. **Figure 3.12**, shows the increasing number of references to legislative instruments and regulations, as well as the growth of administrative discretions,[74] which will be returned to below.[75]

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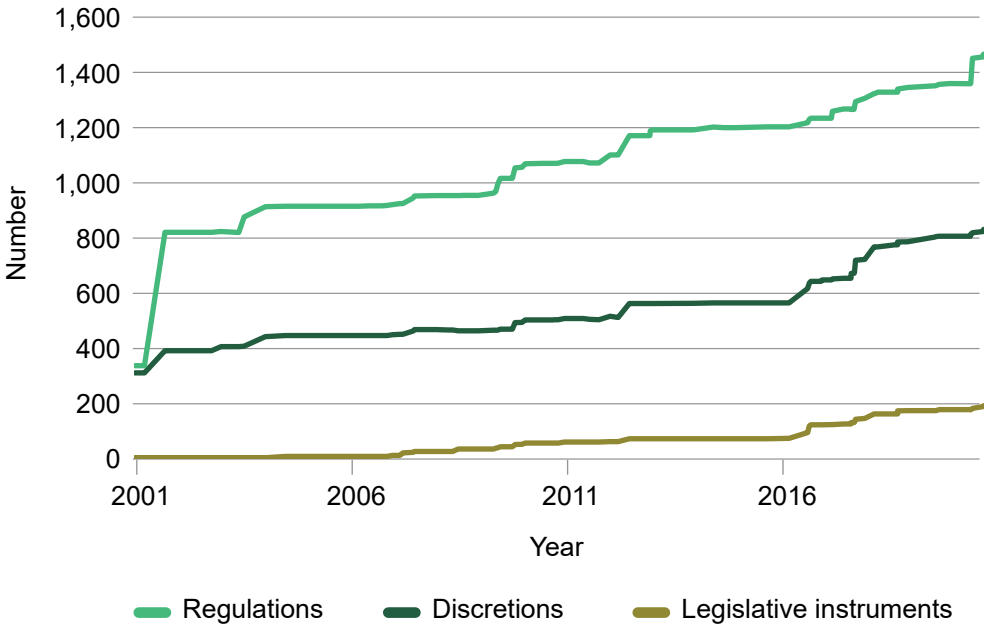
73 'Legislative instruments' were introduced in 2003 in the *Legislative Instruments Act 2003* (Cth), now the *Legislation Act 2003* (Cth). Older Acts that have not been amended frequently may therefore have fewer or no references to 'legislative instruments'.

74 Administrative discretions include 'Minister may', 'ASIC may', 'ACCC may', 'RBA may', and 'APRA may'.

75 See [3.160].

Figure 3.12: References to administrative discretions and delegated legislation in the Corporations Act



3.116 **Table 3.3** offers a snapshot of potentially complex features of the 308 ASIC legislative instruments, made under all ASIC-administered legislation, that were in force as at 30 June 2021.

Table 3.3: ASIC legislative instruments in summary

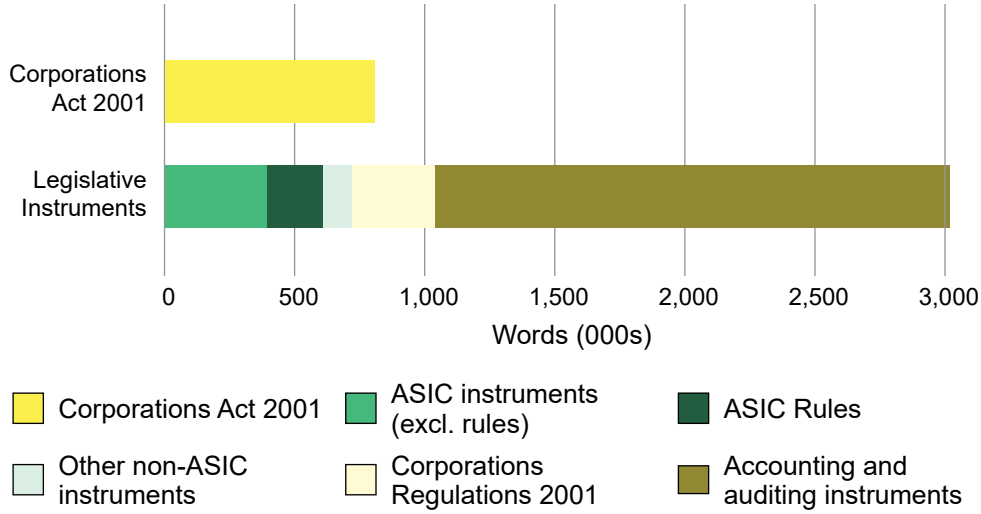
Total pages	2,994
Total words	648,709
External cross-references	1,446
Internal cross-references	5,183
Bold and italicised terms	4,380
Obligations	3,327
Conditional statements	6,295
Notional amendments to Act or regulations	1,030
Reasonableness standards	804

Computationally reviewing legislative instruments

3.117 As illustrated in **Figure 3.13** below, the body of legislative instruments made under the *Corporations Act* is much larger than the Act itself. These legislative instruments include:

- 255 ASIC legislative instruments comprising 611,572 words (more than a third of those words are contained in 12 ASIC Rules);[76]
- 169 legislative instruments relating to auditing and accounting standards, containing 1.9 million words;
- the *Corporations Regulations*, containing 315,823 words; and
- a further 22 legislative instruments, such as ministerial determinations, containing 113,504 words.

Figure 3.13: Legislative instruments under the Corporations Act — word length



3.118 The ASIC legislative instruments contain 3,214 obligations-related terms and 1,008 notional amendments to the *Corporations Act* or another instrument. These instruments also rely on 'reasonableness' standards on 790 occasions. Approximately 4,134 terms are defined in these instruments,[77] although some simply

76 *ASIC Market Integrity Rules (Futures Markets – Capital) 2017*; *ASIC Market Integrity Rules (Securities Markets – Capital) 2017*; *ASIC Market Integrity Rules (IMB Market) 2010*; *ASIC Market Integrity Rules (Futures Markets) 2017*; *ASIC Market Integrity Rules (Securities Markets) 2017*; *ASIC Derivative Trade Repository Rules 2013*; *ASIC Derivative Transaction Rules (Reporting) 2013*; *ASIC Derivative Transaction Rules (Clearing) 2015*; *ASIC Client Money Reporting Rules 2017*; *ASIC Financial Benchmark (Administration) Rules 2018*; *ASIC Financial Benchmark (Compelled) Rules 2018*; *ASIC Market Integrity Rules (Capital) 2021*.

77 These were identified by counting the number of bold and italicised terms in legislative instruments. Not all instruments use this approach to identifying defined terms, so this is likely an undercount.

repeat definitions from the Act. Sixty-three of these instruments notionally insert definitions into the *Corporations Act* or *Corporations Regulations*.

3.119 The ASIC legislative instruments have an average Shannon entropy of 6.6, which is considerably lower than the *Corporations Act*. A number of ASIC rules, notably the various *ASIC Market Integrity Rules,* have entropies above 8, which is higher than most Commonwealth Acts (but still significantly lower than the *Corporations Act*), reflecting the intricacy and diversity of material to which some ASIC legislative instruments relate.

Manually reviewing ASIC instruments

3.120 Of the 295 ASIC legislative instruments (excluding Rules) in force as at 30 June 2021:

a. 242 (or 82%) cite a provision of the *Corporations Act* as a source of authority; and

b. 181 (or 61%) cite a provision in Chapter 7 of the *Corporations Act* as a source of authority.

3.121 Frequently cited sources of authority include:

a. Section 1020F (Part 7.9): 84 legislative instruments;

b. Section 926A (Part 7.6): 65 legislative instruments;

c. Section 741 (Part 6D.4): 48 legislative instruments;

d. Section 601QA (Part 5C.11): 46 legislative instruments; and

e. Section 992B (Part 7.8): 37 legislative instruments.

3.122 The ALRC's analysis suggests these instruments serve three key purposes:

a. Granting relief;

b. Notional amendments to legislative provisions; and

c. Prescription of detail necessary for the *Corporations Act* to function.

3.123 Each of these purposes will now be examined in more detail in the following sections.

Granting relief

> Exemptions, exclusions, and other grants of relief are complex legislative features because they increase 'the number of factual situations or assessments involved in the determination of a rule's applicability'.[78] The use of many exceptions and limitations in legislation can make it more complex to process and apply. In addition, extensive use of exemptions can be a symptom of complexity and other problems in legislation, such as over-

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

> prescriptiveness. Exemptions highlight parts of the legislation that are not operating appropriately for a sufficiently broad range of circumstances.

3.124 ASIC has a range of powers in the *Corporations Act* and other financial services legislation to grant exemptions and exclusions for classes of persons, products, services, and circumstances.[79] The ALRC has identified that 173 (or 59%) of ASIC's 295 legislative instruments grant relief through exemptions and exclusions. A total of 171 of these relate to the *Corporations Act*.

3.125 Some exemptions and exclusions are subject to conditions, while others are unconditional. For example, one instrument contains an unconditional exemption from licensing requirements for any person providing financial product advice given in relation to mortgage offset accounts.[80] In contrast, another instrument relating to 'group purchasing bodies' contains an exemption that is subject to a range of conditions, such as requiring the exempt entity to provide certain information to any person receiving a financial service from the entity.[81]

3.126 Not all ASIC legislative instruments that grant relief from provisions of the *Corporations Act* rely on a power to 'make exemptions'. Some rely instead on powers to notionally amend the Act by way of a 'declaration'. For example, *ASIC Corporations (Foreign Small-Scale Offers) Instrument 2015/362* notionally amends the Act to insert various provisions that, in effect, exempt offers of certain securities and interests in managed investment schemes from prospectus and product disclosure obligations.

3.127 Of the 173 ASIC legislative instruments that grant an exemption, 69 (or 40%) notionally amend the *Corporations Act*, the *Corporations Regulations*, or other financial services legislation. Some of these notional amendments have the effect of granting relief, and some have other purposes, such as imposing alternative obligations on the exempt person. For example, an instrument relating to 'externally-administered bodies' grants a number of exemptions by stating that particular persons 'do not have to comply with' various provisions of the Act, and also notionally amends the Act to impose reporting obligations on certain exempt persons.[82] These notional amendments achieve a similar result as conditions placed on an exemption.

3.128 The ALRC's analysis suggests that 102 instruments grant a continuation of an earlier exemption (which may have expired), 45 provide novel exemptions,[83] and 26 provide transitional exemptions (such as ASIC's deferral of design and distribution obligations).[84] A total of 48 legislative instruments that grant relief also contain conditions for that relief. Approximately 56 exemptions potentially affect the

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79 See, eg, *Corporations Act 2001* (Cth) s 926A.

80 The exemption also applies in relation to 'arranging for another person to apply for, acquire, vary or dispose of a mortgage offset account': *ASIC Corporations (Mortgage Offset Accounts) Instrument 2017/795*.

81 *ASIC Corporations (Group Purchasing Bodies) Instrument 2018/751*.

82 See *ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251*.

83 Novel means that the relief was granted in new circumstances.

84 *ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486*.

regulated population as a whole, or a wide cross-section of the population regulated by the relevant Part of the *Corporations Act*, while 111 instruments likely only affect a limited set of the population regulated by the relevant provision of the Act.

Exemptions in other regimes

3.129 The number and scope of exemption powers in the *Corporations Act*, and the number of instruments that grant relief from the Act, appear to be unusually high compared with other major Commonwealth regulatory schemes.

3.130 For example, the ACCC is granted only limited exemption powers under the *Competition and Consumer Act*, and only in relation to the competition provisions of that Act. The ACCC also has limited authorisation powers for competition law. The ACCC has granted one exemption and is considering one other. The ACCC cannot grant exemptions from the consumer protections of the *Competition and Consumer Act*, including the *Australian Consumer Law*.

3.131 APRA has granted four class exemptions from provisions of the *Financial Sector (Collection of Data) Act 2001* (Cth), and three exemptions under the *Banking Act 1959* (Cth). The Australian Maritime Safety Authority has granted 44 exemptions under the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth). The Australian Transaction Reports and Analysis Centre ('AUSTRAC') has granted 145 exemptions under s 248 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), the vast majority of which relate to specific persons rather than classes of persons. The Australian Human Rights Commission has granted nine temporary exemptions from particular provisions of the *Sex Discrimination Act 1984* (Cth), 46 from provisions of the *Disability Discrimination Act 1992* (Cth), and five from provisions of the *Age Discrimination Act 2004* (Cth).

3.132 Other Commonwealth regulatory regimes under which regulators may make class exemptions include the *Civil Aviation Safety Regulations 1998* (Cth) and the *Greenhouse and Energy Minimum Standards Act 2012* (Cth). Delegates of the Minister or the Departmental Secretary may make exemptions under other regimes, such as the *Aviation Transport Security Act 2004* (Cth), and the *Air Navigation Act 1920* (Cth). These laws appear to contain fewer exemption powers, and are subject to fewer exempting instruments, than the *Corporations Act*.

3.133 Financial services and corporations legislation in other jurisdictions is not subject to the same extent of class exemptions as the *Corporations Act*.

3.134 For example, in New Zealand, under the *FMC Act* (NZ) approximately 17 class exemptions were in force as of 1 September 2021.[85] Just 12 class exemptions have a term longer than two years. The *FMC Act* (NZ) provides specific criteria to which the Financial Markets Authority must have regard when making exemptions.[86] The *Corporations Act* has no similar provision.[87]

85 An additional 2 amendments are in force in relation to these class exemptions.
86 *Financial Markets Conduct Act 2013* (NZ) s 557.
87 However, ASIC has established its own criteria as outlined in Australian Securities and Investments

3.135 The Financial Conduct Authority in the UK does not appear to have the power to grant exemptions from the *FSM Act* (UK). Some exemptions appear in the Act itself, and others are granted by the Treasury through a single consolidated statutory instrument, the *Regulated Activities Order 2001*.[88] The Financial Conduct Authority has a number of powers to grant exemptions from or vary the application of rules made by the Financial Conduct Authority itself.[89]

Notional amendments

> An instrument 'notionally amends' a piece of legislation if the instrument provides that the legislation applies 'as if' particular words or provisions were inserted, omitted, varied, or modified. Notional amendments detract significantly from the readability and navigability of legislation. Notional amendments are not apparent on the face of the legislation, yet have the same legal effect as any other amendment. Notional amendments are also known as 'modifications', for example in s 5(2) of the *Legislation Act*.
>
> Notional amendments can mean that the text of an Act does not reflect the ultimate effect of the law, nor is the existence of notional amendments apparent to the reader of the Act. Notional amendments can fundamentally change the substance of an Act or legislative instrument, such as by imposing new obligations, or varying obligations for a particular class of persons. Notional amendments can therefore lead to legislative complexity.

3.136 Remarkably, almost one-third of all legislative instruments that contain notional amendments to Commonwealth Acts are made under the *Corporations Act*, as **Figure 3.14** illustrates. The Federal Register of Legislation lists 106 legislative instruments that notionally amend the *Corporations Act*, 22 instruments that notionally amend the second-placed *Superannuation Act 1976* (Cth), and 14 instruments that notionally amend the *Social Security Act 1991* (Cth). In total, Commonwealth Acts are notionally amended by 359 instruments registered on the Federal Register of Legislation.[90]

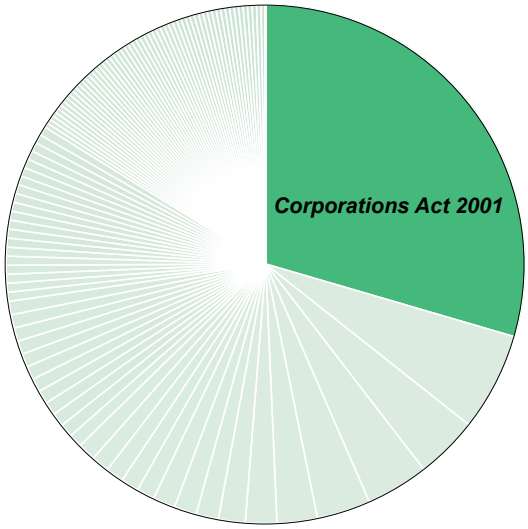
Commission, *Applications for Relief* (Regulatory Guide 51, July 2020) [RG 51.58]–[RG 51.75].

88 *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (UK) SI 2001/544.

89 *Financial Services and Markets Act 2000* (UK) ss 138A, 261L, 294.

90 The figure of 359 instruments includes in force and not in force instruments.

Figure 3.14: Instruments notionally amending each Commonwealth Act



30% of all instruments containing notional amendments are made under the Corporations Act.

3.137 According to the ALRC's analysis, twelve ASIC legislative instruments notionally amend the *Corporations Act*, the *Corporations Regulations,* or both, to impose obligations. A further 17 instruments make notional amendments to vary an obligation as it applies to a class of persons, products, services, or circumstances. A total of 9 instruments make notional amendments for procedural purposes, such as by prescribing procedural matters or making technical notional amendments to the law.

3.138 In analysing legislative instruments, the ALRC has distinguished between notional amendments that apply to only a segment of the population regulated by the legislative provision, and notional amendments that potentially apply to the entire population regulated by the legislative provision. Sixty instruments that notionally amend the *Corporations Act* apply to only a segment of the regulated population. For those instruments, only the affected segment of the population (and consumers and businesses transacting with them) need to be aware of the notional amendments. However, 37 instruments potentially affect the regulated population as a whole, such that the notional amendments are relevant to all persons regulated by the relevant provisions of the law, and any businesses and consumers transacting with them.

3.139 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. The extent to which the Act has been notionally amended may

partly explain the need for the volume of ASIC regulatory guidance that has been published.[91]

3.140 It is unusual for an Act of Parliament to empower an executive agency (such as a regulator) to notionally amend an Act, as Professor Bottomley has observed.[92] 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) does have a highly constrained power to notionally amend legislation.[93] ASIC's relatively unconstrained powers are therefore notable.[94]

3.141 The *FSM Act* (UK) permits the Treasury to amend the legislation in limited circumstances,[95] and it appears that the Treasury can use powers contained in other Acts to amend the *FSM Act* (UK).[96] However, amendments are clearly indicated in the text of the Act or even integrated into the text of the Act,[97] in contrast to the situation in Australia.

Prescribing detail

3.142 Many legislative instruments made under the *Corporations Act* prescribe detail, which may support the operation of a high-level principle in the Act, or may include detailed rules for a regime set up in the Act. For example, ASIC legislative instruments provide for detailed obligations and regulatory requirements, such as for market integrity and derivative trade repositories.[98]

3.143 The ALRC has identified 79 instruments made under the *Corporations Act* that prescribe detail or otherwise contain procedural provisions. Categorising these instruments by reference to their primary purpose, approximately 27 instruments are procedural, 20 vary an obligation in the law, 19 impose obligations, and 13 relate to the administration of an ancillary scheme. The 12 ASIC legislative instruments that

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91 See, for example, Australian Securities and Investments Commission, *Time-Sharing Schemes* (Regulatory Guide 160, December 2020). This 79-page Regulatory Guide explains the regulation of time-sharing schemes, mostly based on the notional amendments in the 68-page *ASIC Corporations (Time-Sharing Schemes) Instrument 2017/272*.

92 Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as Law-Maker' (2011) 39(1) *Federal Law Review* 1.

93 *Securities Act of 1933* (US) 15 USC § 78l(k)(2), as discussed in Bottomley (n 92) 2–3.

94 Several other Commonwealth Acts grant a regulator power to notionally amend an Act, but those powers are more constrained than ASIC's powers, and very few notional amendments have been made under those Acts. For example, s 370-5 of the *Taxation Administration Act 1953* (Cth) grants the Commissioner for Taxation a remedial power to notionally amend taxation law provided that various thresholds are met, including that the notional amendment is 'not inconsistent with the intended purpose or object of the provision'.

95 *Financial Services and Markets Act 2000* (UK) s 17.Transitional amendments can be made by a Minister of the Crown under s 426.

96 See, eg, the *Payment Services Regulations 2017* (UK) SI 2017/752. This instrument relied in part on s 2(2) of the *European Communities Act 1972* (UK) to make amendments to the *FSM Act* (UK): Explanatory Memorandum, *Payment Services Regulations 2017* (UK) SI 2017/272, 2.

97 UK legislation is published with a range of notes, including C-notes that indicate non-Parliamentary amendments that do not alter the text of the legislation.

98 See n 76 for a list of ASIC-made 'Rules'.

are Rules also broadly fit within the category of prescribing detail necessary for the Act to function.

3.144 Using legislative instruments to prescribe detail, particularly where that detail frequently requires amendment, is an important function of legislative instruments, and is specifically envisioned by various OPC guides.[99]

ASIC individual relief instruments

3.145 ASIC also relies on its powers to make exemptions and notional amendments to make instruments that only affect particular named persons. These are referred to by ASIC as individual relief instruments.

3.146 Between 2004 and 2014 ASIC made over 20,000 individual relief instruments under the *Corporations Act*.[100] These instruments are generally made where ASIC considers it is necessary to reduce the impact 'of unintended consequences of the law or where the cost of compliance clearly outweighs regulatory benefit'.[101] In the 18 months from October 2018 to March 2020, ASIC approved relief on 1,810 occasions.[102]

3.147 As discussed in the methodology section, the ALRC computationally analysed ASIC Gazettes to identify individual relief instruments. The results of this analysis are contained in **Table 3.4**. Most relief instruments relate to disclosure and licensing provisions of the *Corporations Act*, specifically in relation to managed investment schemes (s 601QA(1)), takeovers (s 655A(1)), prospectuses (s 741(1)), financial services licensing (ss 911A(2) and 926A(2)), and financial product disclosure (s 1020F(1)).

99 Office of Parliamentary Counsel (Cth) (n 40) [82]; Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [15]–[20].

100 Hui Xian Chia and Ian Ramsay, 'Section 1322 as a Response to the Complexity of the Corporations Act 2001 (Cth)' (2015) 33(6) *Company and Securities Law Journal* 389, 396–397.

101 Australian Government, *Fit for the Future: A Capability Review of the Australian Securities and Investments Commission* (2015) 135.

102 Data collated from ASIC reports on relief applications: Australian Securities and Investments Commission, *Overview of Decisions on Relief Applications (October 2018 to March 2019)* (Report No 620, June 2019); Australian Securities and Investments Commission, *Overview of Decisions on Relief Applications (April 2019 to September 2019)* (Report No 654, February 2020); Australian Securities and Investments Commission, *Overview of Decisions on Relief Applications (October 2019 to March 2020)* (Report No 664, June 2020).

Table 3.4: ASIC individual relief instruments (2001–2020)

Relevant provisions of the *Corporations Act*	**Authorising section**	**Estimated number of Gazetted relief instruments**
Part 1.2A—Disclosing entities	111AT(1)	65
Section 205G—Listed company—director to notify market operator of shareholdings etc.	205G(6)	17
Chapter 2L—Debentures	283GA(1)	94
Chapter 2M—Financial reports and audit	341(1)	27
Section 601CK—Balance-sheets and other documents	601CK(7)	42
Chapter 5C—Managed investment schemes	601QA(1)	2,691
Chapter 5D—Licensed trustee companies	601YAA(1)	1
Section 606—Prohibition on certain acquisitions of relevant interests in voting shares	611	287
Chapter 6—Takeovers	655A(1)	1,047
Chapter 6A—Compulsory acquisitions and buy-outs	669(1)	109
Chapter 6C—Information about ownership of listed companies, listed registered schemes and listed notified foreign passport funds	673(1)	392
Chapter 6D—Fundraising	741(1)	2,481
Section 765A—Specific things that are not financial products	765A(2)	4
Part 7.5A—Regulation of derivative transactions and derivative trade repositories	907D(2)	11
Section 911A—Need for an Australian financial services licence	911A(2)	1,297
Part 7.6—Licensing of providers of financial services	926A(2)	395
Part 7.7—Financial services disclosure	951B(1)	269
Part 7.8—Other provisions relating to conduct etc.	992B(1)	948
Part 7.9—Financial product disclosure and other provisions relating to issue, sale and purchase of financial products	1020F(1)	2,404
Part 7.11, Division 3—Transfer of certain securities	1073E(1)	1
Part 7.11—Title and transfer	1075A(1)	17
Chapter 8A—Asia Region Funds Passport	1217	40
Part 10.2, Division 1, Subdivision D—Treatment of people who carry on financial services businesses and their representatives	1437(2)(b)	10
Part 10.2, Division 1, Subdivision E—Product disclosure requirements	1442(2)(b)	8

Legislative change

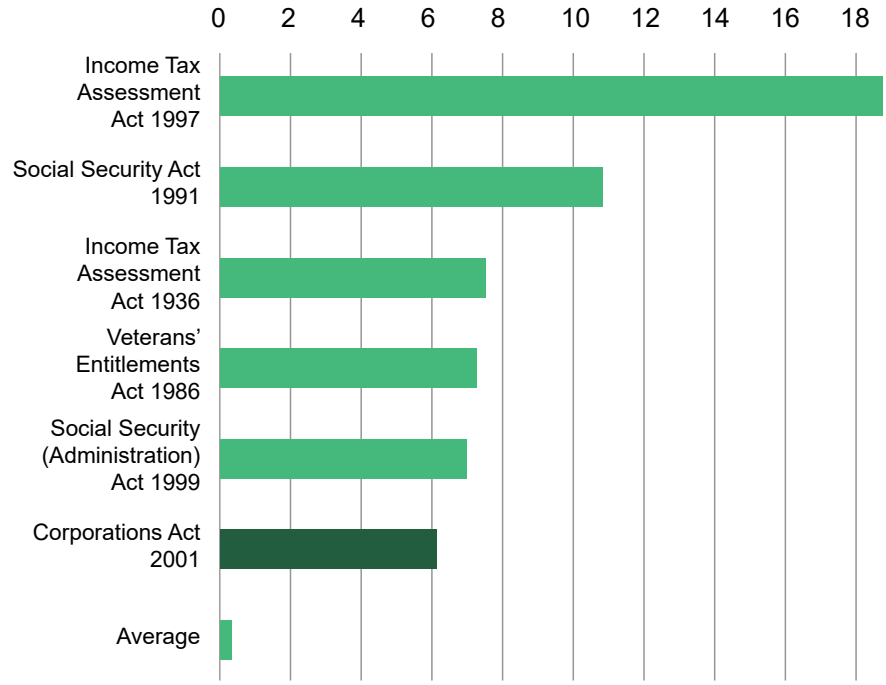
> Frequent amendments to an Act can contribute to legislative complexity for consumers and businesses seeking to understand their rights and obligations, and for practitioners and judges interpreting and applying the law. Continual tinkering can create deep conceptual incoherence in legislation, which can complicate the lawmaking process for policymakers, drafters, and parliamentarians. However, legislative change can also bring benefits when it reduces complexity, such as by removing inoperative provisions or simplifying existing provisions. Data on amendments to a legislative text, including their size and scope, is relevant to understanding the pace and substance of legislative change.

3.148 The *Corporations Act* has been amended 123 times in the past 20 years.[103] Just 18 Commonwealth Acts have had more amendments, and many of these are far older than the *Corporations Act*. On average, the *Corporations Act* has been amended 6.15 times per year, placing it sixth among 1,220 Commonwealth Acts. Professor Grantham has commented that the *Corporations Act* has been the subject of 'a seemingly endless number of amendments, deletions, and insertions'.[104]

103 References in this section to 'amendments' of the *Corporations Act* do not include 'notional amendments' discussed earlier.

104 Ross Grantham, 'To Whom Does Australian Corporate and Consumer Legislation Speak?' (2018) 37(1) *University of Queensland Law Journal* 57, 65.

Figure 3.15: Amendments per year — Commonwealth Acts



3.149 The *ASIC Act* is the 17th most amended Act, when counted by average number of amendments per year, and the *NCCP Act* is 54th.

3.150 The *Corporations Act* has been the subject of 92 legislative compilations since enactment, an average of just over four per year. Some compilations simultaneously incorporate the substance of multiple amending Acts. The *FMC Act* (NZ) has been the subject of an average of just 2.5 compilations per year. The *FSM Act* (UK) has had 248 compilations since enactment in 2000; one reason this number is significantly higher than for the *Corporations Act* is that in the UK, new compilations are created in response to amendments by delegated legislation, which are integrated into the text of the compilations (or notes indicating such amendments are included), neither of which occurs in Australian legislation compilations.

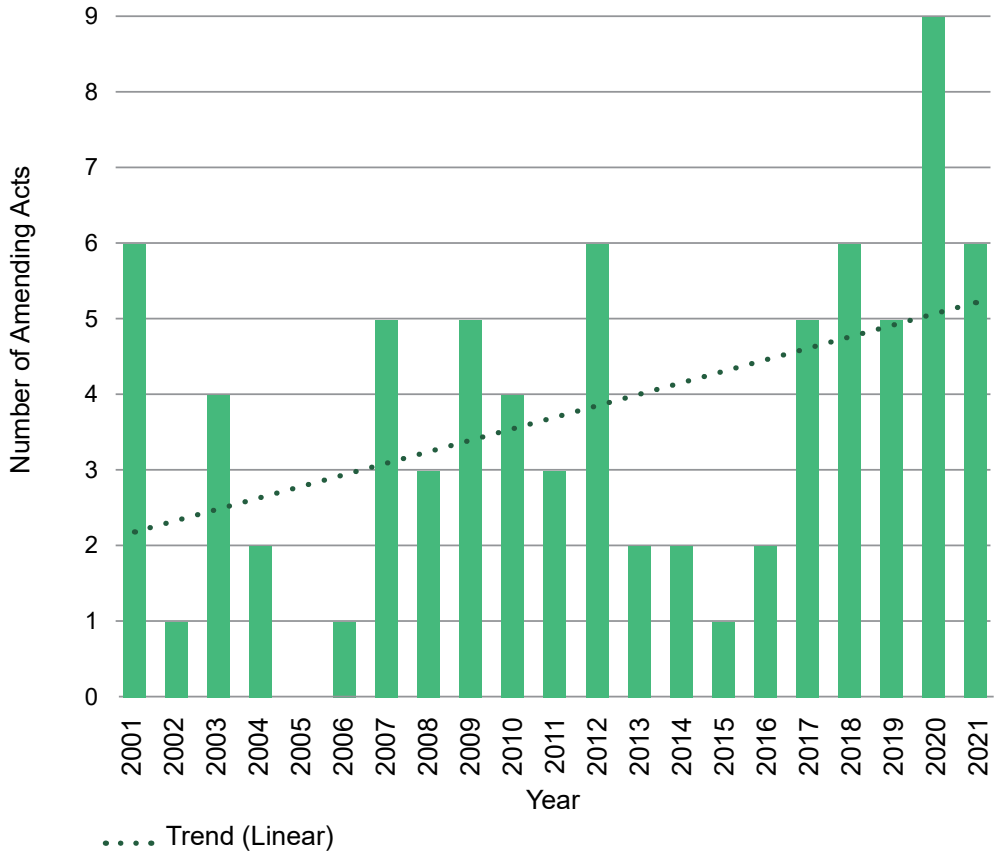
3.151 Chapter 7 of the *Corporations Act*, owing to both its size and the complex and dynamic nature of the subject matter, has been the most frequently amended chapter of the *Corporations Act* since enactment of the *FSR Act*.[105]

3.152 As at 27 October 2021, Chapter 7 has been amended by 78 different Acts. **Figure 3.16** below shows the number of amending Acts in each calendar year since

105 Analysis of the endnotes to the *Corporations Act* shows provisions of Chapter 7 to be the most amended in the Act.

the enactment of the *Corporations Act*. Three Acts received Royal Assent before the *FSR Act* in 2001. As can be seen, the trend is of an increasing number of amending Acts per year. However, this analysis does not take into account the length, scope, or impact of each amending Act.

Figure 3.16: Number of Acts amending Chapter 7 of the Corporations Act



3.153 This data also shows the bulk of amendments are clustered around three groups of events. First, initial amendments to improve the operation of Chapter 7 (2001–04); secondly, the Global Financial Crisis and its aftermath (2007–12); thirdly, the policy response in the lead-up to, during, and after the Financial Services Royal Commission, a period that also included the Murray Inquiry and the ASIC Enforcement Review (2013–21). A summary of important amendments to Chapter 7 is available on the ALRC website.

3.154 Amendments to Chapter 7 have therefore frequently been made in reaction to particular events affecting the financial services industry, and the instances of misconduct and limitations in the existing regulatory frameworks that those events

revealed. The amendments introduced by the *Corporations Amendment (Short Selling) Act 2008* (Cth) and the *Corporations Legislation Amendment (Derivative Transactions) Act 2012* (Cth), for example, were direct responses to the Global Financial Crisis ('GFC').[106]

3.155 Similarly, the FOFA reforms enacted by the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) and *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) (and which introduced Part 7.7A into the *Corporations Act*) represented the government response to the Ripoll Report. The Ripoll Report was itself a reaction to the GFC and the collapse of financial services providers like Storm Financial and Opes Prime.[107] FOFA went further than merely responding to those instances of misconduct, however, and instead enacted a new regulatory regime for financial advice comprised of a 'complex of loyalty obligations'.[108]

3.156 Other policy reforms have perhaps been less reactive to specific instances of misconduct. For example, reforms arising out of the recommendations of the Murray Inquiry in 2014.[109] These include the reforms enacted by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth) and the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth). Similarly, the introduction of AFCA by the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) arose out of the Ramsay Review into Consumer Dispute Resolution Arrangements.[110]

3.157 The legislative amendments enacted in response to the recommendations of the Financial Services Royal Commission responded to particular misconduct highlighted before Commissioner Hayne, but these reforms also seek to go further than addressing specific instances of misconduct and instead alter broader aspects of the policy settings for financial services regulation in Australia.

3.158 Many of these amendments were accompanied by reforms to other aspects of the financial system. For example, the FOFA reforms were closely related to the 'Stronger Super' reforms to the regulation of superannuation.[111] More recently, the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) made significant amendments to both the *Corporations Act* and the *SIS Act*. Accordingly, it is important to consider amendments to Chapter 7 alongside the evolution of other regulatory legislation applicable to the Australian financial services industry.

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106 Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis Butterworths, 10th ed, 2021) [1.61].

107 See further Samuel Walpole, M Scott Donald and Rosemary Langford, 'Regulating for Loyalty in the Financial Services Industry' [2021] *Company and Securities Law Journal* 355, 362; Black and Hanrahan (n 106) [1.61].

108 Walpole, Donald and Langford (n 107) 362.

109 For an outline of the Murray Inquiry, see Black and Hanrahan (n 106) [1.67].

110 Ibid [1.65]–[1.66].

111 Walpole, Donald and Langford (n 107) 365.

The role of the regulator

3.159 ASIC provided the ALRC with detailed data for the period 1 July 2016 to 28 February 2021 relating to ASIC's administration of the *Corporations Act*, *ASIC Act*, and *NCCP Act*. This data relates to individual relief instruments, authorisations, no action letters, and various other administrative powers that ASIC exercises under the three Acts. The data underlines the centrality of ASIC to the effective functioning of corporations and financial services law, with ASIC exercising its administrative powers under various provisions of the Acts on 6,940 occasions in that period.

3.160 ASIC, the Minister, and other regulators (such as the Reserve Bank of Australia)[112] are given a range of discretionary powers under the *Corporations Act*. The Act contains over 822 instances of discretion-related terms (such as 'Minister may', 'ASIC may'), up from 305 in 2001. Much of this increase has occurred over the past five years: the number has increased by almost 300 since October 2016. Chapter 7 of the Act contains a disproportionate number (360, or 44%) of these discretion-related terms.

Regulatory guidance

> A significant volume of guidance in all its forms is arguably both a source and a symptom of complexity in the law. It leads to complexity because it adds another layer of material that regulated entities have to consider and weigh up against other sources of rules. It is a symptom of complexity in that the demand for guidance in part stems from difficulties in understanding and navigating the legislative scheme. Stakeholders, including lawyers, have told the ALRC that they rely heavily on ASIC guidance, and can even treat guidance as law. The regulatory ecosystem is dependent on ASIC and other regulatory guidance because it is unlikely that a licensee or financial adviser could understand the *Corporations Act*, its hundreds of legislative instruments, and other related legislation that regulates their conduct.

3.161 The importance of ASIC to the regulatory regime, and to stakeholder understanding of it, is reflected in the volume of ASIC guidance. As at 11 March 2021, ASIC had in force 205 regulatory guides and 200 information sheets. Regulatory guides alone totalled more than 7,500 pages.

The *Corporations Act* and regulation

3.162 The *Corporations Act* is primarily a regulatory Act. It regulates millions of transactions between consumers, investors, and businesses. Data relating to disputes and complaints highlights the importance of the Act in regulating such transactions, including in providing investor and consumer protections. Given the centrality of the Act in Australian economic and legal life, it is important that the

112 For an example of a power exercisable by the Reserve Bank of Australia, see *Corporations Act 2001* (Cth) s 823CA.

legislative scheme is as simple, navigable, and accessible as possible, while still achieving its objectives in regulating a set of complex markets.

3.163 Data on the prevalence of particular areas of dispute, such as that collated below in relation to the courts and AFCA, may indicate aspects of the law that could be prioritised for further qualitative and quantitative analysis to determine whether legislative complexity may be a problem. Any improvement in the clarity of aspects of the law that are subject to frequent dispute is likely to have benefits for consumers and businesses through easier resolution of disputes.

The *Corporations Act* in the courts

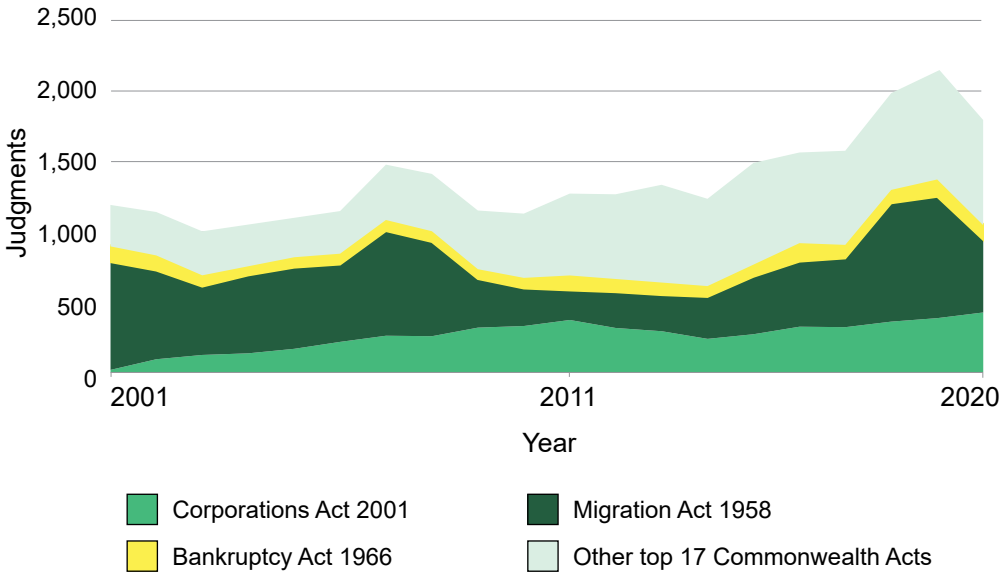
> The ALRC considers that litigation and dispute or compliance-related data may be relevant to identifying areas of complexity within legislation. Particular sections that are subject to more frequent litigation may be affected by uncertain drafting, complex definitions, or overly prescriptive content, all of which may necessitate the involvement of courts or other dispute resolution bodies to resolve the uncertainties.
>
> Disputes and non-compliance with legislation may also be the result of unnecessarily complex legislative regimes more broadly, which can complicate compliance with the law. Alternatively, disputants may be reluctant to litigate regarding complex components of the legislation because of uncertainty as to how the dispute is likely to be resolved. As a result, dispute and compliance-related data must be understood in the context of the entire regulatory ecosystem.

3.164 The ALRC has generated data on publicly available judgments delivered since 2000 in the High Court and Federal Court (single judge and Full Court), as well as the NSW Supreme Court, Court of Appeal, Court of Criminal Appeal, and District Court. Data on the Full Federal Court dates from 2002.[113] The ALRC has used this to create 'litigation heatmaps' relating to various provisions of the *Corporations Act*.

3.165 The data shows that the *Corporations Act* has consistently been one of the most frequently cited Commonwealth Acts in Commonwealth and NSW courts, emphasising the importance of the Act to legal professionals and the judiciary. Besides Acts covering matters of procedure and jurisdiction,[114] it is the second most cited Act in the High Court and Federal Court, and the most cited Commonwealth Act in the NSW Supreme Court. **Figure 3.17** illustrates the most cited Commonwealth Acts over time in the Federal Court (single judge).

113 See **Appendix D** for full methodology.
114 See, eg, *Judiciary Act 1903* (Cth).

Figure 3.17: Most commonly cited Acts in Federal Court (single judge) judgments



3.166 The *Corporations Act* has been cited in the Federal Court (single judge) in 5,378 judgments, which is more than 10% of the Court's judgments since 2001. On appeal in the Full Court of the Federal Court, the Act has been cited in 372 judgments, which makes it the sixth most cited Act in the appellate jurisdiction.

3.167 The data also shows that most sections of the *Corporations Act* have never been cited in the court judgments analysed by the ALRC: only 1,370 of the Act's 3,539 current sections have been cited in court judgments. Focusing legislative simplification on provisions that are most frequently litigated may bring significant benefits.

3.168 The *Corporations Act* has been cited in the High Court in 116 judgments out of 1,301 published since 2000. This makes it the second most cited piece of Commonwealth legislation in the High Court (after the *Migration Act 1958* (Cth), excluding procedural Acts). Only a limited number of sections have been considered in the High Court.[115]

3.169 In the Federal Court, the most cited sections were ss 411, 447A, 9, 439A, 1322, 477, 412, 1041H, 461, and 180. This means that the most cited section in Chapter 7 is s 1041H on misleading and deceptive conduct (121 cases). In

115 The most cited *Corporations Act* sections are s 9 (the largest section containing definitions — 5 cases), s 180 (3 cases), s 500 (3 cases), and s 588FF (3 cases). A number of sections in Chapter 7 have been referred to once: ss 760A, 761A, 761D, 761EA, 762A, 762C, 763A, 765A, 766A, 766B, 766E, 911A, 924A, 925A, 1041A, 1041H, 1041I, 1041L, 1041N. The *Corporations Act* was referred to most frequently in 2012 (14 cases), followed by 2015 (10 cases). The *Corporations Regulations* have been referred to only 3 times.

comparison, the most cited sections in the Full Court of the Federal Court were ss 9, 182, 181, 1041H, 588FF, 180, 588FE, 183, 79, and 596A. Again, this means that the most cited section in Chapter 7 was s 1041H (14 cases).

3.170 Among the 58,378 NSW judgments analysed by the ALRC, the *Corporations Act* was the most cited Commonwealth Act with 6,039 judgments. In the NSW Supreme Court, the *Corporations Act* has been cited at first instance in 5,264 of the Court's 34,700 published judgments over the period. The second-placed *Family Law Act 1975* (Cth) was considered in just 557 judgments in the same period. Given that *Corporations Act* matters can be litigated in both state and federal courts, and there is an enormous area of activity regulated by the Act, this is perhaps unsurprising. The NSW Court of Appeal cited the *Corporations Act* in 594 judgments out of its 8,601 in the period. The Act appeared only infrequently in judgments of the NSW Court of Criminal Appeal and the NSW District Court.

AFCA complaints

3.171 AFCA has provided the ALRC with data for the period from AFCA's establishment on 1 November 2018 to 31 March 2021, and all data presented in this section is current as at that date. The data suggests that AFCA is the primary forum for resolution of consumer disputes relating to financial services.

3.172 The AFCA external dispute resolution scheme has received 177,230 complaints, covering 199,942 issues. A single complaint can involve any number of issues.

3.173 A total of 160,356 of these complaints have been resolved as at 31 March 2021, relating to 180,432 issues. The number of these complaints that have been resolved by a preliminary assessment (6,466) or final determination (8,630) by AFCA since 2018 is significantly higher than the number of publicly available judgments relating to the *Corporations Act* in Commonwealth and NSW courts since 2001 (11,981 judgments). In addition, as discussed below, large numbers of complaints to AFCA are resolved in other ways, for example following negotiations with the financial firm.

3.174 A breakdown of the data illustrates that most complaints involve credit issues, and most complaints are made against banks.

3.175 In addition, the majority of complaints (56%) related to very large members of AFCA. 36 percent of complaints were made against a bank, 20% against a general insurer, and 13% against a credit provider.

Products and issues

3.176 Complaints most frequently raised issues relating to credit (43%), followed by general insurance (24%) and deposit taking (10%). Notably few complaints raised issues relating to superannuation, despite it being a financial product held by almost all households. These figures suggest that issues that attract consumer complaints

can and do arise more frequently in relation to credit and general insurance products than other products.

a. **Credit**: Complaints most frequently raised issues relating to the following credit products: credit cards (34%), home loans (21%), personal loans (17%), and business loans (5%). The most common issues raised in relation to credit were: financial difficulty (19%), financial firm decisions (21%), and privacy and confidentiality (11%).

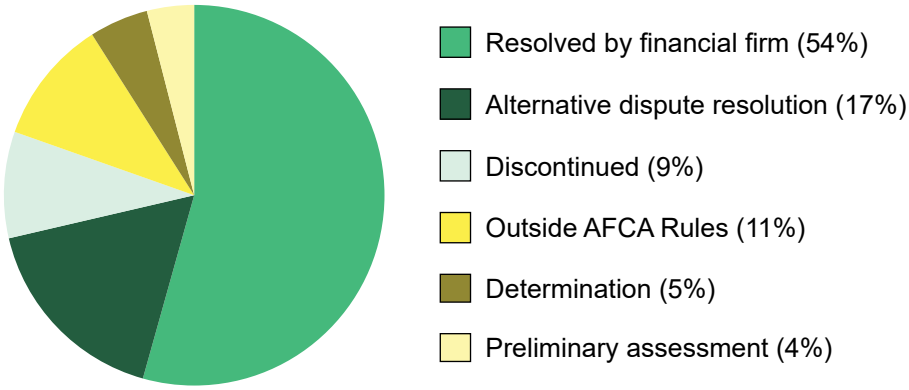
b. **General insurance**: Complaints most frequently raised issues relating to the following insurance products: motor vehicle insurance (23%), home building insurance (19%), and travel insurance (15%). A large majority of issues raised were about a decision made by a financial firm (59%) — for example, a decision to deny or only partially pay out an insurance claim. 26 per cent of issues raised related to service.

3.177 Overall, 29% of issues raised in complaints to AFCA related to a decision of a financial firm. Service (19%), charges (10%), transactions (10%), and financial difficulty (9%) were also prominent issues. Disclosure ranked seventh among issues raised with AFCA, accounting for 5% of issues. However, disclosure accounted for more than double this figure in relation to investments (13%) and life insurance (11%).

Outcomes

3.178 **Figure 3.18** below shows the relative frequency of particular types of outcomes in complaints to AFCA.[116] Most issues have been resolved without AFCA making either a preliminary assessment or a final determination.

Figure 3.18: Outcomes in complaints made to AFCA

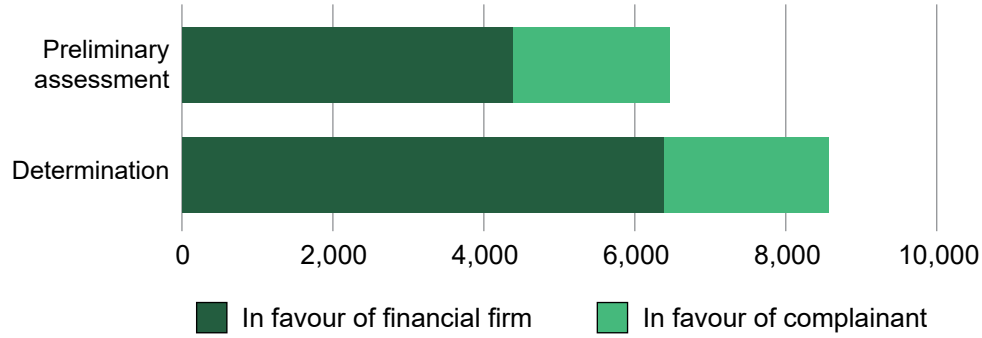


116 Data in this section relating to outcomes excludes issues in relation to which no outcome has yet been recorded. AFCA records an outcome in relation to each issue raised in a complaint, rather than in relation to each complaint. A complaint may raise more than one issue.

3.179 Most issues have been resolved either by the financial firm directly, or through alternative dispute resolution, such as negotiation and conciliation, which involve the complainant and financial firm working with AFCA to resolve the dispute. However, a minority (9%) of issues have been the subject of a finding made by AFCA, in either a preliminary assessment or final determination. A preliminary assessment or final determination has been made more frequently in relation to the following products, than in relation to other products: life insurance (19%), general insurance (16%), superannuation (12%), and investments (13%).

3.180 **Figure 3.19** below shows the number of issues resolved in favour of financial firms and complainants in AFCA preliminary assessments and final determinations. The majority of issues were resolved in favour of the financial firm: 68% of preliminary assessments and 75% of final determinations found in favour of the financial firm.

Figure 3.19: Findings in AFCA preliminary assessments and final determinations



3.181 A total of 2% of issues in complaints were assessed by AFCA as being 'systemic'. A systemic issue is one which is likely to affect a class of persons beyond the complainant. AFCA must report any systemic issue to ASIC, APRA, the ATO, or another appropriate body. For example, in 2020–21 AFCA referred 55 systemic issues to other bodies.[117]

3.182 AFCA referred 7,294 complaints (8,054 issues) to other forums, which accounted for 4% of all issues. The largest portion of these referrals were to a legal adviser (32%), followed by referrals to a court (18%).

ASIC breach reports

3.183 The ALRC has obtained breach report data from ASIC covering the period 1 July 2016 to 28 February 2021. ASIC's data illuminates the general areas of the law to which breach reports relate. Like dispute resolution data, breach report data may highlight areas of the legislation or provisions of legislation that are too complex, or which would bring the most benefits if simplified.

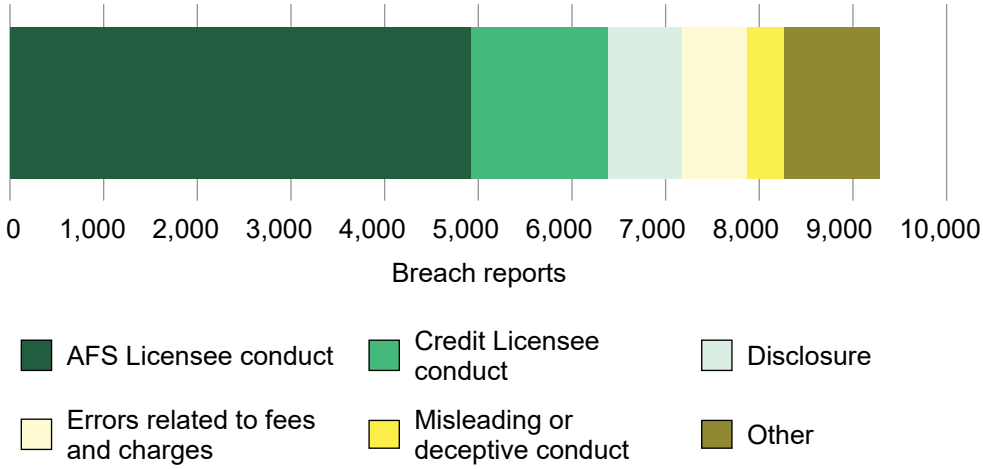
117 Australian Financial Complaints Authority, *Annual Review: 2020–21* (2021) 73.

3.184 Most breach reports to ASIC related to:

- financial services and retail investors (10,981);
- corporations and corporate governance (2,125); and
- markets (717).

3.185 **Figure 3.20** illustrates the types of breaches reported in relation to financial services and retail investors.

Figure 3.20: Breach reports relating to financial services and retail investors



3.186 Of the reported breaches that related to corporations and corporate governance, the most common breaches reported (and some common provisions breached) related to:

- financial reporting (for example, Part 2M.3 of the *Corporations Act*) (83%; 1,754);
- insolvent trading (for example, s 588G of the *Corporations Act*) (7%; 146);
- fraud and other offences by officers (for example, ss 590 and 596 of the *Corporations Act*) (2%; 46)
- directors' duties (for example, Chapter 2D of the *Corporations Act*) (1%; 27);
- disclosures under Chapter 6D of the *Corporations Act* (prospectuses, information statements, continuous disclosure) and disclosures under s 191 of the *Corporations Act* (0.7%; 14);
- meetings of members (for example, Part 2G.2 of the *Corporations Act*) (0.6%; 12);
- auditor misconduct, including failing to notify ASIC of suspected contraventions (for example, ss 311 and 601HG of the *Corporations Act*) (0.5%; 10); and
- managing whilst disqualified (for example, Part 2D.6 of the *Corporations Act*) (0.1%; 2).

3.187 Of the reported breaches relating to markets, the most common breaches reported (and some common provisions breached) related to:

- market integrity rules (for example, ss 798G and 798H of the *Corporations Act*) (45%; 323);
- 'over the counter' (OTC) misconduct, including contracts for difference (for example, ss 912A and 989B *Corporations Act*) (28%; 201);
- market misconduct (Part 7.10 of the *Corporations Act*) (19%; 137);
- short selling (4%; 28). Examples of alleged breaches include:
    - selling a s 1020B product if, at the time of sale, the person did not have a 'presently exercisable and unconditional right to vest' the product in the buyer;
    - non-compliance with the reporting requirements set out in Part 7.9 Div 5B of the *Corporations Act* and Part 7.9 Div 15 of the *Corporations Regulations*;
- notification requirements and disclosure obligations (continuous disclosure obligations and the requirement to provide substantial shareholding notifications (s 671B *Corporations Act*)) (2.5%; 18); and
- insider trading (Part 7.10 Div 3 of the *Corporations Act*) (1%; 8).

PART TWO: USE OF DEFINITIONS

4. When to Define

Contents

Introduction

4.1 This chapter is the first of three chapters (comprising Part Two of this Interim Report) that suggest a number of guiding principles for the use of definitions in legislation. This chapter focuses on when to use definitions, **Chapter 5** focuses on consistency of definitions, and **Chapter 6** focuses on the design of definitions. There is necessarily some overlap between the three chapters — for example, many of the definitions discussed in this and the following chapter demonstrate the importance of using intuitive labels and problems regarding navigability, topics discussed in detail in **Chapter 6**. Cross-references are used throughout the chapters to highlight these links.

4.2 The suggested principles are not intended to represent an exhaustive list of drafting principles that are relevant to legislative definitions. Rather, in accordance with the Terms of Reference for this Inquiry, the principles included here are those considered primarily relevant to the simplification of Commonwealth legislation regulating corporations and financial services. However, these principles may well be applicable to Commonwealth legislation more generally, and indeed to legislation in other jurisdictions in Australia and elsewhere.

4.3 The complexity of definitions contained in the *Corporations Act*, including in Chapter 7 of the Act, in some instances reflects the complexity of the underlying concepts or policy settings. The ALRC has endeavoured in Part Two of this Interim Report to identify examples of definitions that exhibit ‘unnecessary complexity’, and

to suggest simpler alternatives that give effect to the same underlying concepts and policy settings.

4.4 Data analysis indicates that although the number of definitions in the *Corporations Act* is not significantly greater than in other legislation of comparable size, the *Corporations Act* is unique in how frequently it uses defined terms. The chapters in this Part of the Interim Report will focus on examples of defined terms that are used across the *Corporations Act*, and not on definitions used solely in Chapter 7 of the Act. The principles have nonetheless been informed by, and simultaneously have informed, the ALRC's examination of particular definitions in Chapter 7 of the *Corporations Act* in Part Three of this Interim Report.

4.5 The principles outlined in this and the following chapters have been developed from a review of:

- existing guidance published by various legislative drafting offices, including in Australia, Canada, New Zealand, the European Union, and the UK;
- judicial and academic commentary;
- the current use of definitions in Commonwealth legislation relating to corporations and financial services; and
- views expressed by stakeholders in consultations undertaken by the ALRC to date.

4.6 In the space available, it is not possible to undertake an exhaustive analysis of each defined term used in the corporations and financial services legislation. The examples discussed in Part Two of this Interim Report are necessarily a sample chosen to demonstrate the importance of using definitions in a principled way, and to demonstrate the complexity that can arise when definitions are used in other ways.

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 terminology

4.7 **Table 4.1** below contains a brief guide to the terminology used when discussing definitions. That terminology is used throughout this Interim Report, but particularly in this Part of the Interim Report. The guide aims to clarify the expressions relating to definitions and to distinguish between expressions where necessary (for example, 'definition' and 'defined term').

Table 4.1: Terminology used when discussing definitions

Word or phrase	Meaning
defined term	A 'defined term' is a word, phrase, or expression that is given a specific meaning in legislation. Example: 'agency' is a defined term in the *Corporations Act*, because that word is given a specific meaning in s 9 of the Act.
definition	A 'definition' consists of a defined term and the meaning given to that term. Example: ***agency*** means an agency, authority, body or person.
dictionary provision	A dictionary provision is a provision that defines more than one term, and does not contain operative text. Example: s 9 of the *Corporations Act*.

Word or phrase	Meaning
inclusive definition	An 'inclusive definition' is one that defines a term by stating that the word or expression 'includes' certain other concepts or things. Example: ***sheriff*** includes a person charged with the execution of a writ or other process.
label	The word 'label' is used when discussing the words chosen to represent the concept that is being defined (that is, the defined term). 'Label' is most useful when discussing defined words or expressions (defined terms) that do not have an ordinary meaning, or their ordinary meaning does not naturally match the concept that is being defined. Example: This chapter discusses the importance of using intuitive labels for defined terms, and not unreasonably stretching a word's accepted meaning.
interconnected definition	An 'interconnected definition' contains other words or phrases that are also defined by legislation. Example: The definition of 'agency' is interconnected, because the definition contains the words 'body' and 'person', which are also defined in the *Corporations Act*.
relational definition	'Relational definitions' are terms that take on a defined meaning only *in relation to* particular subject matter, circumstances or concepts. Example: ***borrower***, in relation to a debenture, means the body that is or will be liable to repay money under the debenture.
signpost definition	A 'signpost definition' is an entry in a dictionary provision that does not contain the full definition of the term, but indicates (signposts) where a reader can find the term's full definition. Example: ***associated entity*** has the meaning given by section 50AAA.
tagged concept	A 'tagged concept' is a term that is given a particular meaning in narrative form for the purposes of only the section or subsection containing the 'tag'. Example: 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 …

Context

4.8 In formulating principles for the use of definitions in legislation, it is acknowledged that principles can essentially represent an ideal, and the achievement of those ideals may be more difficult in practice than in theory.[1] Further, legislative drafting necessarily takes place in an imperfect world, and legislative drafters operate under several practical constraints.

4.9 The first constraint is that drafters necessarily act on the instructions of those who ask them to draft legislation. Instructors will typically be policymakers from government departments, although they may sometimes be members of Parliament in the case of private members' Bills. Policy-making processes may not incorporate a detailed understanding of the legislative drafting process, and legislative design may not be a priority when developing policy. Working together, instructors and drafters aim to convert policy into legislation. This is a complex process — policy positions may change during the course of legislative drafting, and there is often no clear line between matters of policy and matters of a 'technical' drafting nature.[2] The working relationship between drafters and instructors is therefore important and has implications for the quality of legislation.[3]

4.10 The second, and significant, constraint on legislative drafters is time. Former Commonwealth First Parliamentary Counsel, the Hon Hilary Penfold PSM QC, has observed that legislative drafting is

> almost always carried out in too much of a hurry. This is partly because of the workloads of individual drafters, and partly because of the political demands to produce legislation quickly after the initial policy decisions have been made.[4]

4.11 Sir George Engle KCB QC, former First Parliamentary Counsel of the UK, has cited Lord Thring's pithy observation that 'Bills are made to pass as razors are made to sell'.[5] This highlights the role of the political process in legislative drafting. Often the passage of a Bill through Parliament will give rise to negotiations and amendments to the text of a Bill. What started out as a well-crafted piece of writing may, unavoidably, be amended considerably before it is passed into law.

4.12 Sir George Engle labelled the challenge of accommodating these amendments 'the impracticability of continuous redesign'.[6] He explained the problem as being

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

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

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

4 The Hon Hilary Penfold, 'The Genesis of Laws' (Paper presented at 'Courts in a Representative Democracy', National Conference presented by the AIJA, the LCA and the CCF, Canberra, 1994).

5 Sir George Engle, '"Bills Are Made to Pass as Razors Are Made to Sell": Practical Constraints in the Preparation of Legislation' (1983) 4(2) *Statute Law Review* 7.

6 Ibid 14.

> the practical difficulty of altering the basic structural and conceptual elements of a Bill, as originally designed, so as to enable it to accommodate and present in a satisfactory way all sorts of additional provisions, late changes of policy and other afterthoughts which could not be foreseen when the Bill was originally designed. One of the skills of [experienced drafters] is to make some allowance in [their] original design for this sort of proliferation. But there is a limit to what [they] can cater for, sight unseen.[7]

4.13 Once passed, an Act is then susceptible to future amendments at the will of the Parliament. A drafter of an amending Act is then constrained by decisions made during the drafting of the original Act, for reasons of consistency and coherence, while simultaneously being bound by instructions relating to the latest proposed amendment. An accumulation of disparate amendments made over time to an Act may present a subsequent drafter with significant challenges in identifying and maintaining a consistent and principled approach to matters of drafting, including definitions. Drafters are rarely, if ever, invited to re-assess the drafting of an entire piece of legislation when implementing a particular proposed amendment. Accordingly, the implementation of a principled approach to drafting — including definitions — is likely to be much more difficult for a lengthy existing Act (such as the *Corporations Act*) than it is when drafting a new, shorter, Act.

4.14 Legislative drafters also operate within a world of finite resources and are limited by the tools available to them. This includes technological tools such as the systems used to draft and publish legislation. These systems are explored in further detail in **Chapter 6** of this Interim Report.

4.15 Moreover, even in ideal drafting conditions, a legislative drafter is required to balance many competing drafting objectives. Mousmouti has commented that the process of legislating involves 'making choices on a number of complex issues', and 'there are no universal rules on how to legislate'.[8] The ALRC recognises that the principles proposed in this Interim Report cannot be implemented strictly as rules, and that it may often be necessary to recognise exceptions, or to 'adapt the spirit' of the principles to particular circumstances.[9] Indeed, if legislative drafters are subject to strict rules, it may unhelpfully restrict the exercise of their professional judgment, and become counterproductive in the quest for simpler, clearer, more accessible laws.[10]

4.16 Moreover, a legislative drafter may in a particular instance identify a tension between different principles expressed in Part Two of this Interim Report. The drafter's professional judgement will be required to weigh up the relative benefits of applying

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7 Ibid.

8 Maria Mousmouti, *Designing Effective Legislation* (Edward Elgar Publishing, 2019) 54.

9 Uniform Law Conference of Canada, 'Report of the Committee Appointed to Prepare Bilingual Legislative Drafting Conventions for the Uniform Law Conference of Canada' <www.ulcc-chlc.ca/Civil-Section/Drafting/Drafting-Conventions>.

10 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.

each principle in a given situation, in determining the best drafting option. Minimising legislative complexity should be a consideration at all times, and the 'overarching principle' identified below may be a helpful guide for the drafter's thought process in relation to definitions.

4.17 Justice Gageler encapsulated the inherent difficulty of defining sometimes complex or contested concepts, stating 'nothing that has a history can be defined'.[11] Justice Gageler was there concerned with the concept of 'judicial power' in s 71 of the *Constitution*, and observed that:

> Especially that is so of the concept of judicial power, which has been shown to 'defy, perhaps it were better to say transcend, purely abstract conceptual analysis', to 'inevitably attract consideration of predominant characteristics' and to 'invite comparison with the historic functions and processes of courts of law'.[12]

4.18 Although 'judicial power' is not itself a defined term, Gageler J's comments reflect the challenges faced by legislative drafters in giving textual definition to abstract, complex, or contested concepts.

Overarching principle

Principle: 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.

4.19 Legislation is a form of communication. The aim is to convey the object of the legislation, and to enable effective understanding of, compliance with, and enforcement of, the legislation.[13] Clear communication can be achieved in many different ways, including the style of language used, as well as structure and formatting.[14] Similar considerations may apply in relation to the drafting of other documents, including contracts and disclosure documents, for example. A legislative

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11 *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1 [66]. In making this observation, Gageler J may have been drawing on the following passage of philosopher Friedrich Nietzsche in *On the Genealogy of Morals* (1887):

> The past general history of punishment, the history of its employment for the most diverse ends, crystallises eventually into a kind of unity, which is difficult to analyse into its parts, and which, it is necessary to emphasise, absolutely defies definition. (It is nowadays impossible to say definitely the precise reason for punishment: all ideas, in which a whole process is promiscuously comprehended, elude definition; it is only that which has no history, which can be defined.)

12 *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1 [66] (citations omitted).

13 See, eg, Mousmouti (n 8) 48–51; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Australian Government, 2014) 184.

14 See further Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [83]–[87], [109]–[110].

drafter is tasked with ensuring that the words used in a piece of legislation accurately convey and give effect to the policy intent contained in the drafting instructions. In the case of OPC, instructions for Bills are typically prepared by the Government department responsible for the relevant area of policy.[15] Occasionally, OPC may also be asked to draft a private member's or senator's Bill.[16] Legislative definitions are an important method by which the use of words can be shaped to achieve this goal.

4.20 Professor Eagleson has advocated that definitions should be utilised primarily for the convenience of readers, rather than for the convenience of drafters.[17] Eagleson gave examples of terms such as 'unmarried person' and 'goods', which were defined in legislation at the time, ostensibly for the purpose of achieving a shorthand drafting form. He emphasised that a reader of legislation would likely overlook or be confused by the definitions used, and demonstrated how the provisions could have been drafted differently retaining the ordinary meaning of the terms. The Productivity Commission accepted that making legislation readable for the 'general public' may be a 'secondary consideration' for topics such as 'complicated commercial matters', but also accepted that law is sometimes 'so complex that even non-specialist lawyers have difficulty with it'.[18] The ALRC agrees with the general principle that drafters and proponents of legislation should review draft legislation from the perspective of the reader, and consider from that perspective whether or not a particular definition is helpful, as an important factor in deciding whether and how to define a particular term.

4.21 To emphasise that definitions should be used primarily for the convenience of the reader, rather than the drafter, is not to downplay the importance of defined terms to a drafter's work. Inserting definitions in legislation can also have implications for the work of *future* drafters whose job it is to amend (or further amend) legislation. Some of the examples discussed in this chapter and the following chapter illustrate how introducing a defined term for a particular purpose at a point in time can create unintended complexity in the future. This suggests that in applying the overarching principle, a drafter should as far as practicable consider the potential future implications of introducing a defined term.

4.22 Justice McHugh has stated that the function of definitions is 'to provide aid in construing the statute'.[19] As Finucane has noted, the effective use of definitions can help readers to arrive at the intended meaning of a statute after a 'short and pleasant' journey, rather than a 'long and agonising' journey.[20] Used appropriately,

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15 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [1.21]. See also Office of Parliamentary Counsel (Cth), *OPC's Drafting Services: A Guide for Clients* (6th ed, 2016) for more detail about the instructor and drafter relationship.

16 Department of the Prime Minister and Cabinet (Cth) (n 15) [11.25].

17 Robert D Eagleson, 'Legislative Lexicography' in EG Stanley and TF Hoad (eds), *Words: For Robert Burchfield's Sixty-Fifth Birthday* (DS Brewer, 1988) 81, 82.

18 Productivity Commission (n 13) 185.

19 *Kelly v R* (2004) 218 CLR 216 [103]. See also *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628, 635 (Barwick CJ, and McTiernan and Taylor JJ).

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

definitions can make legislation more user-friendly, clearer, shorter, and easier to read. Conversely, poor use of definitions can add to the complexity of legislation, and obfuscate meaning, leading to uncertainty.

4.23 The ALRC proposes that the above overarching principle should be the primary consideration when determining whether a particular term should be defined in legislation, when choosing the label for a defined term, and when deciding how any definition should be designed, structured, or drafted. This is the overarching principle which informs and underpins all other principles set out in Part Two of this Interim Report.

4.24 Drafting guidance is generally supportive of this principle. OPC guidance states that definitions should primarily be used 'to make legislation more readable', and conversely that 'overuse or misuse of definitions can reduce the readability of legislation'.[21] Similarly, UK guidance suggests that definitions can make legislative material 'easier to follow'.[22] Simamba has stated that definitions 'must be used to aid communication', rather than simply to achieve technical correctness and convenience of drafting.[23]

4.25 To give effect to this principle in practice, in many cases a balance will likely need to be struck between giving sufficient detail to the reader on one hand, and maintaining the overall readability of the text on the other hand. Definitions can make legislation easier to read by encapsulating concepts in fewer words (sometimes a single word) than would otherwise be needed, thereby reducing overall sentence length. Sometimes the additional detail that can be contained within a definition can be of great assistance to a reader in coming to the intended conclusion. On other occasions, less may be more. Arguably, words are merely 'the skin of a living thought', and introducing more words into a definition or into a piece of legislation may consequently increase uncertainty.[24]

4.26 The proposed overarching principle can be compared with the approach of Stark, who has suggested definitions should be considered primarily from the position of the legislative drafter, rather than the reader.[25] Stark argued that the 'most important' function of definitions is to close loopholes in legislation, and that 'accuracy' of drafting should be prioritised over 'easy reading'.[26] He used the term 'accuracy' to mean ensuring that the legislature's conception of the purpose of the legislation prevails over any other conception. He described definitions as a 'defensive tactic' in

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21 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [65]–[66].

22 Office of the Parliamentary Counsel (UK), *Drafting Guidance* (2020) [4.1.2].

23 Bilika H Simamba, 'The Placing and Other Handling of Definitions' (2006) 27(2) *Statute Law Review* 73, 73.

24 The Hon Chief Justice TF Bathurst AC, '50 Years of Commercial Law' (Opening Address, Commercial Law Association of Australia Conference, 31 July 2015), citing *Towne v Eisner*, 245 US 418, 425 (1918) and Roy Goode, 'The Codification of Commercial Law' (1988) 14(3) *Monash Law Review* 135, 156.

25 Jack Stark, 'Tools for Statutory Drafters' [2012] (2) *The Loophole* 51, 57.

26 Ibid 55.

'a duel between a drafter who is trying to effect the legislative body's purpose and a result-oriented judge who is bent on looking for weaknesses in the draft'.[27]

4.27 The ALRC agrees that accuracy is a necessary and appropriate focus in drafting legislation, and that the use of definitions to this end can enhance readability by improving understanding of the content of the legislation. In addition, definitions may helpfully be used to add precision to otherwise vague terms and concepts. Definitions can also increase the clarity of terms and concepts that may otherwise be vague or ambiguous.[28] To the extent that definitions achieve these objectives, reduced reliance on definitions in legislation could have the effect of increasing demand by the regulated community for regulatory guidance regarding the meaning of particular terms and provisions. In addition, there could be an increase in litigation, and less predictable outcomes of litigation, if the meaning of key legislative terms is not clear. Definitions should continue to play an important role in specifying detail that is necessary to give effect to the legislature's intention.

4.28 However, disproportionate attention on these objectives will likely result in legislation becoming overly reliant on definitions, and definitions becoming overly prescriptive. This is likely to reduce the readability of legislation, and ultimately to obscure (rather than give effect to) the legislature's intended meaning or the legislative object.[29] Particularisation can also incentivise regulatory arbitrage, or 'gaming the system'. Furthermore, detailed legislative definitions do not necessarily reduce litigation, as has been illustrated by litigation concerning definitions in recent years, including in the High Court.[30]

27 Ibid 55–6.

28 See [4.57] below.

29 For example, Mousmouti has criticised certain Greek legislation for failing to effectively communicate legislative intent, partly because of 'an abundance of definitions that leads to inevitable confusion': Mousmouti (n 8) 53. See also discussion of regulatory theories in **Chapter 2**.

30 See, eg, *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3, considered further in **Chapter 11**; *Australian Securities and Investments Commission v King* (2020) 376 ALR 1, discussed further below.

Example: Detailed definition

The defined term 'financial product advice' is considered in detail in **Chapter 11** of this Interim Report. As set out there, the definition is complex for a number of reasons, including the use of multiple defined expressions that are 'nested' within the definition (creating an 'interconnected definition', discussed in greater detail in **Chapter 6**), the use of 'non-intuitive labels', and a large number of highly prescriptive exceptions. First, the definition's expression makes the underlying policy settings (the object of the legislation as conceived by the legislature) difficult to identify. Secondly, the definition's expression may reflect a lack of coherence in the underlying policy settings. Arguably, this is an example of a definition that may have been introduced for drafting convenience, rather than primarily being considered from the perspective of the reader. The ALRC proposes in **Chapter 11** that the definition be repealed, and that constituent elements of the definition be simplified for greater readability and navigability.

4.29 It is true that a legislative drafter cannot rely on a 'sympathetic audience' when drafting legislation, and must be aware of the probability that some readers will endeavour to place on legislation a meaning that best suits them.[31] However, this should not be given disproportionate attention and, in the first instance, a reader should be imagined as a person trying to make sense of the law, rather than immediately looking for weaknesses in it. Arguably, the more detail that is included in legislative definitions, the more opportunities are created for regulated entities to design their products and conduct in a way that falls outside the specified boundaries of the definition.

4.30 In addition, the audience for legislation is broad, and what is considered 'readable' will be different for different readers. In particular, lawyers may be more likely than other readers to find technical and precise language readable. However, even experienced lawyers have told the ALRC that they currently find many key definitions in corporations and financial services legislation 'impenetrable'.[32] User testing of legislation could be conducted during consultations on exposure draft legislation, or during regular reviews of legislation.[33] User testing may assist policy proponents and legislative drafters to understand and take into account the perspective of a range of potential readers. However, time and resource constraints will likely mean this is sometimes impracticable. Other methods of obtaining a reader's perspective may be to have a colleague or 'informed layperson', who has not been involved in the drafting process, look over draft legislation and comment on its readability.

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31 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) [1.4]; Turnbull (n 1) 165.

32 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) [6].

33 Productivity Commission (n 13) 185.

The use of defined terms in the *Corporations Act*

4.31 Definitions are currently used in several different ways and for several different purposes, sometimes inconsistently and in ways that do not accord with the principles discussed in Part Two of this Interim Report. Deviating from principle may occasionally be justified. However, doing so is more likely to create complexity in legislation and to inhibit readability and navigability.

4.32 The defined terms considered in this Part include: terms that are given statutory meaning by inclusion in a dictionary provision (which usually appears near the start of an Act, such as s 9 of the *Corporations Act*); terms defined within an operative provision; terms that are defined by a dedicated definitional provision; and 'tagged concepts'. 'Tagged concepts', which can be identified by bold and italicised text, usually contained in parentheses, are terms that are given a meaning in narrative form only for the section or subsection to which the tagged concept relates.[34]

4.33 Definitions, including in the *Corporations Act,* generally employ one or other of the expressions 'means' and 'includes'.[35] According to Pearce:

> The orthodox and, it is submitted, correct approach to the understanding of the effect of these expressions is that 'means' is used if the definition is intended to be exhaustive while 'includes' is used if it is intended to enlarge the ordinary meaning of the word.[36]

4.34 Pearce also discusses cases in which an inclusive definition has been interpreted to be exhaustive, although these go against what he contends is the orthodox view. Inclusive definitions are discussed in greater detail in **Chapter 6** of this Interim Report.

4.35 Matters can be excluded from a definition, typically using the expression 'does not include'. A definition may also take the form of '"X" means ABC and "includes" DEF' to indicate that although a term has a limited meaning specific matters are nonetheless taken to be within that meaning for the avoidance of doubt.[37]

4.36 Other language used, in effect, to define a term may include:

- 'reference to', for example, a 'a reference in this Act to X is a reference to …';
- matters 'taken to' or 'deemed' to be within a defined term; and
- the word 'definition' in the heading to a section that states that the defined term 'is' or 'comprises' certain matters.

---

34 Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, 'Definitions' (Document release 4.0, May 2019) [22]–[23].
35 Pearce (n 31) [6.5].
36 Ibid 265.
37 Ibid [6.9].

Quantitative analysis

4.37 As discussed in **Chapter 3**, the *Corporations Act* contains 1,349 definitions of 1,077 unique terms.[38] The difference in these numbers reflects the fact that some terms have multiple definitions. The *Corporations Regulations* contain a further 455 definitions (of 400 unique terms), which as a result of s 13(1) of the *Legislation Act*, must be considered alongside (or in place of) definitions in the *Corporations Act* when reading the Regulations. While the *Corporations Act* contains a large number of defined terms, it is not inconsistent with other Acts of a similar length.[39]

4.38 Excluding Chapter 10,[40] the *Corporations Act* contains 36 sections that are compilations of more than one definition, performing the role of 'dictionary provisions'.[41] Section 9, headed 'Dictionary', is the most comprehensive of these sections, and lists 584 defined terms. This includes terms that are defined in full, terms which may be given more than one meaning by s 9, and 'signpost definitions'.[42]

4.39 Section 9 is the longest section of the *Corporations Act* at over 21,000 words. Section 761A is the second longest dictionary section in the *Corporations Act*, and defines 129 terms for the purposes of Chapter 7 of the Act.

4.40 **Figure 4.1** below illustrates the distribution of definitions and tagged concepts across the *Corporations Act*. Not surprisingly, Chapter 1 (Introduction) contains the largest number of definitions because it contains the s 9 dictionary and a number of other definitions in Part 1.2 (Interpretation). Given Chapter 7 contains the second longest dictionary section (s 761A) and is the longest chapter in the *Corporations Act*,[43] it is also unsurprising that it contains the second largest number of definitions. As shown by **Figure 4.1**, Chapter 7 contains more than twice as many definitions as the next ranking chapter (Chapter 10) and approximately twice as many definitions as all other chapters (excluding Chapters 1, 10 and 5) combined.

38 All data in this chapter is based on computational analysis as described in **Appendix D** under 'Legislation'.

39 See [3.93] of **Chapter 3.**

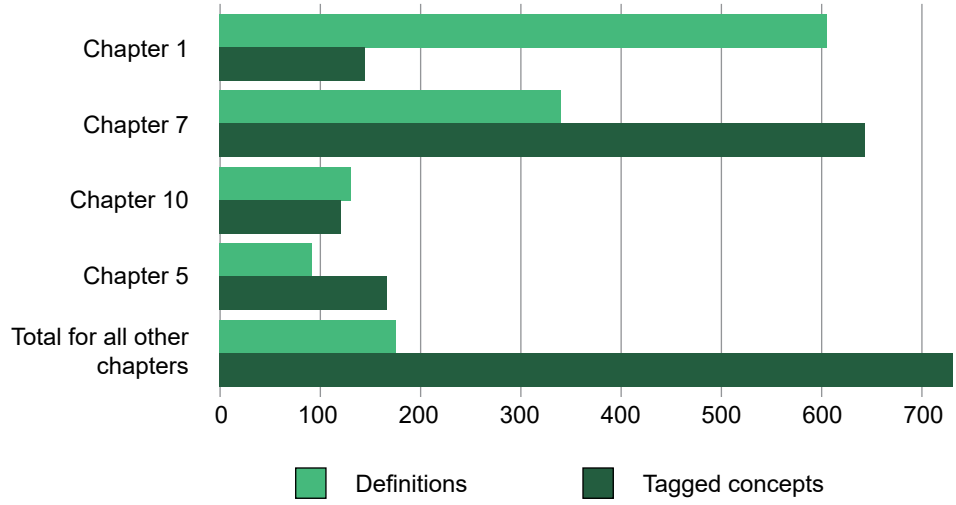
40 Chapter 10 of the *Corporations Act* contains a large number of transitional provisions which have been introduced to manage the consequences of amendments made to the Act. Chapter 10 contains a number of dictionary sections which have effect only for the purposes of provisions in Chapter 10, including 28 dictionary sections that apply for the purposes of a Part. Several of these, such as s 1536, contain only two defined terms — 'amending Act' and 'commencement' — which are used to identify the amending legislation to which the provisions relate and to establish time periods. Definitional sections in Chapter 10 have therefore been excluded from this analysis.

41 See the guide to terminology contained in **Table 4.1** above.

42 Ibid.

43 See **Chapter 3**.

Figure 4.1: Chapters of the Corporations Act with the most definitions and tagged concepts



4.41 It is also notable that Chapter 7 contains by far the largest number of tagged concepts for any chapter of the *Corporations Act*. Accordingly, Chapter 7 is heavily reliant on concepts that are either defined or tagged.

4.42 Although the number of defined terms in the *Corporations Act* is not out of step with other Acts of a similar length, the *Corporations Act* is unique in the extent to which it uses defined terms. The data discussed in this section identifies any use of a term that is defined, and so includes instances when a defined term is not being used in its defined sense. For example, some definitions apply only in relation to particular subject matter, or only in particular provisions. This means that in addition to identifying whether a term is defined, a reader of legislation must also consider whether that term is being used in its defined sense. Consequently, the ALRC has used the expression 'potentially defined' when describing this data. For example, the word 'of' is used over 36,000 times throughout the *Corporations Act*, but may be used in its defined sense only a very small number of times.

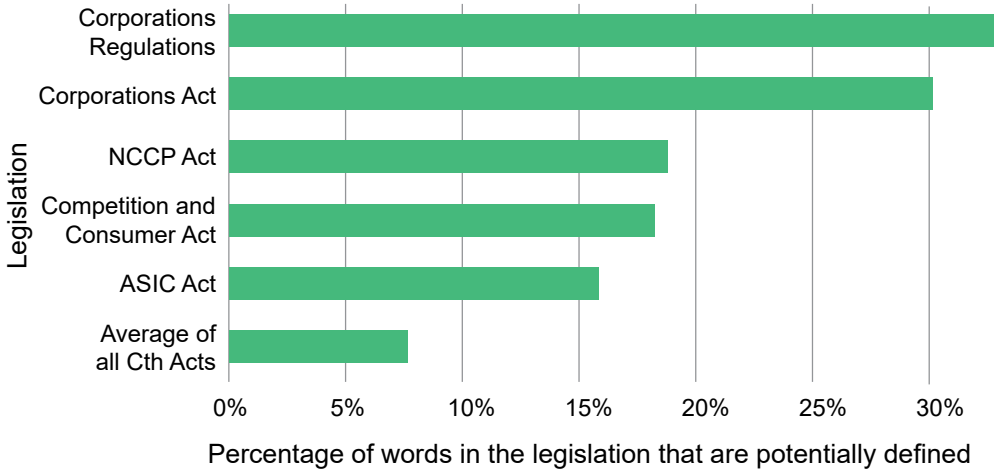
4.43 The *Corporations Act* contains over 242,000 words that are potentially defined. This means that for every 100 words in the *Corporations Act*, just over 30 of those words (or approximately 30% of words in the whole Act) are potentially defined. As discussed in **Chapter 3**, this ranks the *Corporations Act* second among Commonwealth Acts for the use of potentially defined words. The Act uses potentially defined words about four times more than the average for Commonwealth Acts (the average being less than 8% of words).[44] While the *Corporations Act* contains 4% of

44 See **Chapter 3**.

all words in Commonwealth Acts, it accounts for 11% of all potentially defined words in Commonwealth Acts.[45]

4.44 **Figure 4.2** below shows that the *Corporations Act* uses potentially defined terms more frequently than other corporations, financial services, and consumer protection legislation. The analysis for the *Corporations Regulations* in **Figure 4.2** takes into account terms defined in the *Corporations Act*, as well as those defined in the *Corporations Regulations*. The analysis for the *ASIC Act* in **Figure 4.2** includes only terms defined in the *ASIC Act*, and not terms that may take on the meaning they have in the *Corporations Act* by virtue of s 5(2) of the *ASIC Act* (discussed further below).

Figure 4.2: Use of defined terms in key corporations, financial services, and consumer legislation



4.45 Although some terms are used frequently, there is a very large proportion of terms that are defined, but used only infrequently. As discussed further below, this includes some terms that are defined in s 9 of the *Corporations Act* and then used in only one other section.

Overlapping definitions in the *Corporations Act* and *ASIC Act*

4.46 The *ASIC Act* contains 245 definitions. Use of those terms makes up approximately 16% of the *ASIC Act's* words (or 16 words in every 100 words encountered by readers). The *ASIC Act* also contains 215 tagged concepts. This analysis, however, includes only those terms defined or tagged in the *ASIC Act* itself, and not those terms that are defined or tagged in the *Corporations Act*. This

45 As discussed above at [4.42], some terms (such as 'of') appear very frequently throughout the *Corporations Act* and are not always used in their defined sense.

distinction is important, because the *ASIC Act* effectively incorporates *all* defined terms from the *Corporations Act*. Section 5(2) of the *ASIC Act* provides:

> Unless the contrary intention appears:
>
> (a) an expression that:
>
> (i) is used, but not defined, in this Act; and
>
> (ii) is defined in section 761A of the Corporations Act (regardless of whether it is also defined in another section of that Act);
>
> has the same meaning in this Act as in section 761A of the Corporations Act; and
>
> (b) an expression that:
>
> (i) is used, but not defined, in this Act; and
>
> (ii) is not defined in section 761A of the Corporations Act; and
>
> (iii) is used in the Corporations Act;
>
> has the same meaning in this Act as in the Corporations Act.

4.47 The evident purpose of s 5(2) of the *ASIC Act* is to achieve a level of interpretive consistency between the *ASIC Act* and the *Corporations Act*. A provision to this effect has been included since enactment of the predecessor *Australian Securities Commission Act 1989* (Cth).[46] Interpretive consistency between these two Acts is important because they form part of the overarching corporations and financial services regulatory scheme. However, s 5(2) of the *ASIC Act* creates complexity for a reader by requiring the reader to be conscious of any expression defined or used throughout the whole *Corporations Act*, as well as judicial interpretation of those expressions. In addition, of the 245 terms that are defined in the *ASIC Act*, about one third are also defined in the *Corporations Act*. Some of these terms are given the same meaning for both Acts, while others are given different meanings between the two Acts.

4.48 This section sets up a hierarchy in respect of terms that overlap between the *ASIC Act* and the *Corporations Act*:

- a term defined in the *ASIC Act* will take on that meaning in the *ASIC Act*;
- a term used in the *ASIC Act* and defined by s 761A of the *Corporations Act* (but not defined in the *ASIC Act*) will take on the s 761A definition; and
- a term used in the *ASIC Act* but defined by neither the *ASIC Act* nor s 761A of the *Corporations Act* will take on the meaning it has elsewhere in the *Corporations Act*.

4.49 Section 5(2)(b)(iii) would appear to capture terms defined in the *Corporations Act* (other than in s 761A) as well as terms that are *used*, but not necessarily defined,

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46 *Australian Securities Commission Act 1989* (Cth) s 5(2); Explanatory Memorandum, Australian Securities Commission Bill 1988 (Cth) [57].

in the *Corporations Act*. For terms that have more than one defined meaning in the *Corporations Act*,[47] and for terms that are not defined and may take on different meanings when used in particular provisions of the *Corporations Act*, it may not always be clear which meaning the term is intended to have in the *ASIC Act*.

4.50 Few other Commonwealth Acts adopt a similar approach. Section 3AA of the *Taxation Administration Act 1953* (Cth) provides that expressions used in Schedule 1 to that Act have the same meaning as in the *ITA Act 1997*. This means that Schedule 1 to the *Taxation Administration Act 1953* (Cth) incorporates the dictionary to the *ITA Act 1997*, which is contained in s 995–1. Helpfully for readers, Schedule 1 uses asterisks to identify defined terms when they are used, which is consistent with the approach in the *ITA Act 1997*.[48] The *Chemical Weapons (Prohibition) Act 1994* (Cth) incorporates terms used in the international convention implemented by the Act.[49] Unlike s 5(2)(b)(iii) of the *ASIC Act*, s 7(2) of the *Chemical Weapons (Prohibition) Act 1994* (Cth) expressly states that an expression used in both that Act and the Convention have the same meaning as in the Convention whether or not the expression is defined in the Convention. Section 4 of the *Primary Industries Levies and Charges Collection Act 1991* (Cth) is arguably more complex than other examples. Section 4(4) relevantly provides that any term that is not defined in that Act, but is defined in any of several other specified Acts or regulations, has the same meaning as in those other sources.

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).

4.51 There is not currently, and there appears never to have been, a Part 1.3 of the *Corporations Act*. It appears that the reference to Part 1.3 of the *Corporations Act* was a drafting oversight when enacting the *ASIC Act* in 2001, being a failure to remove the words 'Part 1.3' from the equivalent provision in the predecessor *Australian Securities Commission Act 1989* (Cth). The reference to a non-existent Part 1.3 in s 5(3) of the *ASIC Act* should be removed.

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47 For example, 'control' is defined in both s 50AA and in s 910A, and 'security' is defined in s 761A to have different meanings in different parts of Chapter 7 of the *Corporations Act*.

48 This technique for identifying defined terms is discussed further in **Chapter 6** and in Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [48]–[58].

49 *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997).

4.52 Section 5(3) of the *Australian Securities Commission Act 1989* (Cth) provided that 'Parts 1.2 and 1.3 (except section 8) of the Corporations Law' applied for the purposes of that Act. While the Corporations Law (in force under the *Corporations Act 1989* (Cth)) contained a Part 1.3 relating to 'Application Orders' (and including various rules of interpretation for those orders), no Part 1.3 was enacted in the *Corporations Act* in 2001.

4.53 Section 5(3) of the *ASIC Act* provides:

> Except so far as the contrary intention appears in this Act, Parts 1.2 and 1.3 of the Corporations Act apply for the purposes of this Act as if the provisions of this Act were provisions of that Act.

4.54 This is a complex statement that appears to have the effect of applying a number of *Corporations Act* definitions to the *ASIC Act* (potentially duplicating the effect of s 5(2)(b) of the *ASIC Act* in this regard), and also applying to the *ASIC Act* other rules of interpretation contained in Part 1.2 of the *Corporations Act*. The complexity created by s 5(2) of the *ASIC Act* could be reduced if Part 2 Div 2 of the *ASIC Act* were merged with Chapter 7 of the *Corporations Act*, a topic briefly discussed in Chapter 7 of this Interim Report and which will be considered in greater detail in Interim Report C.[50]

When to define a term

Principle: To the extent practicable, words and phrases with an ordinary meaning should not be defined.

4.55 The aim of a legislative drafter should be, to the extent possible, to express concepts in language that accords with the common understanding of the public. This increases the accessibility of law, and reflects the diverse range of readers of legislation, including Members of Parliament, regulators, administrators, members of industry and non-legal professions, consumers and consumer representatives, as well as lawyers and judges.

4.56 When a term is defined in legislation, the effect is notionally to displace any ordinary meaning that the term bears.[51]

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50 Another option would be to repeal ss 5(2)–(3) of the *ASIC Act* so as to remove its interpretive dependency on the *Corporations Act*, and to replicate in the *ASIC Act* all relevant interpretive rules and definitions currently contained in the *Corporations Act*. The ALRC has not proposed this option, pending further consideration of whether Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* should be consolidated.

51 *Office of the Premier v Herald and Weekly Times Pty Ltd* (2013) 38 VR 684 [61] n 70. See also Pearce (n 31) [6.4].

4.57 It will not always be possible to use a term in its ordinary sense. For example, the ordinary sense of a particular term may be vague or ambiguous, or a particular policy imperative may require making distinctions that are not easily or accurately captured by the ordinary meaning of a single term. As discussed above,[52] relying on the ordinary meaning of terms in these circumstances may have the effect of increasing demand for regulatory guidance, and more frequent litigation with less predictable outcomes. In such cases, a definition will often represent a convenient drafting technique to adapt the ordinary meaning of a term. A discussion of appropriate purposes for the use of definitions follows below. However, when a term can be used in its ordinary sense, it should not be defined.

4.58 This principle is supported in a range of existing legislative drafting guidance and academic commentary. For example, Canadian guidance suggests that definitions should be used 'sparingly', and only when terms are not used in their usual sense.[53] New Zealand guidance urges drafters to 'avoid defining terms at all, if possible'.[54] Reasons include that a reader may be 'annoyed' by needing to cross-refer to definitions to understand substantive provisions, or a reader may forget (or simply be unaware) that particular terms in substantive provisions are not being used with their ordinary meaning.

4.59 Drafting guidance documents published in the UK and Australia do not currently contain an explicit principle along these lines.[55] However, drafting guidance in each of these jurisdictions is not inconsistent with such a principle. European Union guidance suggests that terms should be defined if they are 'not unambiguous'.[56] For example, terms may need to be defined if they have several meanings, or the term's meaning needs to be limited or extended for the purposes of the legislation.[57]

4.60 The strongest expression of this principle is probably that of the Victorian Law Reform Commission, who declared that definitions

> should be seen as a last resort, to be used only in an extreme contingency. … The primary goal for drafters is to use words in their ordinary sense so that they do not need to be defined.[58]

4.61 The Commission cited 'the creation and use of unnecessary concepts' as a significant defect of legislation.[59] The Commission described it as necessary for 'efficient communication' that terms be used 'in the same way as the rest of the

52 See discussion above at [4.27].
53 Uniform Law Conference of Canada (n 9) [21].
54 Parliamentary Counsel Office (NZ), 'Definitions That Are Helpful and Are Not Contrived to Create Artificial Concepts' (Plain Language Standard, Supporting Document 8.5).
55 Except in relation to tax legislation in Australia. See further below.
56 European Union, *Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation* (2015) Guideline 14.
57 Ibid [14.1].
58 Victorian Law Reform Commission, *Plain English and the Law: The 1987 Report Republished* (2017) 121.
59 Ibid ix.

community'.[60] In contrast, giving terms unusual meanings (which necessitates the use of definitions), can 'create confusion and hinder communication', and requires readers to 'continually refer to the definition section'.[61] Arguably, the regulated community in relation to some parts of the *Corporations Act* (such as Chapter 7) is conversant with a level of technical and market terminology. Accordingly, the language that is used in relatively specialised legislation might appropriately be more technical than the language in more generally applicable legislation. The Commission went on to emphasise that terms should not be defined if their meaning is obvious, if they have already been defined in a separate interpretation Act, or if they are used in their ordinary sense.[62]

4.62 OPC Drafting Direction 1.8, entitled 'Special rules for Tax Code drafting', contains particular guidance applicable to the several pieces of legislation comprising the Tax Code, including the *ITA Act 1997*.[63] Drafting Direction 1.8 recognises the unique nature of that legislation; for example, the *ITA Act 1997* is currently the longest Commonwealth Act, and the only Act longer than the *Corporations Act*.

4.63 The *ITA Act 1997* and other legislation comprising the Tax Code are products of the Taxation Laws Improvement Project ('TLIP'), which was established in 1993 with the aim of rewriting and simplifying Australian taxation legislation.[64] 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.[65] As discussed in this Part of this Interim Report, some of those features and the guidance contained in Drafting Direction 1.8 may be applicable to legislation more generally.[66]

4.64 Guidance from the TLIP, which is extracted in Drafting Direction 1.8, states:

> Definitions should be used for 2 purposes only:
>
> - to clarify meaning;
> - to 'bunch' concepts.[67]

---

60 Ibid 121.
61 Ibid.
62 Ibid 121, 124.
63 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006) 8–10.
64 For a brief discussion of the TLIP, see David Smith and Grant Richardson, 'The Readability of Australia's Taxation Laws and Supplementary Materials: An Empirical Investigation' (1999) 20(3) *Fiscal Studies* 321.
65 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006) 3.
66 In some instances, these techniques have been applied to Acts that are not part of the Tax Code. See, for example, the use of asterisks to identify defined terms (discussed in **Chapter 6**) in the *Aged Care Act 1997* (Cth).
67 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006) 27.

4.65 This guidance is consistent with the principle that definitions should be used for only limited purposes, and not for substantive purposes. The TLIP guidance advises drafters to rely on the ordinary meaning of a term wherever possible, and to define a term if its ordinary meaning is 'unclear on some point' or 'unacceptably vague'.[68] This is also consistent with the proposition that definitions may appropriately be used to clarify borderline cases, which is discussed in **Chapter 6** in relation to the use of inclusive definitions.

4.66 'Bunching concepts' refers to using a defined term to encapsulate several concepts that share a common characteristic.[69] This purpose for the use of definitions will be discussed further in **Chapter 6**.

4.67 Eagleson has noted that if definitions are used to spell out an 'obvious' meaning of a term, readers may then waste time looking for a 'hidden meaning' of the term, as the reader may expect that a definition would not be used simply to confirm an obvious meaning.[70] Similarly, Pearce has noted that the 'very purpose of defining an expression is to give it a meaning different from that which is its ordinary meaning'.[71]

4.68 For example, the definition in s 9 of the *Corporations Act* of 'expert' as a person 'whose profession or reputation gives authority to a statement made by him or her in relation to that matter' does not appear to add anything to the ordinary meaning of the term, and the purpose of the definition is unclear.

4.69 Stakeholders have indicated to the ALRC that the term 'facility' has functioned well in the sense of its ordinary meaning in parts of the *Corporations Act* for which it is not defined. The term is used in its ordinary (undefined) sense in the Parts of Chapter 7 relating to markets in particular.[72] As a further example, **Chapter 7** of this Interim Report discusses that the functional elements of the definition of 'financial product' may be better left undefined.

To avoid repetition

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

4.70 One of the most commonly cited reasons in favour of using definitions in legislation is to reduce the need to repeat text. In this sense, a definition is of greatest benefit when the defined term is short, the definition is longer, and the defined term

68 Ibid.
69 Ibid.
70 Eagleson (n 17) 85.
71 Pearce (n 31) [6.13].
72 For judicial commentary, see, eg, *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147 [2000]–[2001].

appears many times throughout a piece of legislation. Conversely, a definition is of less benefit when the defined term is long, the definition is short, or the defined term does not appear in many provisions.

4.71 Examples are provided further below of a number of terms defined by s 9 of the *Corporations Act* that are not used at all in the Act, such that they do not fulfil any function of 'avoiding repetition' and could helpfully be repealed. There are also many definitions that are only used in a small number of provisions. Many of these defined terms are also short, such that including the full text of the definition (rather than the defined term) in each provision would not add significant repetition, and would improve navigability because a reader would not need to recognise that a defined term has been used, nor cross-refer to another provision for the meaning of that term. Alternatively, if incorporating the term would significantly add to the length of a section, then navigability may nonetheless be improved by relocating the term to form part of, or to be defined nearer to, the sections in which it is used.

Example: Definitions that do not avoid repetition

In the *Corporations Act*, the term 'State or Territory authority' is defined in s 9 to mean 'an authority or other body (whether incorporated or not) that is established or continued in existence by or under a law of a State or Territory'.

The expression 'State or Territory authority' is only used once and in only one section (s 1317AE(3)(b) of the *Corporations Act*). Further examples of terms defined in s 9 but used in only one section are discussed further below and in Appendix C.1. As discussed there, navigability could be improved by relocating such definitions nearer to, or incorporating their substance within, the provisions that use the defined terms.

4.72 In contrast, many definitions in the *Corporations Act* are lengthy, and the defined terms are used frequently throughout the Act, such that significant repetition is helpfully avoided by use of the definition. For example, the term 'remedial order' is a definition with 16 paragraphs comprising 87 words. The defined term is used in four sections.[73] In three of those sections a note signposts that the term is defined in s 9, which assists navigability.

4.73 The Victorian Law Reform Commission warned against defining terms that are not often used.[74] The Commission had significant reservations about 'unnecessary concepts' created by way of a definition that then needs to be read into a separate substantive provision, citing the 'exhausting' cross-referencing work required of the reader.[75] The example provisions provided in the report suggest that the definitions

73 *Corporations Act 2001* (Cth) ss 657D, 657G, 659C, 1325A.
74 Victorian Law Reform Commission (n 58) 121–3.
75 Ibid 22.

complained of applied only to one particular section of the Act.[76] Eagleson was more specific in expressing reservations about creating a 'one-off' definition.[77] Accordingly, a definition that applies to a whole Act, and that consequently shortens the text of a large number of provisions, is less likely to have drawn the ire of the Commission.

4.74 Guidance issued by OPC describes reducing repetition as a primary purpose of definitions.[78] It advocates the use of short defined terms.[79] The guidance notes that reducing complicated concepts to definitions 'dramatically shortens' operative provisions, making the structure of the operative provision easier to understand.[80] The guidance also acknowledges that there may be 'disadvantages of using definitions', seemingly in response to concerns such as those expressed by the Victorian Law Reform Commission, but asserts that 'the gain in simplicity of the operative provision' outweighs those disadvantages.[81] It is not clear whether this aspect of OPC guidance applies primarily to definitions that apply to a whole Act, rather than to a single provision. However, other material issued by OPC suggests that a term generally should not be defined if the term is not often used.[82]

4.75 Drafting guidance in New Zealand and Canada highlights that definitions can help avoid 'excessive repetition' or 'over-long text' in a document.[83] Pearce has noted that a 'dictionary' section containing defined terms appearing 'frequently' in an Act can serve to 'avoid verbosity and repetition',[84] and Stark has described definitions as contributing to 'economy of expression'.[85]

4.76 UK drafting guidance notes the potential benefits of avoiding repetition of a long compound noun which might otherwise 'jar' or detract from readability, although this suggestion appears to be made in relation to a 'tag' that applies only within a specific provision, and for the particular purpose of avoiding gender-specific pronouns.[86] Similarly, Turnbull has supported defining a 'short term' to avoid needing to repeat a lengthy expression 'several times in a sentence', thereby shortening the sentence and making its structure clearer.[87] This statement appears to relate primarily to 'tags' that apply in relation to only a single provision, rather than 'dictionary' definitions applicable across an Act.

4.77 An area in which existing guidance does not reflect consensus is whether truncated terms — such as abbreviations, acronyms, and initialisms — should be used in defined terms. Abbreviations are any shortened forms of a word, such as

76 Ibid 20–2, 97.
77 Eagleson (n 17) 86.
78 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [65].
79 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [61].
80 Ibid [59].
81 Ibid.
82 Ibid [62]; Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (Document Release 2.1, June 2016) [43].
83 Parliamentary Counsel Office (NZ) (n 54); Uniform Law Conference of Canada (n 9) [21].
84 Pearce (n 31) [6.1].
85 Stark (n 25) 55.
86 Office of the Parliamentary Counsel (UK) (n 22) [2.1.6]–[2.1.7].
87 Turnbull (n 1) 169.

'co', which may be used for 'company'. An acronym is formed by combining parts of the phrase it represents, usually the first letter of each word, and is pronounced as a word. An example is 'ASIC', meaning the Australian Securities and Investments Commission. An initialism is formed in the same way as an acronym, but pronounced as individual letters. An example is 'ABC' for the Australian Broadcasting Corporation.

4.78 OPC suggests avoiding acronyms and initialisms, noting that they 'can often be meaningless to those who have not been involved in the development of the provisions'.[88] However, it also cites a number of 'acceptable acronyms', such as the names of government bodies that are referred to in many pieces of legislation (such as ACCC or AFP), and terms that are 'commonly used and understood'.[89]

4.79 The Victorian Law Reform Commission opposed the use of 'abbreviations' in defined terms as follows: 'For an abbreviation to be justified in an Act, it should be so obvious that it would not need to be listed in the definition section. If it is not obvious to readers, then the full form should be used.'[90] It noted that if a title is used several times within a provision, the full title (for example, 'Supreme Court') could be used on the first occasion, and context would make clear that any subsequent references to 'the Court' would refer to that particular court.[91]

4.80 UK drafting guidance counsels legislative drafters to 'think carefully' before using acronyms or other initials in a defined term, unless they are 'commonly understood in the particular context'.[92] European Union drafting guidance suggests 'excessive use of abbreviations' should be avoided, and any abbreviations should be 'familiar' to 'potential addressees', or clearly explained.[93]

4.81 In contrast, Canadian and New Zealand drafting guidance specifically contemplate the introduction of abbreviations and acronyms as one of only a small number of permissible purposes of definitions.[94] Turnbull described abbreviations as having been 'anathema' to 'the traditional style' of legislative drafting, but he supported the use of acronyms in defined terms, and 'so much the better if the acronyms are used in common speech', such as 'CFCs' for chlorofluorocarbons.[95]

88 Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, 'Definitions' (Document release 4.0, May 2019) [35].
89 Ibid [36], [39].
90 Victorian Law Reform Commission (n 58) 122.
91 Ibid [106].
92 Office of the Parliamentary Counsel (UK) (n 22) [4.1.6].
93 European Union (n 56) Guideline 4, [4.7].
94 Uniform Law Conference of Canada (n 9) [21]; Parliamentary Counsel Office (NZ) (n 54).
95 Turnbull (n 1) 171.

4.82 The ALRC considers that abbreviations should be used cautiously in defined terms, along the lines of the guidance cited above relating to familiarity in common usage. If an abbreviation is to be used in legislation, it should be formally defined.

Examples: Non-intuitive abbreviations

An initialism used in the *Corporations Act* that is not particularly intuitive is 'CS facility' as a shortened form of 'clearing and settlement facility'. It is used, for example, in the definition of 'Australian CS facility licence' in s 761A. The initialism is potentially confusing for the reader, given that a similar initialism, 'CSF', is defined to mean 'crowd-sourced funding' in s 9. 'CSF' is then used in a range of related defined terms, such as 'CSF offer' and 'CSF intermediary'. Further confusion is then potentially introduced by the use of a slightly different defined term 'crowd-funding service' in s 766F, which closely relates to the concept of CSF, but does not use the initialism, and does not include the word 'sourced' (that is, it is inconsistent in the sense that it does not use the term 'crowd-sourced funding service').

A further example is the defined term 'ED securities' in s 111AD, which is short for 'enhanced disclosure securities'. This abbreviation is a creation of statute, rather than a term with which industry is familiar, and is presumably used for economy of expression. The term 'ED securities' is used 49 times in the *Corporations Act*, and 43 of those uses appear within other definitions, such that 'ED securities' is primarily used as part of an 'interconnected definition' (which are discussed in greater detail in **Chapter 6**).

4.83 These examples highlight that economy can sometimes come at the expense of readability and clarity. **Chapter 6** discusses further examples of non-intuitive labels, such as 'relevant agreement', defined in s 9 of the *Corporations Act*, which give readers little or no indication of the substantive meaning of a defined term.

4.84 The *Corporations Act* also helpfully defines a number of other initialisms that would be more familiar and intuitive to most of its readers, including: APRA (Australian Prudential Regulation Authority), AGM (Annual General Meeting), and ACN (Australian Company Number).

To specify meaning

Principle: 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.

4.85 There is significant support for the position that definitional provisions should be used to elucidate meaning, and not for substantive purposes. The implications of this principle, and how it is implemented in practice, have proven fertile ground for discussion.

4.86 Drafting guidance (and commentary) often lists 'explaining what words mean' as the primary function of legislative definitions.[96]

4.87 In particular, it may be helpful to use a definition to explain the meaning of technical terms, or new terms ('neologisms'), that may not be understood widely in the community.[97] In the context of financial services regulation, neologisms may include terms relating to new financial technologies. It may be appropriate to include a neologism in legislation if there is no term with an equivalent meaning that is more widely understood. Canadian drafting guidance suggests that neologisms should be used 'with caution', but should be defined when used.[98]

4.88 However, a legislative dictionary should not be used primarily to explain or confirm existing ordinary meanings of words such as neologisms. Rather, as previously noted, when a term is defined, the ordinary meaning of the term is 'notionally displaced' for the purposes of the legislation,[99] particularly in the case of 'exhaustive' definitions.[100] In this way, legislative definitions can be described as giving a 'special meaning' to a term for the purposes of the legislation.[101] That meaning is in some way different from its commonly understood, or usual, meaning.[102]

4.89 As a counterbalance, drafting guidance and commentary routinely observe that the term chosen to denote a particular meaning should not result in an 'artificial' or 'strange' meaning, or a meaning which is 'contrary' to the ordinary meaning of the term. The importance of intuitive defined terms (or intuitive 'labels') is discussed in **Chapter 6**.

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96 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [260]; Victorian Law Reform Commission (n 58) 125; Stark (n 25) 54; Parliamentary Counsel Office (NZ) (n 54); Uniform Law Conference of Canada (n 9) [21]; Office of the Parliamentary Counsel (UK) (n 22) [4.1.1]; European Union (n 56) Guideline 14, [14.1].

97 Victorian Law Reform Commission (n 58) 122; Eagleson (n 17) 81.

98 Uniform Law Conference of Canada (n 9) [21], [32].

99 Pearce (n 31) [6.4]. See also *Office of the Premier v Herald and Weekly Times Pty Ltd* (2013) 38 VR 684 [61] n 70.

100 Office of the Parliamentary Counsel (UK) (n 22) [4.1.1].

101 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [260].

102 Parliamentary Counsel Office (NZ) (n 54); Uniform Law Conference of Canada (n 9) [21].

4.90 Many terms have more than one ordinary meaning (sometimes called 'polysemous' terms — for example, 'bimonthly' may mean either twice each month, or every two months). It is commonly accepted that a legitimate purpose of legislative definitions is to limit a particular term to a part of its range of ordinary meanings for the purposes of the legislation.[103]

4.91 Eagleson and the Victorian Law Reform Commission specifically advocated that legislation should define terms that have a specific technical meaning (such as a legal meaning) that is different from the term's ordinary meaning, such as 'instrument' and 'action'.[104] Neither of these words is defined in the *Corporations Act*. However, other similar words such as 'incorporation' and 'arrangement' are defined.[105] Without laying down clear guidelines, Eagleson has suggested that such words need not always be defined and, where they are defined, such words should not be defined 'haphazardly'.[106]

4.92 Analysis by the ALRC suggests that Australian corporations and financial services legislation does not frequently define terms to exclude possible alternative meanings of polysemous terms, probably because context often makes the more limited range of meanings clear as a matter of 'common sense'.[107]

Example: Specifying meaning

The term 'body' has a number of meanings in the English language. However, context will often make it sufficiently clear that the term does not refer to a human body, nor to a body of water, in a particular instance. Consequently, the definition of 'body' in s 9 of the *Corporations Act* instead provides further detail on the specific types of organisation that are included within the meaning of the term:

> ***body*** means a body corporate or an unincorporated body and includes, for example, a society or association

4.93 This example further illustrates a much more common purpose for definitions in legislation: delineating the scope of a phrase that may be unhelpfully broad or open-ended, such as by confirming whether particular borderline cases fall within the intended meaning of the term. Drafting guidance in Australia, New Zealand, and the European Union describe this as giving 'precision' to a term or phrase, for example in

103 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [260]; Victorian Law Reform Commission (n 58) 122; Eagleson (n 17) 81; Uniform Law Conference of Canada (n 9) [21]; European Union (n 56) [14.1]; Parliamentary Counsel Office (NZ) (n 54).

104 Eagleson (n 17) 85; Victorian Law Reform Commission (n 58) 122.

105 *Corporations Act 2001* (Cth) s 9.

106 Eagleson (n 17) 85.

107 For a discussion of the role of 'common sense' in statutory interpretation, see FAR Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, 2009) 83.

order 'to avoid problems of interpretation'.[108] The Victorian Law Reform Commission and Eagleson referred to this goal as 'removing uncertainty', which would include, for example, clarifying in a definition whether the term 'spouse' includes a 'de facto spouse'.[109]

4.94 The ALRC agrees that it is appropriate for definitions to be used for the purpose of increasing the 'precision' of legislation, sometimes also referred to as its 'accuracy' in reflecting the legislative intent or object.[110] However, the extent to which corporations and financial services legislation pursues the goal of precision through definitions is arguably extreme, and a significant driver of complexity.[111]

Example: Highly particularised definitions

Some consultees were highly critical of the number of *Corporations Act* definitions (and of the particularity of each of those definitions) that set out when particular entities or persons are 'associates', 'associated', 'close associates', 'related', 'closely related', 'connected', 'recognised affiliates', or 'participants'.[112] To a large degree, this particularity may reflect the complexity of the underlying policy settings. One consultee described the definition of 'associate' as 'immensely complex' and 'not fit for the unique and specific purpose of identifying associates of a company in Chapter 5 of the *Corporations Act*'. In addition, the term 'associate' is used in only one provision of the *ASIC Act*, and is given a bespoke definition for the purposes of that provision.[113]

4.95 Finally, drafting guidance in some jurisdictions (but not Australia or Canada) recognises that it may be appropriate to define a term when it is considered necessary to extend the term *beyond* its ordinary meaning.[114] However, any such use of a definition would be subject to the principle that defined terms should be 'intuitive' (as discussed in **Chapter 6**).

108 European Union (n 56) [6.2.3]. See also Parliamentary Counsel Office (NZ) (n 54); Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [58].
109 Victorian Law Reform Commission (n 58) 122; Eagleson (n 17) 82.
110 See, eg, Stark (n 25) 55; Turnbull (n 1).
111 See further the discussion of regulatory theories in **Chapter 2**; Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021).
112 *Corporations Act 2001* (Cth) ss 9, 761A.
113 *Australian Securities and Investments Commission Act 2001* (Cth) s 12GN.
114 Parliamentary Counsel Office (NZ) (n 54); European Union (n 56) [14.1]; Office of the Parliamentary Counsel (UK) (n 22) [4.1.1].

Not for substantive purposes

4.96 Statements emphasising that the appropriate function of definitions is to explain meaning often contrast this function with the inappropriate use of definitional provisions for substantive purposes.[115]

4.97 Perhaps the clearest expression of this principle appears in OPC Drafting Direction 1.8 relating to the Tax Code legislation, which includes the following 'fundamental rule' for using defined terms:

> don't use a definition to do work more appropriately done by a substantive rule (it might, for example, be more useful to scope a suite of provisions using a substantive provision, rather than creating yet another variation of a core concept).[116]

4.98 A commonly stated reason for not including substantive material within a definitional provision appears to relate to navigability; namely, readers would not expect to find substantive material in such a place, and may 'overlook' the material.[117] This appears to arise from the 'traditional' structure of legislation under which definitions set out the meaning of words and are placed together in early provisions, while obligations and other substantive (or operative) matter are included separately in later provisions.

4.99 In addition, Pearce has described the inclusion of substantive material in definitional provisions as 'poor drafting', in particular because it 'can lead to error in the interpretation of legislation'.[118] Namely, courts use different principles and rules when construing and determining the effect of definitional provisions and substantive provisions. For example, case law establishes that courts are not to construe a definition without reference to its context once it has been 'read into' a particular substantive provision in which the defined term is used.[119]

4.100 Two examples from the *Corporations Act* highlight this issue.

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115 See, eg, Victorian Law Reform Commission (n 58) 125; *Kelly v R* (2004) 218 CLR 216 [103]; Uniform Law Conference of Canada (n 9) [21]; Parliamentary Counsel Office (NZ) (n 54).

116 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006) 10.

117 See, eg, European Union (n 56) [14.4]; Office of the Parliamentary Counsel (UK) (n 22) [4.1.8].

118 Pearce (n 31) [6.14].

119 *Kelly v R* (2004) 218 CLR 216 [103].

Example 1: Definitions and substantive provisions

Section 9 defines 'special resolution' as follows:

> ***special resolution***, when used in a provision outside Schedule 2 means:
>
> (a) in relation to a company, a resolution:
>
> (i) of which notice as set out in paragraph 249L(1)(c) has been given; and
>
> (ii) that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution; or
>
> (b) in relation to a registered scheme, a resolution:
>
> (i) of which notice as set out in paragraph 252J(c) has been given; and
>
> (ii) that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution.

Both ss 249L(1)(c) and 252J(c) are headed 'Contents of notice of meeting of members' and relevantly provide that a notice of meeting must 'if a special resolution is to be proposed at the meeting—set out an intention to propose the special resolution and state the resolution'.[120] The definition of 'special resolution' therefore contains an implicit obligation to give notice, and in a manner which only becomes apparent upon consulting s 249L(1)(c) or s 252J(c) — both of which prescribe the content of a notice but do not express an obligation to give it.

120 Section 252J(c) states that a notice must 'if a special or extraordinary resolution is to be proposed at the meeting—set out an intention to propose the special or extraordinary resolution and state the resolution'.

Example 2: Definitions and substantive provisions

A further example is the term 'misleading'. As will be discussed in **Chapter 13**, several Commonwealth Acts contain prohibitions on: 'misleading or deceptive' conduct;[121] and the making of false or misleading representations.[122] Each of the *Corporations Act*, *ASIC Act*, *NCCP Act*, and *Australian Consumer Law* deem a representation as to a future matter to be misleading, for the purposes of those conduct prohibitions, if the representation is made without reasonable grounds. In the case of the *Corporations Act*, a substantive provision (s 769C) performs this role, whereas in the *ASIC Act* the term 'misleading' is defined in order to capture representations as to future matters (ss 12BA and 12BB). Similarly contrasting approaches are taken in the *Australian Consumer Law*, which uses a substantive provision in s 4, while s 13 of the *NCCP Act* defines the term 'misleading'.

4.101 **Proposal A23**, discussed in **Chapter 13**, presents an opportunity to apply a consistent approach to representations as to future matters and the term 'misleading', at least as between the *Corporations Act* and *ASIC Act*.

4.102 In addition, an obligation or power merely implied within a definitional provision may not be effective in view of the principles that courts apply in construing definitional provisions. For example, it has been held that a definition that refers to a 'person authorised by the Commission' should not be construed as conferring on the Commission a power to grant such an authorisation.[123] Section 3A of the *Social Security Act 1991* (Cth), the first provision appearing in Part 1.2 of the Act (headed 'Definitions'), appears to be directed at such concerns by providing

> If:
>
> (a) a provision of this Act refers to a determination made, approval given or other act done by the Secretary; and
>
> (b) there is no other provision of this Act expressly conferring power on the Secretary to make the determination, give the approval or do the act;
>
> the Secretary has power by this section to make such a determination, give such an approval or do such an act, as the case requires.

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121 For example, *Corporations Act 2001* (Cth) s 1041H; *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA; *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') s 18.

122 For example, *Corporations Act 2001* (Cth) s 1041E; *Australian Securities and Investments Commission Act 2001* (Cth) s 12DB; *National Consumer Credit Protection Act 2009* (Cth) sch 1 ('*National Credit Code*') s 154; *Australian Consumer Law* (n 121) s 29.

123 *HongkongBank v Australian Securities Commission* (1992) 40 FCR 402. See also commentary in Office of Parliamentary Counsel (Cth), Drafting Direction 3.4, 'Conferral and exercise of powers (including by Governor-General)' (Document release 2.0, October 2012) [10]–[16].

4.103 UK drafting guidance provides the following example of a definition that has implicit substantive content, and consequently that should be re-drafted:

> 'information notice' means a notice, issued by the Regulator to a registered person, requiring the registered person to send, within the period of 30 days beginning with day on which the notice is issued, a return to the Regulator containing such information as is specified in the notice.[124]

4.104 Instead, it is suggested that the conferral of any power (such as a power for the regulator to require a person to provide information), and the imposition of any obligation (such as an obligation on a person to comply with a requirement to provide information) should be contained in dedicated operative provisions.[125]

4.105 The categorisation of whether a particular provision is definitional or substantive is not always simple, and depends on the content of the provision, rather than its location or form. For example, provisions expressed 'in the form of a substantive provision', such as a deeming provision ('for the purposes of this Act, X shall be deemed to be [or not to be] Y') have been construed and treated by courts as definitional provisions.[126] Conversely, in one case a provision that is contained in a Part headed 'Definitions', and specifically in a section headed 'Dictionary', was construed as a substantive provision, rather than a definitional provision. The court held the provision (expressed in the form 'X is not to be taken to be Y'), was 'worded as a direction to those administering the Act' rather than as a 'typical definition'.[127] The court further noted that several other provisions in the 'Definitions' Part of the Act expressly conferred powers and fulfilled other substantive functions.

4.106 Stark has expressed support for the use of definitions when 'setting standards', which is arguably a substantive purpose, although he did not provide an example of how a definition might appropriately be used for such a purpose.[128]

Using definitions to determine scope

4.107 Using defined terms to establish the perimeter of legislation is common in Commonwealth legislation. Provided the term is reasonably intuitive, using defined terms in this way can help to give a reader an indication as to the subject matter of an Act and its provisions. Complexity arises, however, when defined terms are adapted to determine the varying scope of aspects of a regulatory regime. This arguably constitutes the use of definitions for substantive purposes, rather than to specify meaning.

4.108 International drafting guidance is divided as to whether definitions should be used to specify the scope of legislation. Some commentators consider it appropriate

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124 Office of the Parliamentary Counsel (UK) (n 22) [4.1.8].
125 Ibid [4.1.9].
126 Pearce (n 31) [6.4].
127 *Franks v Secretary, Department of Family and Community Services* (2002) 125 FCR 212 [21], discussing *Social Security Act 1991* (Cth) s 23(9).
128 Stark (n 25) 55.

to use definitions to delineate the application of legislation, because definitions commonly provide for 'factors that must be present' for particular operative provisions to apply.[129] For example, if an operative provision states that only a doctor may practise medicine, then the term 'doctor' may appropriately be defined (for example by reference to particular qualifications) to delineate more precisely the persons who may practise medicine.[130]

4.109 In contrast, European Union drafting guidance suggests that the scope of a piece of legislation should be stated 'more clearly and more directly' in a dedicated application provision, rather than being subsumed within a definition.[131] Similarly, Canadian guidance considers the application of an Act to be the work of 'substantive provisions rather than definitions'.[132]

4.110 Eagleson has observed that using a definition provision to set the scope of legislation can lead to an unhelpful distortion of the ordinary meaning of the defined term.[133] In the example he cited, the term 'goods' was defined as including a list of items such as ships, vehicles, animals, minerals, crops, gas, and electricity. He described this approach as 'perplexing' for the reader, because it did not reflect the common meaning of 'goods'. Instead, he suggested that an operative provision should specify that the Act applies to that list of items in the same way as it applies to goods.

4.111 Australian guidance does not contain any views about whether it is appropriate, in general, for definitions to set the scope of legislation. However, in the context of tax law drafting, it is expressed to be a 'fundamental rule' that drafters should not 'change the scope of a defined concept by deeming provisions'.[134]

4.112 The defined terms 'financial product' and 'financial service', discussed in detail in **Chapter 7** of this Interim Report, illustrate the complexity that can be caused by using 'deeming' provisions to change the scope of a defined concept for different provisions. The various definitions of the term 'securities' and 'security', also discussed in greater detail in **Chapter 7**, also illustrate the effects of repeatedly adapting definitions for the purpose of different provisions to alter the scope of those provisions.

4.113 A vast range of Commonwealth Acts use defined terms to broadly determine their regulatory perimeter — that is, the conduct and circumstances to which they generally apply. The ALRC has not conducted an in-depth analysis of each of the defined terms listed in the examples below to determine whether defining each term is the most effective option in each case, and therefore does not comment on the appropriateness of those terms more generally.

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129 Ibid 52.
130 Ibid 55.
131 European Union (n 56) [13.4].
132 Uniform Law Conference of Canada (n 9) [21].
133 Eagleson (n 17) 83.
134 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006) 9.

Examples: Commonwealth Acts, defined terms, and regulatory perimeter

The *Competition and Consumer Act* uses a variety of defined terms to determine its regulatory perimeter: 'consumer' (s 4B), 'acquisition, supply and re-supply' (s 4C), and 'market' (s 4E). The *Australian Consumer Law* also uses 'consumer' (s 3) and 'goods' and 'services' (s 2(1)) to set its regulatory perimeter. Within the *Australian Consumer Law*, the scope of specific provisions is determined through defined terms: s 21 (unconscionable conduct in connection with goods and services) applies only to 'goods or services' supplied in 'trade or commerce' (s 2(1)).

Likewise, the *National Credit Code* applies to particular forms of 'credit' (ss 5 and 6), which is a defined term (s 3) that also determines the scope of the *NCCP Act* more generally.

In the *PPS Act*, the concept of a 'security interest' (s 12) is core to the functioning of that Act.

The defined term 'communications' (s 7) is central to the licensing provisions of the *Telecommunications Act 1997* (Cth) (ss 42 and 44), and the concepts of 'national system employee' and 'national system employer' (ss 13 and 14) determine the regulatory perimeter of the *Fair Work Act 2009* (Cth).

4.114 Other Commonwealth legislation that is not strictly regulatory in nature also make use of definitions to determine the scope of the legislation. The *Copyright Act 1968* (Cth), for example, relies on a range of defined terms, such as 'literary work', 'dramatic work', and 'artistic work' (s 10) to describe the range of works that attract copyright protection.

4.115 However, repeated alteration of defined terms to tailor the application of particular provisions is less common, including in the Acts listed in the examples above. In some instances, definitions can be altered by regulations,[135] however these provisions generally apply Act-wide rather than by modifying definitions for specific provisions.

4.116 An alternative to modifying defined terms to determine the application of particular provisions within an Act is to list in detail the various circumstances or persons to which the respective provisions apply in a dedicated application provision. In the case of the *National Credit Code*, for example, particular types of credit are excluded from the application of the Code by s 6, rather than by excluding them from the definition of 'credit'. Similarly, both regulations and ASIC may exclude particular types of credit from the application of the Code.[136] The example re-drafting of the

135 See, eg, *National Consumer Credit Protection Act 2009* (Cth) s 6(1).
136 *National Credit Code* (n 122) ss 6(13)–(14).

definition of 'financial product' discussed in **Chapter 7** of this Interim Report provides an example of how this can be achieved.

4.117 The following example illustrates how using a definition to implement policy decisions about scope can sometimes have the effect of unnaturally extending the ordinary meaning of a term, creating a counter-intuitive label.

Example: Definition used to determine the scope of obligations

Section 9 of the *Corporations Act* defines 'officer' as follows:

> ***officer*** of a corporation means:
>
> (a) a director or secretary of the corporation; or
>
> (b) a person:
>
> (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
>
> (ii) who has the capacity to affect significantly the corporation's financial standing; or
>
> (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or …

In *Australian Securities and Investments Commission v King* ('*ASIC v King*'), the High Court described paragraph (b) above as providing an 'extended definition of "officer"'.[137] The Court had regard to textual considerations, in addition to 'legislative context, history and purpose',[138] in order to reach the conclusion that paragraph (b) of the definition was intended to extend the scope of the term 'officer' beyond its ordinary meaning of 'office holder'.[139]

The defined term 'officer' is used in several provisions of the *Corporations Act*, including s 601FD as under consideration in *ASIC v King*, to impose duties and responsibilities on individuals. The purpose of the extended definition is to impose such duties and responsibilities on people who do not hold an 'office' of a company, as that term is ordinarily understood. According to the High Court:

> It would be an extraordinary state of affairs if those who actually determine the course of a company's financial affairs could avoid responsibility for their conduct by the simple expedient of deliberately eschewing any formal designation of their responsibilities.[140]

137 *Australian Securities and Investments Commission v King* (2020) 376 ALR 1 [34].
138 Ibid [29]–[47].
139 Ibid [24].
140 Ibid [46].

4.118 The High Court's discussion in *ASIC v King* suggests that the intermediate appellate court (the Queensland Court of Appeal) may have been led into error by 'the ordinary meaning of the term "officer" as the holder of an office'.[141] Using the ordinary meaning of 'officer' to place a limit on the statutory definition, the High Court said, was 'contrary to the orthodox view that one should not attempt to construe the words of a definition by reference to the term defined'.[142]

4.119 Notwithstanding the 'orthodox view' that the words used to define a term should not be used to construe its statutory meaning, this discussion highlights the importance of using intuitive labels for defined terms, and not unreasonably stretching a word's accepted meaning. This issue is discussed further in **Chapter 6**.

Notional amendments by legislative instrument

4.120 The use of legislative instruments to notionally amend the *Corporations Act* is discussed in **Chapter 3** and in further detail in **Chapters 7**–**10** of this Interim Report. As discussed in **Chapter 3**, 'notional amendment' conveys that although the text of the Act as passed by Parliament does not change (that being within only Parliament's power), the Act applies in the circumstances to which the instrument relates 'as though it were modified' in the way described.

4.121 Legislative instruments that notionally amend the *Corporations Act* often rely on defined terms within them for their operation, as well as notionally adding defined terms to the Act and notionally amending defined terms in the Act. As discussed in **Chapters 7**–**10**, these instruments create significant complexity and make it difficult to locate, read, and know the law.

141 Ibid [18].

142 *Australian Securities and Investments Commission v King* (2020) 376 ALR 1 [18], citing *Owners of the Ship, Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404, 419.

Example: Notionally inserted definition

Section 9(2) of *ASIC Corporations (Application Form Requirements) Instrument 2017/241* notionally amends s 1016A of the *Corporations Act* by inserting a subheading and two subsections after s 1016A(2). Notional s 1016A(2B)(a) uses the term 'nominated electronic means' and contains the following Note:

> The definition of ***nominated electronic means*** is notionally inserted into section 761A by subsection 5(1) of *ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647*.

In order to understand the law as notionally amended by s 9(2) of *ASIC Corporations (Application Form Requirements) Instrument 2017/241*, a reader must simultaneously:

- read the instrument alongside s 1016A of the *Corporations Act*, as though the provisions contained in the instrument were inserted;
- locate *ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647* and read s 761A of the *Corporations Act* alongside it, as though the definition of 'nominated electronic means' (which contains 721 words) were inserted; and
- interpret the notionally amended s 1016A of the *Corporations Act* in light of that definition.

4.122 By way of further example, *ASIC Corporations (Recognised Accountants: Exempt Services) Instrument 2016/1151* ('*Instrument 2016/1151*') notionally amends reg 7.1.29(4) of the *Corporations Regulations* by inserting one paragraph and replacing one subparagraph. Reg 7.1.29(4) is one of several subregulations that deem certain activities to be an 'exempt service' for the purposes of reg 7.1.29(1) which, in turn, operates as an exclusion from the definition of 'financial service' in s 766A of the *Corporations Act*.[143] The notional amendment to reg 7.1.29(4) uses the term 'limited licensee', and the instrument also makes the following insertion in reg 7.1.29(6):

> ***limited licensee*** has the meaning given by subsection 912A(4) of the Act (as notionally inserted by subregulation 7.6.01BA(3)).

4.123 Regulation 7.6.01BA was repealed with effect from 1 July 2019.[144] Until that time, however, reg 7.6.01BA notionally inserted s 912A(4) into the *Corporations Act*, notwithstanding that the Act already contained a provision numbered s 912A(4).

4.124 Although reg 7.6.01BA has been repealed, reg 7.1.29 and *Instrument 2016/1151*, each of which notionally amends it, remain in force. It may be that after

143 Pursuant to *Corporations Act 2001* (Cth) s 766A(2).
144 *Corporations Amendment Regulation 2013 (No. 3)* (Cth) sch 3 item 1.

the repeal of reg 7.6.01BA the parts of reg 7.1.29 (as notionally amended) that rely on the repealed regulation do not have effect, but this is not clear.

4.125 The example below further illustrates the difficulties that can be created when already complex definitions are notionally amended by a legislative instrument. Arguably, this definition may be better expressed in the form of a substantive provision.

Example: Notionally amended definition

Section 761A of the *Corporations Act* defines the term 'basic deposit product' to mean 'a deposit product that is a facility in relation to which the following conditions are satisfied…'. The term 'deposit product' is itself defined in s 761A (creating an interconnected definition) by reference to s 764A(1)(i), which specifically includes a deposit-taking facility as a financial product and requires reference to concepts in the *Banking Act 1959* (Cth) in order to be fully understood.

The conditions that must be satisfied to fall within the definition comprise five paragraphs and 11 subparagraphs. Regulations may be made to prescribe details for the purposes of two subparagraphs ((a)(vii) and (d)(ii)) and regulations may specify any other conditions for the purposes of paragraph (e). One regulation (reg 7.1.03A of the *Corporations Regulations*) is currently in force for the purposes of subparagraph (d)(ii).

The definition of 'basic deposit product' is notionally amended by *ASIC Class Order — Relief for 31 day notice term deposits [CO 14/1262]* ('*ASIC CO 14/1262*'). That instrument notionally replaces paragraphs (c) and (d), but only in relation to 'an affected term deposit'. The expression 'affected term deposit' is itself defined in *ASIC CO 14/1262* by reference to particular paragraphs of the definition of 'basic deposit product' in s 761A 'ignoring any modifications or variations to the definition notionally made' by the instrument.

In order to fully understand the definition, a reader must therefore consult:

- two defined terms in s 761A of the *Corporations Act*, as well as s 764A;
- the *Banking Act 1959* (Cth);
- the *Corporations Regulations*; and
- *ASIC CO 14/1262*.

4.126 The Explanatory Statement to *ASIC CO 14/1262* stated that the relief (granted for a 'temporary 18-month period' commencing 22 December 2014) was

> intended to give Government the opportunity to consider legislative reform to clarify the meaning of basic deposit product as defined under the Act, as it applies to 31-day notice term deposits.[145]

4.127 Notwithstanding that intention, on 29 June 2021 the operative period for relief in *ASIC CO 14/1262* was extended until 30 June 2024.[146] It is not the only example of 'short term' relief being extended well beyond the original specified term, amplifying the complexity created by notional amendments.

4.128 In addition, compilations of instruments on the Federal Register of Legislation do not always immediately (at the time of commencement) incorporate amendments made to instruments. For example, as at 13 October 2021, amendments made to *ASIC CO 14/1262* by *ASIC Corporations (Amendment) Instrument 2021/785* effective from 1 October 2021 had not yet been incorporated into the compilation published on the Federal Register of Legislation. The existence of the unincorporated amendment was made apparent by a note to the instrument as displayed on ASIC's website, as well as on the 'Unincorporated Amendments' page when viewing *ASIC CO 14/1262* on the Federal Register of Legislation. However, the existence of unincorporated amendments is not immediately apparent when viewing a legislative instrument on the Federal Register of Legislation, such that readers must take it upon themselves to actively check for any unincorporated amendments. It is acknowledged that resourcing and other constraints make it difficult to always keep the Federal Register of Legislation fully up-to-date; the purpose of the observations in this paragraph is to illustrate some of the complexities that confront a reader attempting to ascertain the law, as altered by delegated legislation, at a given time.

145 Explanatory Statement, *ASIC Class Order — Relief for 31 day notice term deposits* (CO 14/1262).
146 *ASIC Corporations (Amendment) Instrument 2021/500*.

Terms that may be defined unnecessarily

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.

4.129 Terms that are defined but not used make legislation longer than it needs to be and potentially distract readers of the dictionary by causing them to be 'alert' for uses of that term if it is of potential relevance to their circumstances. The *Corporations Act* contains 11 terms that although defined are not used in the Act, nor in any delegated legislation under the Act. They are summarised in **Table 4.2** below.

4.130 Removing these definitions from the *Corporations Act* would not substantively affect the operation of that Act. However, it is necessary to consider the possibility that other pieces of legislation (including delegated legislation) could define any of these terms by reference to the definition contained in the *Corporations Act*. If so, removing the definitions from the *Corporations Act* could potentially have unintended effects — for example, a term when used in other legislation could be interpreted as taking on its ordinary meaning, in the absence of the definition in the *Corporations Act*. Consequently, as part of the implementation of this recommendation, it would need to be confirmed whether any other legislation adopts (by cross-reference) any of these definitions contained in the *Corporations Act*. If so, consequential amendments to such legislation may be necessary, such as replacing the cross-reference with the full text of the definition that is being removed from the *Corporations Act*.

4.131 Using the advanced search functionality available on the Federal Register Legislation, it appears that nine out of the following 11 defined terms are not defined in other in-force legislation by reference to the definition contained in the *Corporations Act*. The ALRC has not been able to conclusively determine whether or not the terms 'court of summary jurisdiction' and 'financial corporation' are defined in any other piece of legislation (including delegated legislation) by reference to the *Corporations Act* definition. In each case, however, it would seem highly unlikely that legislation would rely on either definition contained in the *Corporations Act*. In the case of 'court of summary jurisdiction', the term is not inherently related to corporations and is in any event defined in the *Acts Interpretation Act*.[147] In the case of 'financial corporation', the term is defined in the *Corporations Act*, and in other Acts,[148] by reference to the term's meaning in the *Constitution*.[149]

147 *Acts Interpretation Act 1901* (Cth) s 2B.
148 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) s 10 ('constitutional corporation'); *Fair Work Act 2009* (Cth) s 9 ('Australian employer').
149 *Commonwealth of Australia Constitution Act* (Cth) s 51(xx).

Table 4.2: Terms defined, but not used, in the Corporations Act

Defined term	Section	Comments
arbitrage transaction	9	
Australian register	9	
chargeable matter	9	• This term is used in the *Corporations (Fees) Act 2001* (Cth) and is defined in s 4 of that Act
court of summary jurisdiction	9	
emoluments	9	
exempt foreign company	9	
financial corporation	9	• This term is also defined by s 12BA of the *ASIC Act*, where it is defined slightly differently to the *Corporations Act* definition. • The term is used only once in s 12AD(7) of the *ASIC Act*, such that the substance of the definition could potentially be included in that section, rather than being set out in a definition section.
financial product advice law	761A	
Full Court	9	
non-voting share	9	• The defined expression is not used. A note to s 606(6) uses the expression 'non-voting preference share'.
renounceable option	9	• The defined expression is not used. The definition of 'convertible securities' in s 9 uses the expression 'non-renounceable' in the context of an 'option', but it does not use the defined term: 'An option may be a convertible security even if it is non-renounceable'.

Terms defined by the Corporations Act but used only in delegated legislation

4.132 The three terms listed below in **Table 4.3** are defined in s 9 of the *Corporations Act* but used only in delegated legislation made under the *Corporations Act*. These terms are not used in the *Corporations Act* itself, and no other Commonwealth Act

defines these terms by reference to their definition in the *Corporations Act*. In some cases it is unclear if the definition is necessary where the term is used in delegated legislation, and in any event navigability could be improved by relocating the definition from the Act to the delegated legislation in which it is used.

Table 4.3: Terms defined in the Corporations Act but used in delegated legislation only

Defined term	Section	Comments
Australian bank	9	• This term is used once in reg 9.12.02(6) as part of the definition of 'Australian entity' for the purposes of reg 9.12.02. Regulation 9.12.02 relates to an exemption from specified provisions of Chapter 7 of the *Corporations Act*. • The term is also used once in *ASIC Corporations (Horse Schemes) Instrument 2016/790*. • The term is itself defined by reference to the *Banking Act 1959* (Cth) to mean, in summary, an Australian ADI permitted to use the word 'bank, banker or banking' or term of like import. • The term serves no purpose in the *Corporations Act* and could be removed. If the term is in fact necessary for the purposes of reg 9.12.06 or *Instrument 2016/790*, navigability could be improved by inserting the definition there.
cash management trust interest	9	• This term is used in five regulations: regs 7.1.40, 7.6.04A, 7.7.02, 7.7.10, and 7.8.02. • The term serves no purpose in the *Corporations Act* and could be removed from that Act. Navigability of the *Corporations Regulations* could be improved by including the definition of the term within reg 1.0.02 (dictionary provision to the Regulations).

Defined term	Section	Comments
quarter day	9	• This term is used several times in regs 7.5A.73, 10.2.20B and 10.21.01. • The term is also used in three ASIC legislative instruments. This includes, for example, *ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968* in which the term is used as part of a notional insertion to the *Corporations Act*. • Defining this term in the *Corporations Act* therefore avoids the need to repeat the definition in each piece of delegated legislation. However, it is counter-intuitive to require a reader of delegated legislation to look for the definition of a term in an Act in which the term is not used.

Defined terms that are used in only one section of the Corporations Act

4.133 The table at **Appendix C.1** lists and contains comments on 15 defined terms for which the full definition is contained in s 9 of the *Corporations Act*, but which are used in only one other section of the Act. These terms raise two questions: first, whether a definition of the term is necessary (or if the substance could instead be incorporated into the section that uses it); and second, if a defined term is necessary, whether navigability could be improved by moving the definition nearer to the provision in which it is used and placing a signpost in s 9.

4.134 Three of those terms are defined to have the same meaning as in another Commonwealth Act. This suggests it may be unnecessary for the term be given a standalone definition in the *Corporations Act*. Instead, the expression 'within the meaning of [the Act in which it is defined]' could be included in parentheses after the term within the operative provision.[150]

4.135 Seven of the terms are used only as part of another definition, two of which are in s 9 and five of which are in sections devoted to that particular definition. This appears to reflect a drafting practice that generally avoids defining a term within a section that is devoted to defining another term. This highlights the difficulty created by interconnected definitions, discussed in more detail in **Chapter 5**.

4.136 Analysis of the terms and suggestions for improvement are contained in the table at **Appendix C.1**. Those suggestions overlap with general proposals to

150 See, eg, s 1058(5)(b) which refers to 'a police officer (within the meaning of the *Evidence Act 1995*)'.

improve navigability that are discussed in **Chapter 6**. Some of the suggestions relate to re-locating definitions from s 9 of the *Corporations Act* closer to the only provision in which the defined term is used. Legislative drafters will be well aware of relevant considerations when re-locating definitions, such as any consequential amendments that may be required if the definition is picked up by any other legislation.

Commonly used or understood words that are defined inclusively

4.137 The following are examples of several commonly used or understood words that are defined inclusively by s 9 of the *Corporations Act*:

> ***act*** includes thing.
>
> ***cause*** includes procure.
>
> ***event*** includes any happening, circumstance or state of affairs.
>
> ***information*** includes complaint.
>
> ***procure*** includes cause.

4.138 The use of 'includes' in the definition suggests that the intention is to either expand the term's ordinary meaning or to clarify borderline cases. Inclusive definitions are discussed in more detail in **Chapter 6**.

4.139 The purpose of such definitions is generally not clear, which is confusing for the reader and potentially obscures the meaning of the legislation. There may be benefits in removing these definitions from the *Corporations Act*. For example, it would assist to de-clutter s 9, and to reduce the frequency with which a reader encounters a term which is potentially affected by a definition.

4.140 Some brief commentary on each of the defined terms and their use in other Commonwealth legislation is contained in the table at **Appendix C.2**. It is not clear whether it is necessary that these terms be defined. In some (but not all) cases, the terms are used in ways that render the definition redundant. For example, the term 'act' includes 'thing', but on 32 occasions in the *Corporations Act* the expression 'act or thing' is used.

4.141 The table at **Appendix C.2** shows that these definitions are not widely used in Commonwealth legislation. The only in-force Acts to contain these definitions of 'act' and 'information' are the *Corporations Act* and the related *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). These Acts are the only Acts that currently define both 'procure' and 'cause', with the *SIS Act* and the *Retirement Savings Accounts Act 1997* (Cth) containing the above definition of 'procure' but not a definition of 'cause'. The *James Hardie (Investigations and Proceedings) Act 2004* (Cth) is the only Act other than the *Corporations Act* to define the term 'event'.[151]

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151 *James Hardie (Investigations and Proceedings) Act 2004* (Cth) s 3.

4.142 Furthermore, the legislative history of each definition suggests that they are terms that have been carried over from predecessor legislation, such as the *Corporations Act 1989* (Cth) and the *Securities Industry Act 1980* (Cth), into the *Corporations Act*.

5. Consistency of Definitions

Contents

Introduction

5.1 This chapter outlines principles for the consistent use of definitions in legislation, and assesses the consistency of current definitions and concepts across the *Corporations Act* and related Commonwealth legislation, by reference to examples. This chapter builds on the principles outlined in **Chapter 4** regarding when to define terms, and foreshadows the principles in **Chapter 6** regarding the design of definitions.

5.2 A key theme encountered by the ALRC in its consultations and in its examination of definitions in corporations and financial services legislation is the lack of consistency in the use of many common terms, and the complexity this creates. For example, key terms such as 'financial product' are defined differently in related Acts, and even in different provisions of the same Act. This makes it very difficult for the reader to keep in mind which particular definition of a term applies in a particular provision.

5.3 The chapter discusses a number of aspects relating to consistency of definitions:

- First, there is a strong argument that all defined terms should have only one meaning throughout an Act. The chapter sets out some challenges in this regard, including definition provisions that are expressed to apply 'unless the contrary intention appears', and terms that are currently given multiple different meanings within the *Corporations Act*.
- Secondly, it is helpful for terms to have the same meaning in an Act and in all delegated legislation made under it. This chapter examines the current practice of delegated legislation 'notionally amending' definitions (and other provisions) in the *Corporations Act*, which presents a significant challenge.

- Thirdly, there would be advantages in achieving greater consistency in the use of terms and concepts between related Acts, although this is necessarily more difficult to achieve, and may only be practicable in relation to a smaller number of key terms and concepts, requiring a more detailed analysis on a case-by-case basis. In any event, it would improve consistency if the current version of the *Acts Interpretation Act* applied to the *Corporations Act* and the *ASIC Act*.

5.4 This chapter sets out recommendations to: remove from the *Corporations Act* and the *ASIC Act* qualifications stating that definitions apply 'unless a contrary intention appears'; remove from the *Corporations Act* definitions of the common terms 'for' and 'of'; and 'unfreeze' the application of the *Acts Interpretation Act* to each of the *Corporations Act* and the *ASIC Act*. In addition, the ALRC invites stakeholder feedback on the principles discussed in this chapter (see **Question A2** in **Chapter 4** of this Interim Report).

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

Consistency within an Act

5.5 The principle that a term should have only one defined meaning for the purposes of an Act is well established in drafting guidance across all jurisdictions examined. This section examines how inconsistent terminology within an Act can create unnecessary legislative complexity, and suggests alternative drafting methods that can improve consistency and reduce complexity. This section examines, in turn: terms given more than one meaning; multiple terms used to describe the same concept; provision-specific definitions; terms defined by reference to their meaning in a particular chapter; determining whether a 'contrary intention appears'; and relational definitions.

5.6 OPC emphasises this principle (sometimes called the 'one expression, one meaning' principle) in a number of publications.[1] The Victorian Law Reform Commission extended the operation of the principle to include that parts of speech which are related to a defined term should also be used consistently with the meaning of the defined term.[2] For example, in the *Corporations Act*, the terms 'financially

1 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [67]; Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, 'Definitions' (Document release 4.0, May 2019) [4]–[5]; Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006) 8; Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (Document Release 2.1, June 2016) [49]–[51], [59]–[62], [142]–[143].

2 Victorian Law Reform Commission, *Plain English and the Law: The 1987 Report Republished* (2017) 124.

assist' and 'financial assistance' are used in a consistent sense.[3] Section 18A of the *Acts Interpretation Act* also provides that where a word or phrase is defined, other parts of speech and grammatical forms of that word or phrase have corresponding meanings.

5.7 Canadian guidance provides that defined terms should 'never' be used in the same Act in a different sense, and nor should undefined terms unless the intended meaning is 'perfectly clear and no other term is suitable'.[4] European Union guidance expresses that definitions must be 'respected' throughout an Act.[5] UK guidance notes that 'using the same term to denote different things within an Act may be confusing'.[6] New Zealand guidance states that a key function of definitions is to facilitate consistency of concepts within an Act.[7]

5.8 A number of commentators have reinforced the principle that each word and phrase should have only one meaning for the purposes of an Act.[8] Perhaps an exception is Professor Eagleson, who may have been ambivalent on this issue. For example, he has stated that a legitimate use of definitions is to specify different meanings for a term in different parts of an Act. However, other views he has expressed are consistent with the promotion of consistency, such as his opposition to the use of the phrase 'unless the contrary intention appears' in definitional provisions.[9]

5.9 'Relational definitions', which are discussed in detail further below,[10] would in some cases appear to be a recognised exception to the principle of 'one expression, one meaning'.

Terms with more than one meaning in an Act

5.10 In the *Corporations Act*, a large number of terms are defined to 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 in s 9, which is then expressed to be 'affected by' 10 different provisions in relation to 10 different parts (including one schedule) of the Act. In addition, there are another

3 *Corporations Act 2001* (Cth) ss 260A, 738ZE.

4 Uniform Law Conference of Canada, 'Report of the Committee Appointed to Prepare Bilingual Legislative Drafting Conventions for the Uniform Law Conference of Canada' [21], [34] <www.ulcc-chlc.ca/Civil-Section/Drafting/Drafting-Conventions>.

5 European Union, *Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation* (2015) [6.4]. See also Guideline 6, [14.1].

6 Office of the Parliamentary Counsel (UK), *Drafting Guidance* (2020) [4.1.7].

7 Parliamentary Counsel Office (NZ), 'Definitions That Are Helpful and Are Not Contrived to Create Artificial Concepts' (Plain Language Standard, Supporting Document 8.5).

8 See, eg, Louise Finucane, 'Definitions — A Powerful Tool for Keeping an Effective Statute Book' [2017] (1) *The Loophole* 15; Bilika H Simamba, 'The Placing and Other Handling of Definitions' (2006) 27(2) *Statute Law Review* 73.

9 Robert D Eagleson, 'Legislative Lexicography' in EG Stanley and TF Hoad (eds), *Words: For Robert Burchfield's Sixty-Fifth Birthday* (DS Brewer, 1988) 81, 85.

10 See [5.49]–[5.56].

five provisions (not signposted in s 9) that contain different definitions of 'property' that apply to specified provisions of the Act. The word 'property' is therefore in effect defined a total of 16 times throughout the *Corporations Act*. Accordingly, 'property' is the most frequently defined word or phrase in the Act.[11] In contrast, 'property' has only one meaning in the *ASIC Act*, and is not defined in the *PPS Act* (although several sub-categories of property are defined) nor the *NCCP Act*.

5.11 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*.[12] 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.

5.12 **Table 5.1** contains further examples of defined terms with more than one meaning in the *Corporations Act*.

Table 5.1: Terms with more than one defined meaning in the Corporations Act

Defined term	Comments
Investment	'Investment' is given three separate meanings in s 9, distinguishable by being '*investment* in a company, disclosing entity or other body', '*investment* in a notified foreign passport fund', and '*investment* in a registered scheme'.
Issue	'Issue' is given two meanings in s 9: one 'in relation to' interests in a managed investment scheme, and another in all other cases. For the purposes of Chapter 7, the meaning of 'issue' is affected by s 761E, which sets out a general description of when a financial product is 'issued' to a person, subject to specific meanings for four specific types of financial product. Section 761E(3A) also describes, 'for the avoidance of doubt', circumstances not giving rise to the issue of a financial product. A note to the s 9 definition alerts a reader to the existence of s 761E.

11 In addition, a number of other terms defined in s 9 of the *Corporations Act* contain the word 'property', including: 'fund property'; 'outstanding property'; 'PPSA retention of title property'; 'scheme property'; and 'unclaimed property'.

12 For a summary and comparison of these five definitions, see Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis Butterworths, 10th ed, 2021) 118, Table 3.1.

Defined term	Comments
Control	'Control' is defined for 'an entity' by s 50AA for the purposes of the whole Act. Section 910B defines the term 'control' in respect of 'a body corporate' and differently in respect of 'an entity other than a body corporate' for the purposes of Part 7.6. Section 9 alerts readers to the existence of these two definitions. The term 'control' is also defined 'in relation to a financial services licensee' by reg 7.6.04(2) of the *Corporations Regulations* for the purposes of that regulation, which stipulates licence conditions with which all AFS Licensees must comply.
Benefit	'Benefit' is defined generally by s 9 and differently by s 200AB for the purposes of Part 2D.2 Div 2. Section 9 contains a signpost to the s 200AB definition.
Entity	'Entity' is defined by s 9 for the purposes of Chapters 2E and 8A, and by s 64A for the rest of the *Corporations Act*. Both s 9 and s 64A cross-refer to the other.
Financial year	Section 9 provides that 'when used in a provision outside Schedule 2' the term 'financial year' is defined by s 323D 'for a company, registered scheme or disclosing entity' and by s 323DAA 'for a notified foreign passport fund'. The term 'financial year' is not defined in Schedule 2 of the *Corporations Act*, such that when the term is used in Schedule 2 it takes on the meaning of 'financial year' as defined by the *Acts Interpretation Act* on 1 January 2005.[13] 'Financial year' is also defined by s 989A in relation to AFS Licensees for the purposes of the subdivision in which it appears.[14] That definition, in turn, provides a definition for licensees that are a body corporate ('a financial year of the body corporate') and licensees that are not a body corporate (equivalent to the *Acts Interpretation Act* definition). Neither s 9 nor the dictionary in s 761A for Chapter 7 alerts a reader to the existence of the definition in s 989A.

5.13 Defined terms with more than one meaning in the same Act present several challenges to readers. First, a reader must locate the relevant definition. This is

13 See discussion at [5.140]–[5.149] regarding the 'freezing' of the *Acts Interpretation Act* as at 1 January 2005. The current definition of 'financial year' is in s 2B of the *Acts Interpretation Act*, but that section was not inserted into the *Acts Interpretation Act* until 2011, and consequently it does not apply to the *Corporations Act*. Instead, as at 1 January 2005, the term 'financial year' was defined (in almost identical terms) in s 22(e) of the *Acts Interpretation Act*.

14 *Corporations Act 2001* (Cth) pt 7.8 div 6 subdiv C.

made more difficult if, as is the case of the *Corporations Act*, there is no single, comprehensive dictionary or index that indicates all provisions that define the same term. As noted in **Table 5.1** above, dictionary provisions in particular chapters or parts of the Act (such as in s 760A for Chapter 7) also do not comprehensively identify all terms defined in that chapter or part. Secondly, after consulting the relevant definitions, a reader must then determine which of the multiple definitions applies in the provision with which they are concerned.

5.14 There are a number of alternative approaches to avoid a defined term taking a different meaning in different provisions of an Act. Each approach has its advantages and disadvantages, and the optimal approach in a particular situation will depend on circumstance and professional judgement. Regardless of the approach taken, it is significantly more difficult to achieve Act-wide consistency in existing legislation than when drafting new legislation, especially when the existing legislation has a large number of definitions that currently apply in relation to particular provisions (as in the *Corporations Act*).

5.15 One alternative approach is to create different defined terms for each different concept used in the *Corporations Act*. For example, as noted in **Table 5.1** above, 'benefit' is currently defined (in s 200AB) to have a different meaning in one division of the *Corporations Act* (Part 2D.2 Div 2) than it has in the rest of the Act. Instead, a different term could be used in that one division, such that the term 'benefit' is not used in that division, and has only one meaning throughout the Act. Ideally, an alternative 'intuitive' term would be used that accurately reflects the concept as it applies in that division. However, if it is difficult to identify an appropriate alternative term, a less intuitive label could be used (such as 'regulated benefit' or 'Division 2 benefit'). Using a non-intuitive label is less helpful for the reader, and can also create multiple defined terms within an Act that are confusingly similar to each other.[15] Irrespective of how intuitive the new defined term is, from one perspective creating an additional defined term for the Act arguably increases complexity. From another perspective, the Act already contains two concepts, both of which are currently identified by the term 'benefit'. It would therefore be less complex, and more transparent, to use two different terms to refer to those two different concepts.

5.16 Another approach is to use 'application provisions' that determine the scope of a particular provision, rather than in effect amending a definition to delineate that scope. For example, instead of creating a new definition of 'benefit', s 200AB of the *Corporations Act* could provide that the relevant division applies to the items listed in subsection (1) in the same way as it applies to a 'benefit' (and does not apply to items prescribed for the purposes of subsection (2)). Further examples of application provisions can be found in the example drafting contained in **Appendix E**.

Multiple terms for one concept

5.17 As an additional consistency measure, some drafting guidance expressly provides that one concept should be referred to in legislation using only one term,

15 Examples in s 9 of the *Corporations Act* include 'Part 5.1 body' and 'Part 5.7 body'.

and the same concept should not be referred to using a different term in the same Act.[16] The Victorian Law Reform Commission recommended that if 'occasionally' more than one term is used to refer to the same concept, this should be clearly indicated in the general definition provision.[17] The use of multiple terms for one concept appears to be largely a historical drafting technique, and it does not appear to have been used frequently in current Commonwealth corporations and financial services legislation.

5.18 In the *Corporations Act*, the defined terms 'agreement', 'relevant agreement', and 'arrangement' are used to define similar concepts. These definitions operate so as to capture a range of arrangements or relationships between people that are sought to be regulated. The definitions are discussed further in **Chapter 6**.

5.19 A comparison of the defined terms 'lodge' in s 9 and 'lodge with ASIC' in s 761A of the *Corporations Act* provides an example. 'Lodge' is defined by s 9 to mean 'lodge with ASIC in this jurisdiction'. 'Lodge with ASIC' is defined by s 761A for the purposes of Chapter 7 in a relational sense so as to require that whenever a prescribed form is stipulated, 'lodge with ASIC' means 'lodge with ASIC in a prescribed form'.[18]

5.20 A note to the definition of 'lodge with ASIC' in s 761A adds further confusion by stating: 'See section 350 for the meaning of ***lodge in a prescribed form***' (emphasis in original). The bold and italic formatting used there suggests that the expression 'lodge in a prescribed form' is defined, however this is not the case. While s 350 discusses lodging prescribed forms, it does not define 'lodge in a prescribed form'. In contrast, notes to ss 905B and 905F more accurately state: 'See section 350 for how to lodge an application in a prescribed form'.

Provision-specific definitions

5.21 Provision-specific definitions are definitions that are expressed to apply only for the purposes of one or more particular provisions of an Act, rather than applying for the purposes of an Act as a whole. Provision-specific definitions often include the phrase 'when used in'. For example:

> ***person***, when used in Division 2 of Part 2D.2 (sections 200 to 200J), includes a superannuation fund.[19]

5.22 Alternatively, when a term is defined within a particular part or division of an Act, the definition generally begins with 'In this Part' or similar. For example:

> In this Part, unless the contrary intention appears:

16 See, eg, Uniform Law Conference of Canada (n 4) [34]; European Union (n 5) Guideline 6.
17 Victorian Law Reform Commission (n 2) 122–3.
18 This definition also runs counter to the principle that definitions should not impose substantive obligations, discussed in **Chapter 4**.
19 *Corporations Act 2001* (Cth) s 9.

> ***officer***, in relation to a registered foreign company, includes a local agent of the foreign company. …[20]

5.23 Where a term defined by a provision-specific definition is used outside of that provision, then the term potentially takes on multiple meanings within that Act. That is, a term will be used in its defined sense for some provisions, but in its ordinary undefined sense in others. In those circumstances, provision-specific definitions run counter to the principle that a term should have only one meaning for the purposes of an Act.

5.24 In total, 790 definitions in the *Corporations Act* are expressed to apply for the purposes of specific provisions. By contrast, 588 definitions are expressed to apply for the purposes of the whole Act.[21]

5.25 Provision-specific definitions are sometimes contained in dictionary provisions. For example, s 761A contains 136 definitions which apply for the purposes of Chapter 7 of the *Corporations Act* and s 910A contains 22 definitions which apply for the purposes of Part 7.6. A total of 254 definitions in the *Corporations Act* are expressed to apply for the purposes of a particular section and a further nine for a particular subsection.

5.26 **Figure 5.1** shows the number of definitions that are expressed to apply for the purposes of the whole of the *Corporations Act* or a specific provision. These definitions have been identified and classified according to their opening words or other expressions of scope; for example, an Act-wide definition will sometimes be prefaced by the words 'In this Act'.[22]

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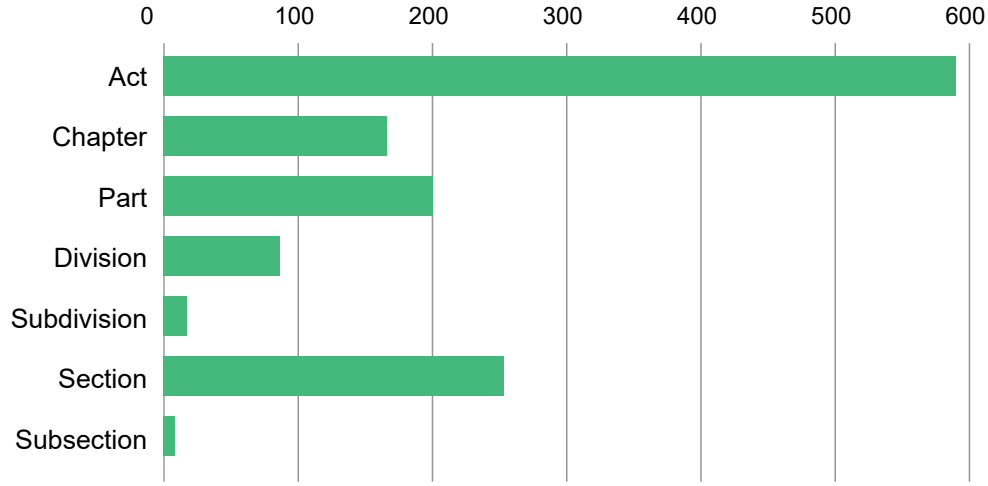
20 Ibid s 416.

21 All data in this chapter is based on a mix of computational and manual analysis, as described at **Appendix D** under 'Defined terms analysis'. The data discussed in this section of this chapter includes signpost definitions. The *Corporations Act* contains 353 signpost definitions. These are definitions that include the words 'has the meaning' or 'has the same meaning' to indicate (or signpost) where the substance of a definition can be found. Just under half (164) signposts relate to Act-wide definitions, while just over half (188) refer to provision-specific definitions.

22 **Figure 5.1** does not include definitions which contain the words 'Meaning of' in the heading, and which do not include the words 'In this Part' or similar. There are 100 defined terms in the *Corporations Act* that use 'Meaning of' in the heading (such as ss 761B–761H) and 10 defined terms that use another form of wording in the heading (such as 'When a person makes a financial investment' in s 763B), at least some of which may apply only to specified provisions.

Figure 5.1: Number of definitions classified according to scope of application



5.27 It is not always clear whether provision-specific definitions are necessary, as opposed to an Act-wide definition. Section 9 of the *Corporations Act* defines 'statement' as follows:

> ***statement***, in Chapter 7, includes matter that is not written but conveys a message.

5.28 This definition appears in s 9 despite the term being defined only for the purposes of Chapter 7 of the *Corporations Act*. There is no signpost in the Chapter 7 dictionary (s 761A) to indicate to a reader that the term is defined for the purposes of Chapter 7.

5.29 The use of the word 'includes' in the definition suggests that this definition is intended to extend the ordinary meaning of 'statement', or to capture borderline cases. It is not clear that the definition is necessary, as a 'statement' in its ordinary meaning would include both oral and written statements, and as a form of communication would ordinarily contain a meaning. This and other examples are indicative of a general trend towards over-defining words and concepts in the *Corporations Act*.

5.30 Section 9 of the *Corporations Act* also defines the term 'agreement' in a provision-specific way as follows:

> ***agreement***, in Chapter 6 or 7, means a relevant agreement.

5.31 'Relevant agreement' is in turn also defined by s 9. The definition of 'relevant agreement' is discussed in more detail in **Chapter 6** of this Interim Report. The effect of defining 'agreement' in this way is that the term takes on its defined meaning in Chapters 6 and 7 of the *Corporations Act*, but its ordinary sense elsewhere in the Act.

Terms defined in s 9 by reference to their Chapter 7 meaning

5.32 Section 9 of the *Corporations Act* contains 28 definitions which provide that a term, 'when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7'. Navigability and readability would be enhanced if each of these definitions instead provided that the term 'has the meaning given by [section number]' or 'has a meaning affected by [section number]' as required.

5.33 The *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (Cth), which received Royal Assent on 28 October 2021, introduces into s 9 a further four definitions that use the expression 'when used in a provision outside Chapter 7, has the same meaning as it has in Chapter 7'.[23]

5.34 The ALRC suggests that any definition that applies Act-wide should be stated in full in a provision that applies Act-wide. Accordingly, a preferable alternative may be for the full definition of the 28 terms described in [5.32] to appear in s 9 of the *Corporations Act*.

Conveying a contrary intention

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'.

5.35 The phrase 'unless the contrary intention appears' appears in many definitional and interpretation provisions, such as s 9 of the *Corporations Act*, and ss 5 and 12AB of the *ASIC Act*. However, no such phrase is used in other definitional provisions such as s 761A of the *Corporations Act*, reg 1.0.02 of the *Corporations Regulations*, s 10 of the *PPS Act*, or s 5 of the *NCCP Act*.

5.36 The inclusion of such a phrase is confusing for the reader. Its effect is to unsettle the reader and encourage the reader immediately to look for any explicit or implicit indication in a particular provision that some meaning other than the defined meaning is intended in that instance. The qualification also negatively affects the navigability of legislation, in the sense that it is more difficult for readers to know whether or not it is necessary to consult definitional provisions in order to interpret the relevant provision properly. Many readers may also overlook the qualification. Currently, a general qualification may be located several pages away from the particular definition that a reader may be consulting (for example, s 9 of the *Corporations Act* contains a list of definitions that is currently 86 pages long).

23 The four definitions are: 'Financial Services and Credit Panel'; 'proposed action notice'; 'response period'; and 'restricted civil penalty provisions'.

5.37 Instead, the reader should be able to rely on a defined term being used on each occasion in its defined sense. Rather than using a defined term in a different sense in a particular provision, alternatives may include using a different term, using an application provision, or re-wording the provision.

5.38 Eagleson has described the use of a general disclaimer such as 'unless the contrary intention appears' as an 'abdication of responsibility' by drafters. In his view, qualifications are added 'in case drafters have overlooked the use of a word in a different sense somewhere in the text', but this should not be necessary now that software enables drafters to check each use of a term, and substitute an alternative term to denote a different meaning on occasion if necessary.[24] He described the inclusion of general disclaimers as unhelpful and causing uncertainty. UK drafting guidance describes it as 'generally unhelpful' and as 'leaving the reader guessing'.[25]

5.39 Moreover, the inclusion of such a phrase is unnecessary as a matter of law. If a contrary intention is expressly indicated in a particular provision of an Act, that will supersede the general definition contained in the definitions provision.[26] In addition, if a court were of the view that the context or content of a particular provision required that the term be understood in a different sense than the defined meaning, even without any express indication that the legislature intended a different meaning, the court would not be restrained from so finding.[27]

5.40 OPC drafting guidance supports the principle that such general qualifications should not be included in new legislation, or when drafting new definitions, on similar grounds to those cited here. However, the matter is evidently more complicated when amending existing definitional provisions, and the question is left to drafter discretion as to 'whether amending provisions should be drafted in a manner consistent with the existing provisions'.[28]

5.41 The ALRC considers that a helpful step in the legislative simplification process would be to check the use of each defined term to identify any provisions in which the term is used in a sense other than the defined meaning. In such provisions, in accordance with the 'one expression, one meaning' principle, a different term should be used wherever possible. In other instances, an application provision could be used to tailor the scope of the operative provision, rather than giving a defined term a different meaning for the purposes of a particular provision. As discussed above, 'security' is given five definitions in the *Corporations Act*.[29] Its use could potentially be improved by giving the term one definition and using application provisions as necessary.

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24 Eagleson (n 9) 85.
25 Office of the Parliamentary Counsel (UK) (n 6) [4.1.18].
26 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) [6.12].
27 Ibid.
28 Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, 'Definitions' (Document release 4.0, May 2019) [26]–[29].
29 See discussion at [5.11].

5.42 Undertaking a complete review of defined terms in the *Corporations Act* would be a large and time-consuming task given the size of the legislation, the significant number of defined terms, and the frequent use of defined terms. However, as part of the same process, unnecessary definitions could be identified in accordance with the principles set out in this chapter, and removed.

5.43 The phrase 'unless the contrary intention appears' is also used in many other provisions of the *Corporations Act*, *Corporations Regulations,* and *ASIC Act*, and the effect and usefulness of the phrase may vary between provisions. The recommendation to remove the phrase is therefore limited to the Act-wide interpretation sections listed in **Recommendation 3**. However, further review may indicate other provisions from which the phrase could be removed. For example, similar arguments would likely support removal of the qualification phrase from interpretation provisions that apply generally to a part or division of a piece of legislation.[30]

5.44 On some occasions the provision containing the qualification phrase applies more specifically, rather than broadly across the Act, part, or division. In these instances, the qualification is likely used to implement a specific policy decision to use the defined term in a different sense in particular provisions, rather than as a general 'cover-all' in case a term is inadvertently used with a different meaning somewhere in an Act. For example, the qualification in s 420(4) of the *Corporations Act* applies only within s 420 itself, just as the qualification in s 1322 applies only within that section. The qualification in s 885E(7) applies only in 'other provisions of this Division', and so arguably not in s 885E itself. The qualification in s 1338B(3)(b) does not identify the provisions to which it applies, but relates to a very specific context, namely references to jurisdiction conferred on courts by s 1338B(1). The narrower application of these qualifications suggests that it would be less burdensome (than for qualifications of broader application) to identify the provisions in which a contrary meaning is intended, and to draw attention more clearly to the different meaning, or to avoid using the defined term in a different sense in those provisions.

5.45 The qualification in paragraph (b) of the definition of 'director' in s 9 of the *Corporations Act* applies Act-wide (duplicating the qualification in the chapeau of s 9). However, the qualification in paragraph (b) applies only in relation to a specific context, namely persons not validly appointed as a director. The effect of paragraph (b) is to create more than one defined meaning of the term 'director'. Interestingly, a legislative note beneath the definition of 'director' lists three 'example' provisions in which (according to the note) a person 'would not be included in the term "director"' due to a 'contrary intention'. The basis on which those provisions are said to indicate a contrary intention is not explained. None of those provisions contains an express contrary intention. There may be policy reasons why a person should not be considered a 'director' for the purposes of those (and other) provisions, but should be considered a director in other instances. For example, arguably a person

30 See, eg, *Corporations Act 2001* (Cth) ss 82, 416, 435, 452B, 910A, 1073B, 1074B, 1276, 1363, 1410. See also *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BC, 12BD, 12GA (cf s 12BE); *Corporations Regulations 2001* (Cth) regs 5.3B.01, 7.9.01, 9.4A.01.

not validly appointed as a director should not have power to call a meeting of the company's members (s 249C), but a person who conducts themselves as a director without being formally appointed as one should be liable for their actions in the same way as a director (for example, pursuant to ss 180–184). However, on each occasion the term 'director' is used, unless an express contrary intention appears, readers must consider whether or not an implicit contrary intention appears so as to displace paragraph (b). In many instances it may be debatable whether or not an implicit contrary intention appears. The guidance in the legislative note is not sufficient to enable readers to make that decision.

5.46 The qualification in the definition of 'offence based on' in s 9 of the *Corporations Act* similarly duplicates the qualification in the chapeau to s 9 and should be removed.

5.47 The qualification in s 337 of the *Corporations Act* is unique in that it applies to the interpretation of delegated legislation, rather than provisions of the Act itself. In short, the section provides rules for the interpretation of accounting and auditing standards 'unless the contrary intention appears' in those standards. As delegated legislation, the standards must be interpreted in accordance with the Act under which they are made. If the Act were to specify interpretive rules without any such qualification phrase, the standards would not have the flexibility to specify alternative interpretive rules. The effect of the qualification phrase in this provision is therefore different to its effect in relation to the interpretation of other provisions of an Act, which can 'override' a general definition as outlined above. In accordance with the principle that terms in delegated legislation should have a consistent meaning with the meaning provided in the associated Act, it would be preferable for the standards not to provide for alternative interpretive rules. However, to the extent that those alternative interpretive rules are in fact appropriate, they are only valid because of the qualification phrase in s 337 of the Act. The qualification therefore should not be removed from s 337 unless it is intended that the interpretive rules contained in the *Corporations Act* should apply uniformly to all accounting and auditing standards.

5.48 Section 280 of the *ASIC Act* is also unique, for the reason that it provides that particular wording is not to be taken as an expression of a 'contrary intention'. In short, s 280 provides that a reference to 'an event, circumstance or thing' includes things that 'happened or arose' before the commencement of the legislation 'unless the contrary intention appears'. It then provides that the use of the present tense in a particular provision is not to be taken as an expression of any contrary intention for this purpose. This qualification, and the clarification regarding the use of present tense, would not be required if it were explicitly identified in each relevant provision whether or not the provision is intended to apply to things that happened before commencement of the legislation.

Relational definitions

Principle: Relational definitions should be used sparingly.

5.49 Relational definitions define terms that only take on the legislatively defined meaning *in relation to* particular subject matter, circumstances, or concepts. Relational definitions can create complexity in legislation, although they are not objectionable in and of themselves.

5.50 At an abstract level, almost all parts of language are relational because they take on meaning in relation to certain things. Some concepts are necessarily relational. One example is the term 'neighbour', which is not defined by any intrinsic properties but by referring to a relationship — typically, one of proximity.

5.51 By way of further example, the term 'parent' implies the existence of a child. Similarly, the term 'child' is often used in a relational sense. This is reflected by the definitions of 'child' and 'parent' in s 9 of the *Corporations Act*:

> ***child***: without limiting who is a child of a person for the purposes of this Act, someone is the ***child*** of a person if he or she is a child of the person within the meaning of the *Family Law Act 1975*.
>
> ***parent***: without limiting who is a parent of a person for the purposes of this Act, someone is the parent of a person if the person is his or her child because of the definition of child in this section.

5.52 Much drafting guidance is silent on the use of relational definitions, and what little guidance there is does not appear to suggest any consistent approach to defining terms relationally or to using the expression 'in relation to'. OPC Drafting Direction 1.5 states:

> Occasionally (particularly for large, complex legislation), it is useful to be able to define an expression differently in relation to different things. For example, in the *Fair Work Act 2009* there is the following definition of 'covers':
>
> ***covers***:
>
> (a) in relation to a modern award: see section 48; and
>
> (b) in relation to an enterprise agreement: see section 53; and
>
> (c) in relation to a workplace determination: see section 277.[31]

5.53 This guidance clearly contemplates that 'in relation to' can be used to indicate that a term has a different relational meaning for different purposes, by listing the specific contexts. The expression 'in relation to' is occasionally used in this way in

31 Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, 'Definitions' (Document release 4.0, May 2019) [10].

each of ss 9 and 761A of the *Corporations Act*. More commonly, definitions specify the meaning of a term 'in relation to' one subject matter only.

5.54 Another OPC Drafting Direction states that for 'relative terms, the old form that used "in relation to" one or more times is to be avoided wherever possible', and instead gives the following examples of appropriate drafting for relational definitions:

> ***relative*** of a person means:
>
> (a) the person's *spouse; or …
>
> ***quasi-ownership*** over land means:
>
> (a) a lease of the land: or …
>
> …
>
> ***provide***:
>
> (a) for entertainment—has the meaning given by section 32–6; and
>
> (b) for a fringe benefit—has the meaning given by subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986*.[32]

5.55 Other OPC drafting guidance acknowledges that relational definitions can contribute to complexity by producing ill-defined concepts. This can occur, for example, when a concept is defined relationally, but 'the drafter might fail to use the concept relationally in all cases'.[33] This guidance does not otherwise shed any light on when or how it is appropriate to use relationally defined terms.

5.56 The Victorian Law Reform Commission considered that relational definitions 'must be used cautiously' because they 'may imply that outside a particular context or case, the word is being used in its ordinary sense in the Act'.[34] If a term has been used in its ordinary sense in some parts of the Act, and in its defined sense in other parts of the Act, then it may not be the most appropriate defined term to use.

Suggested approach to relational definitions

5.57 The examples discussed below suggest that much of the complexity created by relational definitions may be attributable to their expression and their use. Relational definitions should therefore be used sparingly, and careful attention should be paid to their drafting and use.

5.58 When relational definitions are used, it is preferable to use a defined term only in relation to the subject matter specified in the definition. Alternatively, it should be clearly indicated to the reader in each provision in which the term appears, whether or not the term is being used in its defined sense.

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32 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006) 24.

33 Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (n 1) [53].

34 Victorian Law Reform Commission (n 2) 126.

5.59 The examples 'of' and 'for', discussed further below, also illustrate the importance of considering whether definitions should be repealed or amended when the operative provisions that use them are repealed or amended. Undertaking this exercise may be made more difficult by the existence of delegated legislation which may also rely on those defined terms. However, this only serves to highlight the importance of carefully considering whether, and if so how, to define a term in an Act.

5.60 Many relational definitions in the *Corporations Act* use what OPC Drafting Direction 1.8 describes as 'the old form', as noted above. For example:

> ***public document***, in relation to a body corporate, has the meaning given by section 88A.[35]

5.61 The *Corporations Act* contains 318 defined terms that use the expression 'in relation to' in a way that qualifies the definition — typically in the form 'X, in relation to Y, means…'. Section 9 contains 131 definitions expressed to be 'in relation to' something and the phrase 'in relation to' itself appears 179 times in s 9. In s 761A of the *Corporations Act*, 30 defined terms are in the form 'X in relation to Y' and the phrase 'in relation to' appears 46 times.

5.62 Other formulations are also used to create a relational definition. Examples include 'investment', which is defined differently depending on whether the investment is 'in' one of a number of different financial products.[36]

5.63 A number of relational definitions appear to be used to deal with the possessive case. One such example is 'a person's lawyer':

> ***lawyer*** means a duly qualified legal practitioner and, in relation to a person, means such a practitioner acting for the person.[37]

5.64 Relational definitions are sometimes 'doubly relational', requiring two criteria to be satisfied before a reader can conclude that the term is being used in its defined sense. The term 'of', discussed below, is one example. A further example is the definition of 'trade':

> ***trade***, in relation to financial products, in relation to a financial market, includes:
>
> (a) make or accept on that financial market an offer to dispose of, acquire or exchange the financial products; and
>
> (b) make on that financial market an offer or invitation that is intended, or may reasonably be expected, to result in the making or acceptance of an offer to dispose of, acquire or exchange the financial products. [38]

5.65 Doubly relational definitions create complexity by adding yet one more step to the process of reasoning to determine if a term is being used in its defined sense.

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35 *Corporations Act 2001* (Cth) s 9.
36 Ibid.
37 Ibid.
38 Ibid.

In such cases, careful expression that demonstrates clearly how the defined term is used becomes even more important.

5.66 Another awkward example of a relational definition in the *Corporations Act* is the word 'law':

> ***law*** of a State or Territory means a law of, or in force in, the State or Territory.
>
> Note: This definition does not affect the meaning of law when used otherwise than in a phrase such as 'law of a State or Territory'. Examples of such a use is in the phrase 'any provision of any law' in section 100A and the phrase 'law of the Commonwealth' in section 156.[39]

5.67 This note is a welcome clarification of some circumstances in which this relational definition does not apply. However, it also demonstrates the difficulties that arise with relational definitions, especially for terms that are used as commonly as 'law'. A preferable solution may be to include the words 'or in force in' in each provision that refers to a 'law of a State of Territory'.

5.68 In the ALRC's view, relational definitions that define a term by illustrating its use in context (usually in a full sentence) are to be preferred over the form that simply uses the expression 'in relation to'. These have the benefit of making the relational aspect of the definition clearer and more closely aligning the definition of the term with its use. As the examples below demonstrate, the expression 'in relation to' is vague and makes it more difficult for a reader to discern if a term is in fact being used in its defined sense.

5.69 An example of the preferred form being used in s 9 of the *Corporations Act* is the definition of 'on-market':

> ***on-market:*** a transaction of any kind is an on-market transaction if it is effected on a prescribed financial market and is: …

5.70 This form of expression has the benefit of making it clear that 'on-market' takes on its meaning when used with regard to a transaction that is effected on a prescribed financial market.

5.71 A further example is the definition of 'substantial holding' in s 9:

> ***substantial holding:*** a person has a ***substantial holding*** in a body corporate, listed registered scheme or listed notified foreign passport fund, if: …

5.72 The relational aspect of the definition is clearer in this form than if it were expressed as 'substantial holding, in relation to a body corporate, means …'.

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39 Ibid.

Commonly used terms defined relationally in section 9

5.73 The table in **Appendix C.3** contains examples of commonly used or understood terms that are defined by s 9 of the *Corporations Act* but are not used in their defined sense throughout the whole Act. As discussed in the table, several of the terms appear to have been carried over into the *Corporations Act* from the *Corporations Act 1989* (Cth), having been introduced to that Act in 1989 or by amendments in 1990. This includes the defined terms 'for', 'have', 'hold', and 'of'. Their definitions may therefore reflect drafting practice from that time that may not be consistent with modern drafting practice. Further, the purpose of defining several of the terms is not entirely clear, or is at least questionable, such that the Act may be simpler if some of the definitions were removed from the Act.

5.74 With the exception of the defined terms 'for' and 'of', which are discussed further below, the ALRC has not formally recommended repealing all of the definitions at **Appendix C.3** from the *Corporations Act* at this stage of the Inquiry for two principal reasons. First, the policy grounds for including the definitions in the Act are generally not readily apparent. Accordingly, the ALRC is not in a position to recommend any consequential changes that might be necessary to achieve the object of the legislation if the definitions were to be removed. Secondly, it is possible that any number of instruments made under the *Corporations Act* (such as legislative instruments, individual relief instruments, and licence conditions) might use these terms, relying on the definitions contained in the Act. By virtue of s 13(1)(b) of the *Legislation Act*, expressions used in an instrument have the same meaning as in its enabling legislation. It has not been feasible to date for the ALRC to search or analyse such instruments comprehensively to determine whether removing the definitions might be problematic in this regard. This highlights the complexity that is caused when definitions are introduced with an unclear purpose and scope of application: it becomes very difficult to identify the implications of any proposed amendment to the definitions, such that the Act may remain overly cluttered with unnecessary definitions that complicate the task of interpretation. In any event, the examples and arguments in this section support the principles that defined terms should be minimised to the extent practicable and, where used, given a single meaning.

Terms defined 'in relation to financial products'

5.75 Section 9 of the *Corporations Act* contains six terms which are defined 'in relation to financial products'. Three of those terms ('acquire, 'dealing', and 'dispose') are expressed to have the same meaning when used in a provision outside Chapter 7 of the Act as they have in Chapter 7. Three other terms ('of', discussed in greater detail below, 'quotation', and 'trade') are not expressed in the same way. Instead their full definitions are set out in s 9 and apply for the purposes of the whole Act (including Chapter 7).

5.76 As will be discussed in **Chapter 7** of this Interim Report, the term 'financial product' in Chapter 7 of the *Corporations Act* is a complex definition, which itself comprises many defined terms, including terms that are used in parts of the

Corporations Act outside Chapter 7. For provisions that refer to particular types of financial products (such as securities) and are not otherwise expressed as applying to 'financial products' more generally (for example by way of an application provision), terms defined 'in relation to financial products' require the reader to consult the complex definition of 'financial product' in the course of forming a view whether the term is in fact being used in its defined sense.

5.77 In the case of 'dispose', the purpose of defining the term in relation to financial products in paragraph (a) of the definition in s 9 is to distinguish that meaning from a different meaning of the term for the purposes of Chapter 6 (Takeovers). As discussed so far, ideally terms should have only one definition throughout an Act, and so it would have been preferable if a different term had been adopted in one of these contexts.

5.78 'Dealing' in financial products is defined in s 766C for the purposes of Chapter 7 of the *Corporations Act*. That definition applies Act-wide by virtue of s 9. However, the word 'dealing' is used in an undefined sense outside of Chapter 7 of the *Corporations Act* in several different ways.[40] In addition, it is unclear whether the term 'dealing' is used in its defined sense when it relates to a particular type or subset of financial products. For example, s 563A(2) refers to 'dealing in shares in the company'. As securities, shares are a financial product. It is unclear, as a matter of statutory construction, whether this reference to 'dealing in shares' is a reference to 'dealing in a financial product' so as to attract the definition of 'dealing' in s 766C.

5.79 'Acquire' is defined by s 761A of the *Corporations Act* to have a meaning affected by s 761E, and is a term that appears to be used multiple times in relation to financial products outside of Chapter 7 of the Act.[41] One consultee noted that the term 'acquire' is used extensively throughout Chapter 6 of the Act (relating to takeovers) in its ordinary sense. A reader may nonetheless need to confirm whether, on any given occasion, 'acquire' is used in relation to a financial product.

5.80 The fact that these definitions apply for the purposes of the whole *Corporations Act* means that readers must be conscious of whether the terms are being used in their defined sense or not. The concept of a 'financial product' is complex and captures a wide range of other concepts (such as shares, by virtue of their being 'securities'), such that it will not always be obvious when a term is being used in its relational sense.

5.81 This discussion again serves to illustrate that caution should be exercised when defining terms in a relational sense, particularly when they are used in relation to a complex concept (such as 'financial product').

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40 See, for example, s 204E(2)(b), which uses the expression 'dealings with other people' and s 210(a), which uses the expression 'dealing at arm's length'.

41 See, for example, the definition of 'investment' in ss 9, 16(1)(b), and 53(h).

The defined terms 'for' and 'of'

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

5.82 The terms 'for' and 'of' are two commonly used terms that are defined in s 9 of the *Corporations Act*. 'For' is defined as follows:

> ***for***, in relation to a fee or tax, includes in respect of.

5.83 The word 'for' is used over 9,000 times in the *Corporations Act*. The words 'fee' or 'fees' appear a total of 376 times. Closer analysis suggests that the word 'for' may be used 'in relation to a fee' in only 25 sections. A list of sections in which the word 'for' might be used in its defined sense and a relevant excerpt from those sections is at **Appendix C.4**. The term 'for' does not appear to be used in relation to 'a tax' at all in the *Corporations Act*.

5.84 The current definition of 'for' was inserted into the *Corporations Act 1989* (Cth) in 1990 by the *Corporations Legislation Amendment Act 1990* (Cth).[42] The Explanatory Memorandum to the relevant Bill does not discuss the defined term 'for'. Examining the substantive provisions introduced by that Act, however, helps to understand the definition's apparent purpose. Part 7 of the *Corporations Legislation Amendment Act 1990* (Cth), headed 'Imposition of Fees and Taxes', introduced the ability for fees to be payable 'for a chargeable matter' and inserted Part 9.10 into the Corporations Law so as to allow regulations to prescribe a 'fee for a chargeable matter'.[43] This had the effect of re-establishing the basis on which fees were payable under the *Corporations Act 1989* (Cth) to reflect the Act's changed constitutional foundation.[44]

5.85 The words 'in respect of' have been held to be of wider import than the word 'for'. The term 'in respect of' may therefore have been included in the definition of 'for' in order to give that term a wider meaning when used as part of the expression 'for a chargeable matter'. As discussed in **Chapter 4**, the term 'chargeable matter' is defined in the *Corporations Act* but not used. 'Chargeable matter' is, however, defined in the *Corporations (Fees) Act 2001* (Cth) which now contains equivalent provisions to those introduced in 1990 at the same time as the definition of 'for'. If (notwithstanding the legislative history outlined above) the definition of 'for' were thought to be necessary for the purposes of any of the 25 sections in which it may currently be used in its defined sense in the *Corporations Act*, then the words 'or in respect of' should be added to each of those provisions at the same time as repealing the definition of 'for'.

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42 *Corporations Legislation Amendment Act 1990* (Cth) sch 1.
43 Ibid pt 7 sch 1.
44 Explanatory Memorandum, Corporations Legislation Amendment Bill 1990 (Cth) [133]–[134].

5.86 The *Corporations (Fees) Act 2001* (Cth) adopts the definition of 'for' (and other terms) from the *Corporations Act*.[45] If the definition of 'for' is removed from the *Corporations Act*, then (if considered necessary) the words 'or in respect of' could be inserted into each of the few provisions of the *Corporations (Fees) Act 2001* (Cth) in which the word 'for' is used in that sense.

5.87 The word 'of' is defined in s 9 of the *Corporations Act* as follows:

> ***of***, in relation to financial products, means, in the case of interests in a managed investment scheme, made available by.

5.88 The word 'of' is used over 36,000 times in the *Corporations Act*, but to conclude whether it is being used in its defined sense means determining whether it is being used in relation to interests in a managed investment scheme and even then only when those interests are a financial product. As discussed in **Chapter 7** of this Interim Report, 'financial product' is itself a complex defined term. It is initially unclear from the definition whether the word 'of' is being defined when it appears immediately before or after the words 'financial product', or immediately before or after 'interests in a managed investment scheme' or something else. If the definition were intended to apply when the word 'of' follows 'financial product' then the expression 'financial product(s) of' would be read as though it were 'financial product made available by'. It would not make sense to replace 'of' with 'made available by' where 'of' preceded the words 'financial product'.

5.89 Limiting the analysis to Chapter 7 of the *Corporations Act* as the part of the Act where the term is most likely to be used in relation to a financial product that consists of interests in a managed investment scheme, the term is potentially used in its defined sense in only 8 sections, as outlined further below.

5.90 The defined term 'of' appears to have been first defined by s 9 of the *Corporations Act 1989* (Cth), and was not defined in the predecessor *Corporations Act 1981* (Cth). The definition provided:

> 'of', in relation to securities, means, in the case of prescribed interests, made available by.

5.91 That definition has subsequently been amended to reflect changes in terminology from 'securities' to 'financial products',[46] and 'prescribed interests' to 'managed investment schemes'.[47] The term's amendment history suggests that the definition of 'of' has been amended only to reflect changing terminology and without regard to its necessity.

5.92 The concept of 'securities' in the *Corporations Act 1989* (Cth) was narrower than the present definition of 'financial product' in the *Corporations Act*. Securities included, for example, shares, debentures, and 'prescribed interests made available

45 *Corporations (Fees) Act 2001* (Cth) s 4(2).
46 *Financial Services Reform Act 2001* (Cth) s 249.
47 *Managed Investments Act 1998* (Cth) sch 2 item 20.

by' a body.[48] In instances where the Act used the expression 'securities of a body', the concept of shares or debentures could be substituted for 'securities' and the expression would be consistent with correct usage. For example, it makes sense to refer to shares *of* a body or debentures *of* a body. 'Prescribed interests' was defined in such a way that it would not be consistent with correct usage, however, to refer to 'prescribed interests of a body'. This is recognised by the definition of securities in s 92 which used the expression 'prescribed interests made available by' a body, and not 'prescribed interests of' a body.

5.93 In Chapter 7 of the *Corporations Act*, the term 'of' is potentially used in its defined sense in eight sections.[49] Three examples are outlined in **Table 5.2** below (with emphasis added). It may also, potentially, be used in its defined sense outside of Chapter 7. The word 'of' is used over 27,000 times in provisions of the *Corporations Act* outside of Chapter 7, including in many provisions which relate to things that are financial products (such as securities and interests in a managed investment scheme). This means that identifying every instance of its defined use would be a difficult exercise.

Table 5.2: Example uses of the word 'of' in the Corporations Act

Section	Text of provision
1012DA(11)(c)	(11) The regulated person does not have to give the client a Product Disclosure Statement if: … (c) the Product Disclosure Statement is for a financial product **of** the issuer of the relevant product that is in the same class of financial products as the relevant product.
1016B(3)(a)	… This section does not apply if the financial product to which the Product Disclosure Statement relates is: (a) a managed investment product **of** an Australian passport fund …
1012K(1)(a)	(1) ASIC may determine in writing that a number of different bodies are closely related and that their transactions should be aggregated for the purposes of this Subdivision. If ASIC does so: (a) an issue, sale or transfer of financial products **of** any other bodies is taken to also be an issue, sale or transfer of the financial products **of** each of the other bodies by those bodies; …

48 *Corporations Act 1989* (Cth) s 92.
49 *Corporations Act 2001* (Cth) ss 793C, 798C, 1012DA, 1012K, 1015B, 1016B, 1018A, 1101B.

5.94 In each of these examples, it can be seen how if the term 'financial product' was read as though it were 'interests in a managed investment scheme' then the word 'of' may be read to include the meaning of 'made available by' the 'issuer' (as in s 1012DA(11)(c)) or other person or body.

5.95 There are two reasons that even these contexts do not require that the word 'of' be defined. First, there are other products included within the definition of 'financial product' that do not fit comfortably with the language 'financial product of' a person or body, but for which the *Corporations Act* does not define the term 'of'. For example, one would not ordinarily refer to a 'contract of insurance of' an insurer. More typically in this context, one would use the term 'issued' or 'made available by' in place of the word 'of'. This is one example of a financial product which would not have been captured by the definition of 'securities' in the *Corporations Act 1989* (Cth). At the time of introducing the concept of 'financial products' into the *Corporations Act* in 2001, and repealing the predecessor concept of securities, the expression 'financial product' was substituted for 'securities' in the definition of 'of'. The definition was not further amended, however, to account for the range of financial products which, like prescribed interests in the case of securities, did not neatly fit within the expression 'financial product of' a body.

5.96 Secondly, and relatedly, it seems unlikely that a court interpreting a provision such as the examples outlined above would conclude that because the language used to describe a particular financial product did not neatly fit within the context of the provision that the Parliament intended a particular product be excluded. If there were any doubt, then the relevant provisions could be amended to include an additional subsection to the effect that: 'For the avoidance of doubt, a financial product is a financial product of an issuer [or other person as the case may be] if the financial product is made available by the issuer [or other person as the case may be].'

5.97 In the absence of a clear rationale for the term 'of' in the current *Corporations Act*, it seems unnecessary that the term be defined. Any benefits that it may bring are outweighed by the complexity created in requiring a reader to consider whether the very commonly used word is used in its defined sense or not. In reality, many people may not expect the term 'of' to be defined and simply overlook that fact. However, as a term defined for the purposes of the whole Act, it cannot be disregarded.

5.98 As noted above, it has not been feasible to date for the ALRC to search or analyse the myriad legislative and other instruments comprehensively to determine whether removing the definitions of 'for' and 'of' from the *Corporations Act* would affect any instruments made under the Act. In the event it was thought necessary to preserve the effect of the definitions for legislative instruments in force at the time of repealing the definitions, then saving provisions could be introduced for that purpose. This would also introduce an element of complexity by requiring any instrument in force at the time to be interpreted in accordance with the saving provisions. However, as delegated legislation or other instruments 'sunset' (cease operation) or are re-made, fewer instruments would be subject to the saving provisions over time.

Adopting this approach would also have the benefit that the definitions could simply be repealed from the *Corporations Act* and not apply to new instruments made under the Act.

5.99 If saving provisions were introduced, then they should not simply reproduce the definitions in their current form, but rather should express the definitions in as clear a form as possible by spelling out how the defined term and relational elements fit together.

Consistency with delegated legislation

5.100 Instruments should avoid defining terms inconsistently with their enabling legislation wherever possible. Section 13(1)(b) of the *Legislation Act* provides that ('unless the contrary intention appears') expressions used in a legislative instrument or notifiable instrument have the same meaning as in the enabling legislation. The *Acts Interpretation Act* provides that expressions used in an instrument (other than a legislative instrument, notifiable instrument, or a rule of court) have the same meaning as in the Act that authorises the making of the instrument.[50] Consequently, it is only when an instrument expressly defines a term to have a different meaning from its enabling legislation that any inconsistency will arise.

5.101 There appears to be a high level of consistency in the use of terminology between the *Corporations Act* and the *Corporations Regulations*. Only 16 terms are defined by both the Act and the Regulations. Of these, two definitions in the Regulations appear to be substantively unnecessary, because they define the term as having the same meaning as in the Act.[51] However, in each case, including the definition in the Regulations likely assists with navigability. Fourteen terms are given a different meaning for particular regulations than in the Act; many of these terms similarly have multiple different definitions in the Act, such as 'associate', 'participant', and 'property'.[52]

5.102 The definition of 'review fee' could be removed from the *Corporations Regulations* if an apparent drafting error were corrected in the *Corporations Act*. Section 9 of the *Corporations Act* defines 'review fee' as having the meaning given

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50 This provision is currently contained in s 26 of the *Acts Interpretation Act*. In the version of the *Acts Interpretation Act* that applies to the *Corporations Act* and the *ASIC Act* (that is, the version of the *Acts Interpretation Act* that was in force on 1 January 2005), an equivalent provision is contained in s 46(1)(b).

51 Reg 1.0.02 defines 'ABN' with slightly different wording than, but to the same effect as, the *Corporations Act*. Reg 7.5A.73 defines 'quarter day' as having the same meaning as in the Act, and includes a note with the content of the definition. Curiously, reg 7.9.01 defines 'amount' as including 'a nil amount', whereas s 9 of the Act defines 'amount' as including 'a nil amount and zero'. It is not clear whether omitting 'and zero' from the definition in reg 7.9.01 is intended to have any substantive effect, or whether the definition is unnecessary because in effect it replicates the definition in the Act.

52 See, eg, 'associate' in regs 7.6.01C, 7.11.01, 10.2.35; 'company' in reg 7.11.01; 'event' in reg 7.9.65; 'interest' in reg 7.7A.12B; 'investment' in reg 7.8.02; 'participant' in reg 9.12.03; 'property' in regs 5.3B.31, 7.1.17, 7.5.01, 7.8.07; 'relative' in regs 7.1.17, 7.5.01.

by s 5 of the *Corporations (Review Fees) Act 2003* (Cth). In fact, s 5 of that Act does not define or use the term 'review fee' (although the term appears in the section heading). Instead, s 4 of that Act defines 'review fee' as a fee that is imposed by s 5, which is an operative provision. The substantive effect of the apparent error in s 9 of the *Corporations Act* is unclear, partly because on several occasions the *Corporations Act* does not use the defined term 'review fee' but instead uses the phrase 'fees imposed under the *Corporations (Review Fees) Act*' or similar wording.[53] Similarly, reg 9.10.01 defines 'review fee' (for the purposes of that regulation only) as 'a fee imposed by s 5 of the *Corporations (Review Fees) Act*'. Two alternatives could simplify this concept and improve consistency, either by:

- amending s 9 of the *Corporations Act* such that the definition of 'review fee' refers to s 4, rather than s 5, of the *Corporations (Review Fees) Act*, removing the definition of 'review fee' from reg 9.10.01, and consistently using the term 'review fee' throughout the legislation; or
- removing the definition of 'review fee' from s 9 of the *Corporations Act*, and instead using the phrase 'fee imposed by s 5 of the *Corporations (Review Fees) Act*' throughout the legislation.

5.103 The definition of 'rules' in the *Corporations Regulations* highlights that the equivalent definition in the *Corporations Act* (see below) is not particularly intuitive, and might helpfully be amended. Regulation 7.1.04(10) defines 'rules' (for the purpose of one sub-regulation only) to refer to the rules of a market or clearing and settlement facility. It appears that the substance of that definition of 'rules' could be included in the relevant sub-regulation without adding undue length to the sub-regulation. In that case, the definition of 'rules' could be removed from the *Corporations Regulations*, improving consistency between the Regulations and the Act.

5.104 Section 9 of the *Corporations Act* defines the generic term 'rules' to refer to various rules of court. A number of more specific terms such as 'listing rules', 'derivative transaction rules', and 'financial benchmark rules' are defined to refer to other types of rules. In some provisions of the Act the term 'rules' does appear to refer to rules of court.[54] However, in a sizeable number of other provisions the term 'rules' is evidently used in a different sense (contrary to the definition), for example to refer to rules governing a market, the rules of common law and equity, and various rules in the *Bankruptcy Act 1966* (Cth).[55] It may be preferable to amend the defined term 'rules' to instead read 'rules of court' or similar, such that the generic term 'rules' could be left undefined to take on the apparent meaning in the context of each provision in which it appears. Some provisions in the *Corporations Act* already use a term such as 'rules of court', even though that term is not defined.[56]

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53 See, eg, *Corporations Act 2001* (Cth) ss 1531, 1364. In contrast, ss 347C and 1533 each use 'review fee' once, item 4.3 of the 'Small business guide' (Part 1.5) uses 'review fee' followed by a note to the *Corporations (Review Fees) Act*, and four sections (ss 601AB, 489AE, 601PB, 601PBC) use the phrase 'review fee in respect of a review date'.

54 See, eg, ibid ss 467, 475, 488.

55 See, eg, ibid ss 9 (definition of 'on-market'), 9 (definition of 'general law'), 553E, respectively.

56 See, eg, ibid ss 9 (definition of 'Corporations legislation'), 468, 472.

5.105 Furthermore, regulatory guidance and other guidance should use terminology that is consistent with the legislation to which it relates. However, given the distinct purpose and drafting style of guidance documents, this may not always be possible or desirable. The term 'responsible manager', for example, is a concept created by ASIC in regulatory guidance which is neither defined nor used in the *Corporations Act*. As will be discussed in **Chapter 8**, although the term may possibly be confused with other similar terms defined in the *Corporations Act* (such as 'senior manager' or 'responsible officer' defined in s 9), the term is relatively intuitive and aids understanding of the regulatory guidance in which it is used.[57]

5.106 Guidance from the Senate Standing Committee for the Scrutiny of Delegated Legislation states that 'key definitions central to the operation of the regulatory scheme' should be contained in Acts of Parliament,[58] and that:

> Instruments and their explanatory statements should be clear and intelligible to all persons interested in or affected by them, not only those with particular knowledge or expertise. Key terms should be clearly defined to remove any potential confusion or misunderstanding. Where the definition of a key term is sourced from the instrument's enabling legislation or another source of legislation, the relevant source provision should be cited in the instrument and its explanatory statement. This is particularly important where a term has a specific meaning within the context of a statutory scheme.[59]

5.107 Issues relating to legislative hierarchy will be examined further in Interim Report B.

Changes to defined terms or concepts by delegated legislation

5.108 Several defined terms within the *Corporations Act* are able to be changed, in a substantive sense, by way of delegated legislation (typically regulations). Put differently, the scope of a defined term can be changed by delegated legislation. This is often because defined terms are being used and altered to set the scope or boundaries of a particular aspect of regulation, as discussed in **Chapter 4**. Two particularly problematic definitions in this regard, 'financial product' and 'financial service' (from Chapter 7 of the *Corporations Act*), are discussed in **Chapter 7** of this Interim Report. More generally, definitions that can be changed by way of delegated legislation present a navigability challenge to readers because to understand the term a reader must first identify whether any delegated legislation in fact alters the term, and then interpret the defined term accordingly.

5.109 Delegated legislation is on occasion used, in effect, to determine which provisions of the *Corporations Act* use a particular concept or 'version' of that concept. For example, s 9 provides that 'affairs, in relation to a body corporate,

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57 See, eg, Australian Securities and Investments Commission, *AFS Licensing: Organisational Competence* (Regulatory Guide 105, April 2020).

58 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines* (Parliament of Australia, 1st ed, 2020) 27.

59 Ibid 15.

has, in the provisions referred to in section 53, a meaning affected by that section'. Section 53 provides:

> For the purposes of the definition of ***examinable affairs*** in section 9, section 53AA, 232, 233 or 234, paragraph 461(1)(e), section 487, subsection 1307(1) or section 1309, or of a prescribed provision of this Act, the affairs of a body corporate include …

5.110 One effect of this section is that regulations may prescribe additional sections in which the concept 'affairs of a body corporate' includes the matters listed in ss 53(a)–(k). This creates a particularly complex concept because a reader must:

- first, determine whether in a particular instance the term 'affairs' is used in relation to a body corporate;
- secondly, consult s 53 (assuming they are aware of the definition of 'affairs' in s 9) to determine whether the particular provision containing the term 'affairs' is listed there; and
- thirdly, if the particular provision is not listed in s 53, consult the *Corporations Regulations* to determine whether the particular provision is listed there. Currently, three provisions are prescribed by the Regulations for the purpose of s 53.[60]

5.111 The ALRC appreciates that delegated legislation can be an appropriate and helpful way to achieve flexibility in regulation generally. However, the number of sources that a reader must be aware of, and consult, to determine whether a particular meaning is given to the term 'affairs' in a particular instance in the *Corporations Act* appears unnecessarily complex.

5.112 Another definition that relies on delegated legislation in this way is 'participant'. This appears to be one of the most complexly constructed definitions in the *Corporations Act*.

60 *Corporations Regulations 2001* (Cth) reg 1.0.18.

Example: Definition reliant on delegated legislation

Section 9 of the *Corporations Act* provides:

> ***participant***, when used in a provision (***the relevant provision***) outside Chapter 7 in relation to a clearing and settlement facility or a financial market, has the same meaning as it has in Chapter 7 in relation to a clearing and settlement facility or a financial market, except that it does not include a reference to a recognised affiliate (within the meaning of that Chapter) in relation to such a facility or market unless regulations for the purposes of this definition provide that, in the relevant provision, it does include a recognised affiliate.

This definition is long, convoluted, includes multiple conditional statements and exceptions to exceptions, contains relational components (applying to particular provisions of the Act as well as particular subject matter), contains interconnected definitions (which are also relational), appears to be used to implement complex underlying policy decisions regarding scope, uses a relatively non-intuitive label, and relies on delegated legislation to determine which provisions apply which meaning of the term. In summary, it exhibits almost every type of definitional complexity identified in this Interim Report. In addition, s 9 does not provide a signpost that directs a reader to the term's Chapter 7 definition in s 761A. The definition in s 761A is itself long and complex, and again relies on delegated legislation to determine which provisions within Chapter 7 apply particular defined meanings of the term.

Amending definitions by legislative instrument

5.113 As discussed in **Chapter 4**, legislative instruments are used to notionally amend the *Corporations Act* in a number of ways that relate to the use of definitions. Consistency issues can arise when legislative instruments notionally amend terms that are defined by the *Corporations Act*.

Example: Notional amendment of a definition

ASIC Corporations (Disclosure Relief—Offers to Associates) Instrument 2017/737 (‘*Instrument 2017/737*’) notionally amends the definition of ‘senior manager’ in s 9 of the *Corporations Act* by substituting an alternative paragraph (a) of the definition for the purposes of Chapter 6D and Part 7.9. When the term ‘senior manager’ appears in Chapter 6D, the notional amendment to the definition applies to all persons. In contrast, when the term ‘senior manager’ appears in Part 7.9, the notionally amended definition applies only ‘in relation to a managed investment product and a foreign passport fund product’.[61]

According to the Explanatory Statement for *Instrument 2017/737*, it is intended ‘to correct a technical issue in the *Corporations Act* that arose from the replacement of the term “executive officer” with the term “senior manager” under the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*’.[62] The underlying purpose of that amendment to the definition is to ensure that exceptions to disclosure obligations in ss *708(2) and 1012D(9A) of the Corporations Act* apply in the case of issuing financial products to the director or secretary of a company, as was the case before the term ‘senior manager’ was introduced.[63]

5.114 This example illustrates the problematic inconsistencies that can be created when defined terms are notionally amended. In the example above, the term ‘senior manager’ takes on one meaning in Chapter 6D, another meaning in Part 7.9, and yet another meaning in the remainder of the *Corporations Act*. In addition, readers must keep in mind that ‘senior manager’ has four different defined meanings in s 9, depending whether it is used ‘in relation to’ a corporation, partnership, trust, or joint venture.

5.115 Inconsistent terminology for concepts could be reduced, and made more navigable, by reducing reliance on notional amendments to definitions in legislative instruments. In turn, this may require greater reliance on application provisions to determine scope (by exclusion or inclusion) and to exempt from obligations. This problem is discussed in greater detail in **Chapter 10** of this Interim Report.

61 *ASIC Corporations (Disclosure Relief—Offers to Associates) Instrument 2017/737*.
62 Australian Securities and Investments Commission, Explanatory Statement, *ASIC Corporations (Disclosure Relief—Offers to Associates) Instrument 2017/737* and *ASIC Corporations (Repeal) Instrument 2017/738*.
63 Ibid.

Consistency between related Acts

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

5.116 The greater the 'reach' of consistency in legislation, the simpler the task of the reader in understanding and applying its provisions. Accordingly, to the extent that it is practicable to define terms in the same way across multiple pieces of legislation, this goal should be pursued. However, it is much more difficult to achieve consistency of terminology between different Acts, than it is to achieve consistency within a single Act, for several reasons.

5.117 For example, each Act is drafted to suit particular purposes and policy settings. Drafting legislation to use terminology in a way that accurately gives effect to those purposes and policies is difficult enough, let alone at the same time trying to take into account the existing terminology already used in a number of other related Acts, particularly when that terminology may already exhibit significant inconsistencies.

5.118 In addition, it may be difficult to identify the specific set of 'related' pieces of legislation.[64] There are innumerable interactions between the more than 1,200 Commonwealth Acts currently in force, and the level of interaction between any two Acts will likely be unique. Acts cannot be neatly categorised into discrete groups of related Acts. For example, the definition of 'financial services laws' in s 761A of the *Corporations Act* provides a long list of legislation and yet includes a 'catch-all' reference to 'any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services'.

5.119 Accordingly, this principle is couched in relatively modest terms in relation to its scope, and is targeted more at particular terms in key pieces of legislation than at wholesale reform of the statute book. For this reason, the ALRC has focused in this Interim Report on particular key terms such as 'financial product' (see **Chapter 7**) as an example of how this type of complex and 'delicate' reform might be undertaken on a case-by-case basis. If, over time, the use of definitions generally becomes more closely aligned with principles set out in current drafting guidance and in this Interim Report, it may become easier to achieve greater consistency between Acts.

5.120 Most legislative drafting guidance does not refer to consistency of terminology between different pieces of legislation. As an exception, European Union guidance provides that 'terminology used in a given Act shall be consistent both internally and

64 See, eg, the discussion in Pearce (n 26) [3.43].

with Acts already in force, especially in the same field'.[65] The Victorian Law Reform Commission also considered that drafters should

> endeavour wherever possible to use a definition which is consistent with the way in which the word is used in other Acts. If the definition is only suitable in one Act, that may be an indication that a word is being defined in an unusual way and the definition should be reconsidered.[66]

5.121 It is noteworthy that the language used by the Victorian Law Reform Commission is also relatively modest, urging drafters only to 'endeavour' to achieve this goal.

5.122 The concept of a 'small business' is defined differently in numerous Commonwealth Acts. Several definitions are summarised in the table at **Appendix C.5**.[67] As the summaries show, definitions generally vary by reference to indicators of the size of a business, such as revenue, assets, or number of employees. Part 1.5 of the *Corporations Act* also contains a 'Small business guide' which does not have the status of law but 'summarises the main rules in the [*Corporations Act*] that apply to proprietary companies limited by shares—the most common type of company used by small business'.[68] The term 'small business' is not defined for the purposes of the guide.

5.123 Stakeholders have recognised the varying definitions of 'small business' in Commonwealth legislation as a source of potential confusion and complexity. The Australian Small Business and Family Enterprise Ombudsman has noted, for example, that statistical reporting and understanding the contribution of small businesses to the Australian economy is 'complicated' by the lack of 'a consistent definition of small business across government'.[69] Achieving uniformity, however, would be made difficult by the different policies underpinning each piece of legislation as well as the wide range of business types and structures that might, in the ordinary sense of the term, be considered a small business.

5.124 The phrase 'business day' is also defined differently across Commonwealth Acts. Section 2B of the *Acts Interpretation Act* defines 'business day' for the purposes of Commonwealth legislation generally, while some other Acts provide definitions specific to those Acts. This includes the *Corporations Act* (s 9), the *NCCP Act* (s 9) and the *National Credit Code* (s 204), the *Competition and Consumer Act* (in numerous provisions), and the *PPS Act* (s 10).

5.125 The definition of 'business day' in the *Acts Interpretation Act* was inserted by the *Acts Interpretation Amendment Act 2011* (Cth).[70] The Explanatory Memorandum

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65 European Union (n 5) Guideline 6.
66 Victorian Law Reform Commission (n 2) 124.
67 The definition of 'small business' is also discussed in the context of the definitions of 'retail client' and 'wholesale client' in **Chapter 12**.
68 *Corporations Act 2001* (Cth) pt 1.5.
69 Australian Small Business and Family Enterprise Ombudsman, *Small Business Counts* (2020) 4.
70 *Acts Interpretation Amendment Act 2011* (Cth) sch 1 item 4.

to those amendments noted that there were 'over 200 references to "business day" in Commonwealth legislation, many with differing definitions'.[71] The Explanatory Memorandum also stated that the *Acts Interpretation Act* 'is a logical repository for this definition and will ensure that it can be applied consistently across the statute book'.[72] At the same time as introducing the definition of 'business day', the *Acts Interpretation Amendment Act 2011* (Cth) also repealed pre-existing definitions of 'business day' contained in 14 Commonwealth Acts. The definitions of 'business day' contained in the *Corporations Act*, *NCCP Act*, *PPS Act*, and *Competition and Consumer Act* were not repealed — the policy reason for retaining those bespoke definitions is not clear.

5.126 The *Privacy Act 1998* (Cth) ('*Privacy Act*') and the *NCCP Act* effectively define the term 'consumer credit' differently. Section 5 of the *National Credit Code* defines the 'provision of credit to which this Code applies', and various exclusions are contained in the Code, in other provisions of the Act, and in regulations. Section 6 of the *Privacy Act* contains a similar definition of 'consumer credit', but no provision is made for exclusions. Consequently, a particular loan might qualify for consumer protection under the *Privacy Act*, but not fall within the *NCCP Act*. The definition of 'consumer credit' in the *Privacy Act* is intended to be broader than the predecessor definition of 'credit' in that Act by including 'credit obtained for the purposes of investing in residential property and related purposes' in addition to credit for 'personal, family or household purposes' in the former definition.[73] The purpose of extending the definition in this way was to match a similar extension of *NCCP Act* protections to the same type of credit transactions.[74] Notwithstanding that purpose, the definitions were not made identical. In practice, the difference could result in unnecessary compliance burdens, or other unintended consequences.

Cross-references to definitions in other Acts

5.127 When definitions are consistent between different Acts, definitions that cross-refer to the content of a definition in another Act are undesirable from a navigability perspective. However, cross-references will sometimes be preferable to attempting to replicate in full a complex definition from another Act.

5.128 For example, a cross-reference may be expressed in the format:

> ***professional accounting body*** has the same meaning as in the ASIC Act.[75]

5.129 'Professional accounting body' is defined in s 5(1) of the *ASIC Act* as 'a body prescribed by the regulations for the purposes of this definition'. Regulation 2AC of the *ASIC Regulations* currently list three organisations for this purpose. A reader

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71 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) [20].
72 Ibid.
73 Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth) 102.
74 Ibid.
75 *Corporations Act 2001* (Cth) s 9.

therefore needs to check three sources to understand the meaning of the term in the *Corporations Act*.

5.130 The ALRC notes that a cross-reference is a more difficult and time-consuming mechanism for a reader than re-stating the relevant definition in full in each relevant Act. However, there are also benefits of using a cross-reference. For example, amendments to the definition in the other Act will ordinarily flow through to the referring Act, assisting to maintain consistency of terminology over time. It would also be possible for drafting offices to maintain a list of definitions in different Acts that are intended to be consistent with each other for this purpose, but that is necessarily a more cumbersome and vulnerable process. Regardless of which mechanism is used, it is important for drafters to actively consider whether or not amendments to one definition are appropriate in the other Act — it may not always be the case that consistency should be maintained. However, the general desirability of consistency of key terms between related Acts should be considered in making that decision.

5.131 OPC guidance supports replicating definitions in full in each relevant Act, even if that requires repeating a large amount of text.[76] However, if it is proposed that a term be used consistently across the statute book, it may be appropriate for the term to be defined in the *Acts Interpretation Act*.[77]

5.132 The Victorian Law Reform Commission suggested that including a cross-reference to the definition in the other Act is a 'deceptively simple' drafting technique that should not be used because the effect is to 'force the reader to look elsewhere'.[78] Similarly, New Zealand guidance suggests avoiding the creation of 'a chain of definitions that requires a reader to bounce between definitions or — or even different legislation — to understand a concept'.[79] An exception is made for terms that are defined for all Acts in the *Legislation Act 2019* (NZ): 'It is not necessary to restate these definitions in new legislation.'[80]

5.133 The legal effect of using a cross-reference to a definition in another Act must be carefully considered on a case-by-case basis.

5.134 For example, UK drafting guidance suggests that cross-referring to (or 'attracting') a definition from another Act will not automatically apply (or 'pick up') the case law on the meaning of that defined term in the other Act. Similarly, it suggests that future amendments to one definition will not necessarily result in automatic amendments to the other Act. In both cases, the legal effect 'will ultimately be a question of construction' and will depend largely on context.[81]

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76 Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, 'Definitions' (Document release 4.0, May 2019) [51]–[52].

77 Ibid [45]–[47]; Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (2014) 5.

78 Victorian Law Reform Commission (n 2) 124.

79 Parliamentary Counsel Office (NZ) (n 7).

80 Legislative Design and Advisory Committee (NZ), *Legislation Guidelines* (2021) [13.2].

81 Office of the Parliamentary Counsel (UK) (n 6) [4.1.10]–[4.1.15].

5.135 One consultee suggested to the ALRC that a new dedicated Act could be created to contain all defined terms that are to be consistent across corporations and financial services legislation. Such an Act might be analogous to a 'Common Terms Agreement' that accompanies, and is used to interpret, a suite of related transactional agreements between private parties in commercial matters. It would highlight the goal of consistency in terminology in related Acts, and would provide transparency as to the level of consistency achieved at any one point in time. However, it may also create a challenge for navigability by creating an extra source of definitions that would need to be kept in mind, and consulted, by a reader. Furthermore, the selection of related substantive Acts to which the new interpretive Act should apply may also be difficult.

5.136 It appears that many cross-referring definitions currently in the *Corporations Act* refer to particularly complex definitions that may be difficult to replicate in full in the *Corporations Act*. For example, s 9 of the *Corporations Act* provides:

> ***aggregated turnover*** has the same meaning as in the Income Tax Assessment Act 1997.

5.137 The definition of 'aggregated turnover' in the *ITA Act 1997* is a complex definition including many defined terms within it (creating an interconnected definition, discussed in **Chapter 6**). If that definition were to be replicated in full in the *Corporations Act*, it would arguably require replicating (or cross-referring to) each definition within the primary term. Arguably, this is a circumstance in which the simplest solution is indeed for the *Corporations Act* to cross-refer to the definition contained in the other Act. However, as discussed in **Chapter 4**, the term 'aggregated turnover' is only used once in a single section of the *Corporations Act*,[82] and so an in-text cross-reference (for example, the words 'within the meaning of the *Income Tax Assessment Act 1997*') could be inserted after the words 'aggregated turnover' in that section. The definition of 'aggregated turnover' could then be removed from s 9.

5.138 As noted above, s 9 of the *Corporations Act* defines the term 'child' by reference to its meaning in the *Family Law Act 1975* (Cth).

5.139 The definition of a 'child' of a person in the *Family Law Act 1975* (Cth) is 'affected by' the five complex provisions in Part VII Div 1 Subdiv D of that Act. Again, this is a complex definition that would be very difficult to replicate in full in the *Corporations Act*.

82 *Corporations Act 2001* (Cth) s 1274.

'Freezing' of the *Acts Interpretation Act*

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).

5.140 The *Acts Interpretation Act* is a generally applicable Act that applies to the interpretation of Commonwealth legislation. The *Acts Interpretation Act* contains several rules of statutory interpretation and in Part 2 defines 87 terms or concepts for the purposes of any Commonwealth Act.

5.141 The *Acts Interpretation Act* applies to the *Corporations Act* and *ASIC Act*. However, as discussed in **Background Paper FSL4**,[83] provisions in both Acts provide effectively that the application of the *Acts Interpretation Act* is 'frozen' as at 1 January 2005. This presents a challenge to a reader because not only must they recall (as perhaps only most legally trained readers would) that they must keep the *Acts Interpretation Act* in mind, but they must also be aware of the 'freezing' provisions and then locate the *Acts Interpretation Act* as it was in force on 1 January 2005.

5.142 Practical difficulties that arise from 'freezing' the *Acts Interpretation Act* include:

- uncertainty as to whether the 'frozen' *Acts Interpretation Act* applies to all delegated legislation made under the *Corporations Act* and under the *ASIC Act*;
- time and cost for ASIC in repeatedly amending its instruments that delegate certain of its functions, duties, and powers under the *Corporations Act* and the *ASIC Act*;
- amendments to the *Acts Interpretation Act* must be replicated in each of the *Corporations Act* and the *ASIC Act* when they are intended to apply to those Acts;
- inconsistent rules regarding the effect of legislative examples; and

83 Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021).

- increased time, cost, and difficulty for administrators and legislative drafters when considering and implementing legislative and policy changes.[84]

5.143 The stated rationale in explanatory materials relating to the 'freezing' provisions in the *Corporations Act* and *ASIC Act* is not compelling. As discussed in **Background Paper FSL4**, the *Corporations Act* and *ASIC Act* are two of eight Commonwealth Acts that are subject (or parts of which are subject) to a point-in-time version of the *Acts Interpretation Act*. All of those Acts are supported, at least in part, by a referral of matters under s 51(xxxvii) of the *Constitution*. Seven other Acts, however, are also supported by a referral of matters from the states but are *not* subject to a 'frozen' *Acts Interpretation Act*. This includes, for example, the *NCCP Act.* It seems particularly anomalous that one financial services legislation regime (contained in the *Corporations Act* and *ASIC Act*) is subject to a different version of the *Acts Interpretation Act* than is another regime (contained in the *NCCP Act*). This analysis, which is expanded upon in **Background Paper FSL4**, suggests that the existence of the referrals from the states to the Commonwealth does not necessitate that the *Acts Interpretation Act* be 'frozen' for the purposes of the *Corporations Act* and *ASIC Act*.

5.144 In addition, the Commonwealth Parliament is able to achieve an identical result to amending the *Acts Interpretation Act*, albeit less efficiently, by directly amending the *Corporations Act* itself. For example, up until 2011, the word 'document' was defined consistently in each of the *Corporations Act* and the *Acts Interpretation Act*. In 2011, the definition of 'document' in the *Acts Interpretation Act* was amended so as to resolve apparent drafting issues and to modernise the language used.[85] Consequently, the definition in each of the *Corporations Act* and the *Acts Interpretation Act* became inconsistent. It was not until 16 December 2020 that the definition of 'document' in the *Corporations Act* was amended such that it is now identical to the current *Acts Interpretation Act* definition.[86] In the context of other insolvency reforms and the COVID-19 pandemic, this amendment was made 'to ensure that the reforms apply to all information, including information that is not in a paper or material form'. If the application of the *Acts Interpretation Act* to the *Corporations Act* were not 'frozen', then the definition of 'document' could have been repealed from the *Corporations Act*, and the amendments to the *Acts Interpretation Act* definition would have applied to the *Corporations Act* commencing in 2011, rather than waiting for the Commonwealth Parliament to achieve the same result by making an identical amendment to the *Corporations Act* some nine years later.

5.145 One practical difference in this regard is that amendments to the *Corporations Act* by the Commonwealth Parliament are subject to the requirements of the intergovernmental agreement relating to the referrals, the Corporations Agreement 2002, whereas amendments to the *Acts Interpretation Act* are not. Clause 506 of the Corporations Agreement provides that the Commonwealth will not introduce a bill to

84 Ibid.
85 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) [13]–[14].
86 *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth).

repeal or amend the *Corporations Act* (or other specified Acts, including the *ASIC Act*) without first consulting, and obtaining the approval of, the forum established under the Agreement. The Commonwealth is also required to release exposure draft legislation and notify the forum about other legislation that would 'alter the effect, scope or operation' of the *Corporations Act* or *ASIC Act*.[87] Clause 507 of the Corporations Agreement also sets out several broad exemptions to the consultation and approval processes in clause 506, including 'financial products and services' and any other subject-matters agreed by the forum.[88]

5.146 Given the broad carve-outs from the requirement for state approval under clause 506 of the Corporations Agreement 2002, the Commonwealth would appear to have considerable scope to amend interpretive provisions in the *Corporations Act*. In doing so, the Commonwealth could achieve the same effect as amending the *Acts Interpretation Act*. To the extent the Commonwealth considered that repealing the 'freezing provisions' required consultation and approval under the Corporations Agreement, it is also apparent that the forum established under the Agreement could either dispense with the need for approval of an amendment that would repeal the *Acts Interpretation Act* 'freezing provisions' or grant its approval after the processes in the Agreement were followed.

5.147 Absent any cogent argument that amendments to the *Acts Interpretation Act* may greatly affect the scope of the matters referred to the Commonwealth, or have some other unforeseen effect, there seems little reason that the *Acts Interpretation Act* should remain 'frozen' for the purposes of the *Corporations Act* and *ASIC Act* but not the *NCCP Act*. Given the Commonwealth can effectively achieve the same outcome as amending the *Acts Interpretation Act* by amending the definitions of terms in the *Corporations Act* and *ASIC Act* themselves, and the Commonwealth has previously amended ss 5C and 5A so as to change the date of 'freezing', repealing the provision would appear to be within the Commonwealth's legislative power as underpinned by the states' referral.

5.148 At the least, if the sections were not repealed then the convoluted language in ss 5C and 5A should be amended to insert the date of 1 January 2005, either in the substantive provision or by a note, so as to save readers needing to determine the date on which s 4 of the *Legislative Instruments (Transitional and Consequential Amendments) Act 2003* (Cth) commenced. Commercially produced annotated versions of the legislation commonly include a note indicating the date. However, the authoritative legislation produced by the Commonwealth does not. To further aid readers, a version of the *Acts Interpretation Act* as in force on 1 January 2005 could be made available, potentially via ASIC's website, or could be made more readily accessible when viewing the *Corporations Act* or the *ASIC Act* on the Federal

87 The Corporations Agreement 2002 (compilation as at July 2017 prepared by the Department of the Treasury (Cth)) cls 509, 516.

88 For a brief summary of the consultation and approval requirements, see Office of Parliamentary Counsel (Cth), Drafting Direction 4.3, 'Amendments requiring consultation with States and Territories under an intergovernmental agreement' (Document release 3.0, October 2012) [8]–[10].

Register of Legislation.[89] Commercial publishers that prepare compilations of the corporations legislation, usually published yearly, regularly include a copy of the *Acts Interpretation Act* as in force on 1 January 2005 as part of the publication.

5.149 If **Recommendation 5** were implemented, then defined terms in the *Acts Interpretation Act* that are duplicated in the *Corporations Act* (such as 'document') should be repealed (as contemplated by **Recommendation 6**). Similarly, other interpretive rules that are duplicated in both the *Acts Interpretation Act* and *Corporations Act* could also be repealed.

89 This could be done, for example, by providing a link to the consolidated version of the Act as was in force on 1 January 2005.

6. Design of Definitions

Contents

Introduction

6.1 This chapter discusses challenges and principles relating to the design of legislative definitions. This chapter builds further on the principles outlined in **Chapter 4** regarding when to use defined terms, and principles for the consistent use of definitions outlined in **Chapter 5**.

6.2 The decision to define a term, and the extent to which the definition is used consistently, affect readability and navigability. This chapter suggests ways in which legislation can be made more readable and navigable when using definitions. These measures would reduce unnecessary complexity in corporations and financial services legislation.

6.3 Topics discussed in this chapter include: limiting the use of interconnected definitions; using 'intuitive labels' for defined terms; making clear whether definitions are exhaustive or inclusive; and appropriate use of technology-neutral language in definitions. The chapter concludes with recommendations for reform relating to the navigability of definitions, including a comprehensive glossary of defined terms, a provision indicating the location and application of dictionary provisions, and using the word 'definition' in dedicated definitional provisions. It is further recommended that Extensible Markup Language ('XML') technology be utilised to enhance the navigability of definitions, which may also improve the navigability of legislation more generally. The final recommendation relates to user research that could enable further improvements to the Federal Register of Legislation — the authoritative source of all Commonwealth legislation.

6.4 The ALRC invites stakeholder feedback on the definitional principles discussed in this chapter (see **Question A2** in **Chapter 4** of this Interim Report).

Readability

Interconnected definitions

Principle: Interconnected definitions should be used sparingly.

6.5 A definition that contains other defined terms can be referred to as an interconnected definition. In some instances, the defined terms contained in a definition themselves rely on other defined terms, and so on. This potentially creates a long 'chain' of interconnected definitions that must be read together in order to understand the first definition. To use the analogy of a Russian doll, a reader needs to unpack several layers before being able to fully understand the defined term. This analogy usefully captures the idea that defined terms (and therefore the definitions of those terms) can be 'nested' within another definition.

6.6 Interconnected definitions present a challenge to both navigability and readability. Navigability is reduced because a reader must look elsewhere for the meaning of any 'nested' term, and readability is reduced because a reader must keep several linked concepts in their mind to comprehend the defined term.[1]

6.7 There is not a significant amount of drafting guidance or literature on this issue, which is surprising given its prevalence in legislation.

6.8 OPC guidance does warn against defining a term that is 'only' used in another definition, and even then the principle is subject to a qualification, recognising that sometimes an interconnected definition is preferable to fully spelling out a 'nested' concept within the original definition.[2] As outlined in **Appendix C.1**, the defined terms 'chargee', 'connected entity', 'deductible gift recipient', and 'machine-copy' are terms defined by s 9 of the *Corporations Act* but used only as part of another definition in the Act. The challenges posed by interconnected definitions could be mitigated by using dedicated provisions to arrange related definitions in a way that more clearly shows their dependencies (or 'interconnectedness'). Part 1.2 Div 6 of the *Corporations Act*, which sets out several defined terms relevant to subsidiaries and related bodies corporate, demonstrates this approach (although it could be more clearly arranged). This technique could be particularly useful for defined terms that are used *only* in another definition, because the defined term that is only 'nested' within the first definition can be removed from (and therefore 'declutter') an Act-wide dictionary such as s 9 of the *Corporations Act*.

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1 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [32].

2 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [62]; Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (Document Release 2.1, June 2016) [47].

6.9 Chief Justice Allsop recently commented that the phenomenon of interconnected definitions 'produces difficulty and over-refinement'.[3] Sometimes, however, an interconnected definition can reduce complexity and improve readability if a particularly intuitive label is chosen to replace an otherwise non-descript complex list of cross-referenced provisions.

6.10 Several examples of interconnected definitions within Chapter 7 of the *Corporations Act* are discussed in Part Three of this Interim Report. Many are also used outside of Chapter 7 of the Act.

6.11 One example from outside of Chapter 7 of the *Corporations Act* is the term 'wholly-owned subsidiary':

> ***wholly-owned subsidiary***, in relation to a body corporate, means a body corporate none of whose members is a person other than:
>
> (a) the firstmentioned body; or
>
> (b) a nominee of the firstmentioned body; or
>
> (c) a subsidiary of the firstmentioned body, being a subsidiary none of whose members is a person other than:
>
> (i) the firstmentioned body; or
>
> (ii) a nominee of the firstmentioned body; or
>
> (d) a nominee of such a subsidiary.[4]

6.12 The following defined terms are 'nested' within the definition of 'wholly-owned subsidiary': 'body corporate', 'member', and 'subsidiary'.[5] Contained within the definition of 'body corporate' is the defined term 'unincorporated registrable body', which in turn relies on the defined terms 'registrable Australian body' and 'foreign company'.[6] The definition of the term 'subsidiary' in s 9 refers a reader to Part 1.2 Div 6, which contains five sections relevant to determining the meaning of subsidiary that in turn contain other defined terms. This includes, for example, the term 'control' which is given meaning by s 50AA.

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3 *Australian Securities and Investments Commission v TAL Life Limited (No 2)* (2021) 389 ALR 128 [149].

4 *Corporations Act 2001* (Cth) s 9.

5 Ibid.

6 Ibid.

Intuitive labels

Principle: Defined terms should correspond intuitively with the substance of the definition.

6.13 An 'intuitive' label for defined term gives the reader a helpful indication of the content of the definition. The more intuitive a defined term is, the easier it is for a reader to keep in mind the meaning of the term, and the less likely the reader is to misunderstand the meaning of a term. There is no disadvantage in using an intuitive defined term, and so no countervailing consideration when seeking an appropriate term for a particular definition. The difficulty is simply in selecting the most intuitive term in practice. If a term can be identified that precisely corresponds to the substance of the definition, it may be that the term can simply be used in its ordinary sense, and a definition is in fact unnecessary (as discussed in **Chapter 4**).

6.14 There is a plethora of drafting guidance and commentary in support of this principle. For example, OPC guidance discourages the use of 'colourless' terms such as 'relevant period'.[7] OPC guidance also states that

> concepts can be clear in their boundaries and definition but become ill-defined because of a poor and confusing choice of label. … Choosing meaningful and clear labels that aid a reader is essential to avoiding complexity in legislation.[8]

6.15 This guidance gives the example of the term 'discount capital gain' in subdivision 115-A of the *ITA Act 1997* as a label that 'has been criticised as confusing because it is in fact not a capital gain that has been discounted, but rather a capital gain that might be eligible for the discount should certain criteria have been met'.[9]

6.16 Section 9 of the *Corporations Act* contains several examples of non-intuitive labels: 'eligible applicant', 'quarter day', 'regulated entity', 'relevant date', 'relevant financial market', 'relevant agreement', 'relevant interest', and 'relevant market operator'. The definition of 'relevant agreement' is discussed further below. Using terms such as 'eligible' or 'relevant' creates non-intuitive labels by begging the question as to what makes something 'eligible' or to what something must be 'relevant'.

6.17 Other terms are given labels by reference to a provision of the *Corporations Act*, for example: 'Chapter 5 body corporate', 'Part 5.1 body', 'Part 5.7 body', 'Part 10.1 transitionals', and 'section 513C day'. Two other terms are defined by reference to the predecessor Corporations Law under the *Corporations Act 1989* (Cth): 'old

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7 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [60]; Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (n 2) [58].

8 Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (n 2) [58].

9 Ibid, citing Richard Krever, 'Taming Complexity in Australian Income Tax' (2003) 25(4) *Sydney Law Review* 467.

Division 11 of Part 11.2 transitionals' and 'old Division 12 of Part 11.2 transitionals'. While this form of labelling is non-intuitive, it has the small benefit that the term itself indicates to a reader where they might find the term's substantive definition. Definitions in this form may also be difficult to understand if the provisions to which they relate are themselves complex or difficult to interpret.

6.18 As noted in **Chapter 4**, OPC Drafting Direction 1.8 provides that in addition to clarifying meaning, the other purpose for which definitions should be used in the Tax Code legislation is to 'bunch' concepts.[10] A 'bunched' concept operates in the same way as an intuitive label. According to Drafting Direction 1.8, 'bunched' concepts 'provide a convenient way of talking about groups of things that share a relevant characteristic'.[11] The Drafting Direction continues:

> Readers will find a 'bunching' concept easier to understand the more obvious the bunching criterion is to them. This will depend on the nature of their experience with the subject matter. Often, the drafter needs to bunch for purposes that derive from the policy of the legislation and are not based on the reader's previous experience. This can lead to concepts that are non-intuitive or artificial. The position can be made worse if the name chosen for the concept is artificial or meaningless.[12]

6.19 Drafting Direction 1.8 advises drafters to 'bunch in a way that is intuitive to the reader, and avoid terms that are artificial in their content or their names'. It also recognises, however, that this is not always possible and that

> there will be cases where a certain amount of artificiality can be tolerated to get the benefits of using the bunching concept. Remember that a new item of terminology can become familiar quite quickly, especially if it fits well into the overall conceptual scheme of the legislation. An example is the concept of CGT event in the capital gains tax rewrite.[13]

6.20 An example of a 'bunched' concept in the *Corporations Act* that has become familiar to regulated entities (though nonetheless is complex) is the defined term 'financial service', discussed in greater detail in **Chapter 7** of this Interim Report.

6.21 The definition of 'financial service' includes a number of specific items that would be cumbersome to repeat on each occasion that the term is used, and that are not easily captured by the ordinary meaning of any one term. The definition of 'group executives' in s 9 of the *Corporations Act* is arguably another example. Labels such as these may be helpful in significantly shortening operative provisions,[14] such as when:

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10 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006) 27.
11 Ibid.
12 Ibid Attachment B [9].
13 Ibid Attachment B [10].
14 See the discussion of using defined terms to avoid repetition in **Chapter 4**.

- it is not possible to identify a term with an ordinary meaning that captures the relevant subject matter with sufficient accuracy;
- using the defined term in operative provisions is preferable to (or at least is not worse than) describing in greater detail in the operative provision the subject matter captured by the defined term; and
- the label is sufficiently intuitive to help a reader understand the provision, ideally by grouping only like subject matter under the one label.

6.22 The definition of 'financial product' in Chapter 7 of the *Corporations Act* illustrates how the shared characteristic, or criterion, that can be used to bunch concepts may be the function of those concepts. This creates what could be called a 'functional definition'. In the case of 'financial product', its functional definition gives effect to the underlying policy that functionally similar products be regulated in a like manner.[15] Like the definition of 'financial service', a large number of specific items that would be cumbersome to repeat are specifically included ('bunched') within the definition of 'financial product'. As discussed in **Chapter 7**, however, this combination of a functional definition and specific inclusions creates unnecessary complexity. The High Court's recent judgment in *Australian Securities and Investments Commission v King* ('*ASIC v King*', also discussed in **Chapter 4**) further illustrates the complexity that can arise when a definition combines functional aspects and non-functional aspects.[16]

6.23 The Victorian Law Reform Commission warned against giving terms 'strange' or 'novel' meanings,[17] and Professor Eagleson advocated the use of 'up-to-date' and 'plain English' terms. Eagleson recommended using an application provision rather than giving a term an unusual meaning. For example, instead of defining 'X' to include 'Y' (when 'Y' would not ordinarily be expected to come within the ordinary meaning of 'X'), an application provision could state that the relevant provisions apply to both 'X' and 'Y'.[18]

6.24 New Zealand guidance counsels against giving a defined term a meaning that is 'artificial', 'misleading', 'unnatural', 'overly stretched', 'contrived', or 'counter-intuitive'.[19] Similarly, Canadian guidance advises against 'artificial' and 'unnatural' meanings of words.[20] European Union guidance observes that definitions may

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15 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.77], [4.3].

16 *Australian Securities and Investments Commission v King* (2020) 376 ALR 1, especially [26], [51], [88].

17 Victorian Law Reform Commission, *Plain English and the Law: The 1987 Report Republished* (2017) 122.

18 Robert D Eagleson, 'Legislative Lexicography' in EG Stanley and TF Hoad (eds), *Words: For Robert Burchfield's Sixty-Fifth Birthday* (DS Brewer, 1988) 81, 83.

19 Parliamentary Counsel Office (NZ), 'Definitions That Are Helpful and Are Not Contrived to Create Artificial Concepts' (Plain Language Standard, Supporting Document 8.5).

20 Uniform Law Conference of Canada, 'Report of the Committee Appointed to Prepare Bilingual Legislative Drafting Conventions for the Uniform Law Conference of Canada' [21] <www.ulcc-chlc.ca/Civil-Section/Drafting/Drafting-Conventions>.

legitimately limit or extend the ordinary meaning of a term, but that the defined meaning should not be 'contrary to' the ordinary meaning of the term.[21]

6.25 UK drafting guidance supports this principle, and provides as an example that it is generally non-intuitive to use a single letter as a tagged term to replace a compound noun. That is, the guidance suggests that drafters should not use the letter 'P' to denote 'a person in control of a company's affairs', even though this may shorten the provision.[22]

6.26 UK drafting guidance further observes that the 'natural meaning of a defined term may influence the way that the definition is interpreted so it is important to ensure that an appropriate label is used'.[23]

6.27 In Australia, the position at common law appears quite restrictive in terms of the influence that the defined term, or 'label', will have on interpreting the content of the definition. Namely, the High Court has held that it 'would be quite circular to construe the words of a definition by reference to the term defined'.[24] Pearce has cited a number of cases in which this approach has been queried, but followed.[25]

6.28 For example, in 2011 the Full Court of the Federal Court held that it was obliged to interpret the defined term 'marketable petroleum commodity' in tax legislation such that the relevant commodities did not in fact need to be marketable because the definition itself did not include any reference to marketability.[26] A further illustration is the decision of *ASIC v King*,[27] in which the High Court appeared to suggest that the Queensland Court of Appeal was led into error by construing the statutory definition of 'officer' in s 9 of the *Corporations Act* by reference to the ordinary meaning of that term.[28] This discussion suggests that readers (including courts) are most likely to be assisted by a label that is sufficiently evocative to remind the reader of the main thrust of the concept but that does not mislead readers regarding the substance of the definition.[29]

Relevant agreement

6.29 'Relevant agreement' creates a non-intuitive label because the word 'relevant' begs the question: relevant to what? Non-intuitive labels such as this that do not carry an obvious ordinary meaning have the benefit of alerting a reader that the term may be defined and therefore that the reader should look for that term's defined meaning.

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21 European Union, *Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation* (2015) [14.1].
22 Office of the Parliamentary Counsel (UK), *Drafting Guidance* (2020) [2.1.9]–[2.1.11].
23 Ibid [4.1.3].
24 *Owners of the Ship, Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404, 419, citing *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503.
25 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) [6.4].
26 *Esso Australia Resources Pty Ltd v Commissioner of Taxation* (2011) 199 FCR 226.
27 *Australian Securities and Investments Commission v King* (2020) 376 ALR 1.
28 Ibid [18].
29 One example in this latter respect is the defined term 'linked to a refusal or failure to give effect to a determination made by AFCA', discussed in **Chapter 8** of this Interim Report.

However, such labels do very little to help a reader understand the provision they are reading without simultaneously consulting a definition, which may be located in a completely different part of the *Corporations Act*. Ideally, defined terms should be both intuitive *and* easily identifiable when used in an operative provision. Identifying defined terms is discussed further below.

6.30 The definition of 'relevant agreement' is set out in **Table 6.1** below. Although the defined term contains the word 'agreement', its effect is to capture relationships that go beyond binding contracts or agreements, including an arrangement that may be

> 'something less than a binding contract or agreement, something in the nature of an understanding which may not be enforceable at law'; it 'may be informal as well as unenforceable and the parties may be free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it'.[30]

6.31 The term 'relevant agreement' is not used in Chapters 6 and 7 of the *Corporations Act*. The definition of 'agreement' in s 9, which provides that agreement means a 'relevant agreement' in Chapters 6 and 7, therefore seems to fulfil the purpose of replacing the term 'agreement', wherever it is used, with 'relevant agreement'. Explanatory material, including for predecessor legislation to the *Corporations Act* containing the same definition, does not otherwise explain why 'agreement' has been defined in this way.

6.32 'Agreement' is used in its non-defined sense outside of Chapters 6 and 7 of the *Corporations Act*. Therefore, not only does the definition operate so as to give the word 'agreement' two different meanings, but it operates so as to give it a counter-intuitive meaning for the purposes of Chapters 6 and 7 of the Act.

Table 6.1: Definitions of 'relevant agreement', 'arrangement', and 'scheme'

Section	Text of section
Corporations Act, s 9	***relevant agreement*** means an agreement, arrangement or understanding: (a) whether formal or informal or partly formal and partly informal; and (b) whether written or oral or partly written and partly oral; and (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.

30 *Cornwall Resource Corporation NL v Waraluck Ltd* (1997) 23 ACSR 571, 573, quoting *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434, 443–4.

Section	Text of section
Corporations Act, s 761A	***arrangement*** means, subject to section 761B, a contract, agreement, understanding, scheme or other arrangement (as existing from time to time): (a) whether formal or informal, or partly formal and partly informal; and (b) whether written or oral, or partly written and partly oral; and (c) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights. (Section 761B provides for situations where two or more arrangements considered together may be a derivative or other financial product)
ITA Act 1997, s 995-1	***arrangement*** means any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings ***scheme*** means: (b) any arrangement; or (c) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise

6.33 As **Table 6.1** above shows, 'arrangement' is defined by s 761A of the *Corporations Act* for the purposes of Chapter 7 in terms quite similar to the definition of 'relevant agreement'. 'Arrangement' is not defined (and is used in its undefined sense) in Chapter 6. 'Arrangement' is also defined differently by s 9 for the purposes of Part 5.1 of the Act.

6.34 Although the word 'scheme' is not defined, its inclusion in the definition of 'arrangement' may be intended to make the term 'arrangement' broader than 'relevant agreement' (which in the context of Chapter 7 effectively replaces the term 'agreement'). This is supported by the Revised Explanatory Memorandum to the FSR Bill, which noted that 'arrangement' was to be

> defined broadly, along the lines of the definition of 'Chapter 8 agreement' in existing section 9 of the Corporations Act to include formal and informal arrangements, whether oral or in writing and whether enforceable or not.

6.35 'Chapter 8 agreement' was at the time of the FSR Bill defined as follows:

> ***Chapter 8 agreement means:***
>
> (a) a relevant agreement; or
>
> (b) a proposed relevant agreement; or
>
> (c) a relevant agreement as varied, or as proposed to be varied; or
>
> (d) where a relevant agreement has been varied—the relevant agreement as in force at any time before the variation; or
>
> (e) where a relevant agreement has been discharged—the relevant agreement as in force at any time before its discharge.

6.36 'Relevant agreement' was, in turn, defined by s 9 of the *Corporations Act* at the time of the FSR Bill in identical terms to the present definition.

6.37 The *ITA Act 1997* demonstrates a different approach which uses terminology more consistently and intuitively. The term 'agreement' is not defined in the *ITA Act 1997*. As can be seen from **Table 6.1** above, the term 'arrangement' is similar, and would appear to implement a similar policy, to the definitions of 'relevant agreement' and 'arrangement' in the *Corporations Act*. The definition of 'scheme' in the *ITA Act 1997* illustrates how another concept has been introduced to capture a broader range of meaning than the term 'arrangement'. These terms establish a clear conceptual hierarchy using intuitive labels.

6.38 The *Competition and Consumer Act* demonstrates another approach to terminology for similar concepts by using the terms contract, arrangement, and understanding (often as part of the expression 'contract, arrangement or understanding') without defining them.[31]

6.39 The example of 'relevant agreement', as well as many of the examples discussed under the heading 'Relational definitions' in **Chapter 5**, demonstrate that much of the inconsistency in definitions, terminology, and concepts in the *Corporations Act* may be explained by its legislative history. This includes the Act's significant amendment over time, most notably by the introduction of the *FSR Act* in 2001, which introduced a suite of defined terms intended principally for use in Chapter 7 of the *Corporations Act*.

6.40 This analysis highlights the problems that using different terminology to describe similar concepts can create. It also lends support to the view that relocating the content of Chapter 7 outside the *Corporations Act* would present an opportunity for significant simplification of definitions, terminology, and concepts.

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31 With the exception of Part X (International liner cargo shipping), for the purposes of which s 10.02 defines 'agreement' to mean 'any contract, agreement, arrangement or understanding, whether made in or outside Australia'.

Inclusive definitions

6.41 As discussed in **Chapter 4**, definitions generally employ one or other of the expressions 'means' and 'includes'.[32] Although the conventional view appears to be that 'means' is used if a definition is exhaustive and 'includes' if it is intended to enlarge or clarify meaning, this approach has not always been followed.[33] The *Corporations Act* contains 163 definitions that contain the word 'includes', 66 of which are located in s 9.

6.42 The High Court appears to accept that inclusive definitions may be used to clarify, as well as to enlarge meaning. In *Corporate Affairs Commission (SA) v Australian Central Credit Union,* the Court stated that the function of an inclusive definition

> is commonly both to extend the ordinary meaning of the particular word or phrase to include matters which otherwise would not be encompassed by it and to avoid possible uncertainty by expressly providing for the inclusion of particular borderline cases.[34]

6.43 Canadian guidance states that the word 'includes' may be used to indicate that a definition extends the ordinary meaning of a term, or to give examples of the meaning without being exhaustive.[35] UK guidance states that the word 'includes' should indicate that the definition 'adapts' rather than 'replaces' the ordinary meaning of the term being defined.[36]

6.44 There is some discussion in the literature and drafting guidance about the appropriate phrasing to be used in a definition that is intended to be inclusive rather than exhaustive.[37] This does not appear to be a significant cause of complexity in the *Corporations Act*, although there are many definitions that contain the word 'includes'.

6.45 Eagleson suggested that an 'inclusive' definition should contain a short list of generic terms, rather than a long list of specific terms, to avoid readers drawing an unintended conclusion that the list of examples is intended to be exhaustive.[38] Arguably, a longer list of examples can be helpful when underlying policy is complex and the list can assist readers in discerning whether or not particular borderline cases are intended to be included within the definition.

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32 Pearce (n 25) 265.
33 Ibid.
34 *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201, [5].
35 Uniform Law Conference of Canada (n 20) [21].
36 Office of the Parliamentary Counsel (UK) (n 22) [4.1.1].
37 See, eg, Pearce (n 25) [6.5]–[6.10]; Office of the Parliamentary Counsel (UK) (n 22) [4.1.1]; Uniform Law Conference of Canada (n 20) [21].
38 Eagleson (n 18) 88–9.

6.46 In order to be clear when a definition is intended to be non-exhaustive, the definition could include the expression 'includes, but is not limited to', such as in the existing definition of 'bank' in s 9 of the *Corporations Act*:

> ***bank*** or ***banker*** includes, but is not limited to, a body corporate that is an ADI (authorised deposittaking institution) for the purposes of the *Banking Act 1959*.

Definitions subject to exclusions

6.47 Just as definitions may be inclusive, definitions may also explicitly exclude things that may otherwise be caught by the definition or to avoid doubt at the edges.

Example 1: Definition subject to an exclusion

Section 9 of the *Corporations Act* relevantly defines 'mining purposes' to mean

> any or all of the following purposes: …
>
> (b) obtaining, by any mode or method, ores, metals or minerals; …
>
> whether in Australia or elsewhere, but does not include quarrying operations for the sole purpose of obtaining stone for building, roadmaking or similar purposes.

6.48 In other instances, exclusions are used to create different provision-specific meanings. This clearly runs counter to the principle, discussed in **Chapter 5**, that terms should have only one meaning in an Act.

Example 2: Definition subject to an exclusion

Section 9 of the *Corporations Act* provides that a 'public company'

> (a) in section 195 and Chapter 2E, includes a body corporate (other than a prescribed body corporate) that:
>
> (i) is incorporated in a State or an internal Territory, but not under this Act; and
>
> (ii) is included in the official list of a prescribed financial market; and
>
> (b) in Chapter 2E does not include a company that is not required to have "Limited" in its name because of section 150 or 151.

6.49 In the *Corporations Act*, definitions that exclude are less common than inclusive definitions, with 30 definitions containing the words 'does not include'. There is one definition — 'benefit' in s 200AB — which contains both the expression 'includes' and 'does not include' in the same definitional section.

6.50 This analysis does not, however, capture terms that are defined by more than one section so as to include or exclude things from the definition. An example of this is 'financial product', which is defined generally in s 763A of the *Corporations Act*, subject to specific inclusions in s 764A, and specific exclusions in s 765A. 'Financial product' is discussed in detail in **Chapter 7** of this Interim Report. As discussed there, using definitions so as to include or exclude matters can cause significant complexity, particularly if multiple definitions of the term are created. An alternative, also discussed in **Chapter 4**, is to use application provisions instead of definitions.

Meanings 'affected by' other provisions

6.51 As has been noted in some of the examples discussed so far, definitions sometimes provide that the meaning of a term is 'affected by' one or more other provisions. The *Corporations Act* contains 52 such definitions, 26 of which are contained in s 9.

6.52 In one sense, the rule of statutory interpretation that requires an Act to be read as a whole means that the meaning of any term is potentially 'affected by' the other provisions of an Act.[39] The main purpose of specifying that the meaning of a term is 'affected by' a particular provision is to alert the reader that the other provision *expressly* affects the meaning of a term.[40]

6.53 In some cases, although the term is contained in a dictionary provision, the term is not itself defined, and therefore is left to carry its ordinary meaning, as affected by another provision. An example in s 9 of the *Corporations Act* is 'carry on', which is not defined but 'has a meaning affected by Division 3'. Division 3 contains four sections which affect the meaning of 'carry on' when used in the context of a business. In other cases, 'affected by' is used to indicate that an undefined term is affected by specific provisions for particular purposes or provisions. For example, s 9 provides that 'class' has

> (b) in relation to shares or interests in a managed investment scheme—a meaning affected by section 57; and
>
> (c) when used in relation to securities for the purposes of Chapter 6, 6A or 6C—a meaning affected by subsection 605(2).

6.54 On other occasions in the *Corporations Act*, a term is both defined and affected by other provisions. For example, s 960 provides that

> ***conflicted remuneration*** has the meaning given by section 963A, as affected by sections 963AA, 963B, 963C and 963D.

6.55 The definition of 'conflicted remuneration' in s 963A is itself relatively complex, and arguably provides another example of a definition that would better be expressed as a substantive provision (and an example of a definition used to implement policy).

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39 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [69].

40 See Office of Parliamentary Counsel (Cth), Drafting Direction 1.5, 'Definitions' (Document release 4.0, May 2019) [64].

That complexity is compounded by the need to consult four other sections, two of which effectively set out exclusions from the definition, two of which apply only in relation to particular products, and all of which provide for regulations to be made.

6.56 Providing that a definition is 'affected by' another provision has the potential to create, but also to mitigate, complexity. For example, as discussed in **Chapter 5**, 'property' in s 9 of the *Corporations Act* has multiple meanings, affected by 10 different sections, for the purposes of 10 different parts of the Act. This creates unnecessary complexity. If particular provisions are to apply to bespoke categories of property, this could be achieved more simply by way of application provisions, rather than multiple definitions.

Appropriate use of technology-neutral language

6.57 It is commonly stated that regulation should not inadvertently hamper the development of new technologies that can make business and customer services more efficient and effective. Definitions that refer to specific technologies may require more frequent amendment than 'technology neutral' expressions to keep up with technological changes.

6.58 Lawn has described technology neutrality as meaning that 'no one technology is favoured over any other', and legislation should 'neither require nor assume a particular technology'.[41] He describes a number of drafting techniques and interpretive principles that can be used to keep laws up to date. He also notes that it will not always be desirable for legislation to be technology neutral, for example when the nature of the legislation means 'that only well-known and understood existing technologies should be captured in the legislation'.[42]

6.59 The Financial System Inquiry in 2014 recommended that the Australian Government should 'amend priority areas of regulation to be technology neutral', and embed 'consideration of the principle of technology neutrality into development processes for future regulation'.[43] However, it also recognised that technology-specific regulation may be 'beneficial in cases where adopting a common technology standard would improve overall system efficiency. In these cases, future review mechanisms should be established to ensure technology-specific regulation does not impede innovation.'[44]

6.60 It has been queried whether regulatory frameworks should be 'more than just open to technology solutions' and should instead '*expect* and *advocate* for new technologies and new approaches'.[45] The Director of Innovation at the UK Financial

41 Geoff Lawn, 'Achieving Technological Neutrality in Drafting Legislation' [2014] (1) *The Loophole* 29, 33.
42 Ibid 53.
43 David Murray et al, *Financial System Inquiry* (Final Report, 2014) rec 39.
44 Ibid 270.
45 Cathie Armour, 'An Australian Regulator's View on Financial Technology' (Speech, China Financial Summit, Beijing, 23 October 2019) (emphasis in original).

Conduct Authority has asked 'can we remain "technology-neutral" in a world where technology is so embedded in the delivery of financial services and so fundamental a driver of consumer outcomes?'[46]

6.61 Australia's regulatory regime has been described as 'intended to be principles-based and operate in a technology-neutral way', although the regulatory regime is 'sometimes amended to facilitate or recognise new technologies — for example, electronic securities offering documents'.[47] As the pace of technological change increases, changes in financial products and services, and new ways of conducting business more generally, present increasing regulatory challenges.

6.62 Some definitions in the *Corporations Act* appear to have the potential to hamper the use of new technologies. For example, defined terms in s 9 such as 'publish', 'machine-copy', 'negative', 'printed', 'reproduction', 'certified', and 'transparency' contain references to specific forms, such as 'writing' or 'a print made from a negative'.

6.63 The Australian Government is currently consulting on ways to improve the 'technology neutrality of Treasury portfolio laws' as part of the Department of Prime Minister and Cabinet's 'Deregulation Taskforce'.[48] The Government is concerned that: 'Consumers and businesses can miss out on the benefits of new technology when old methods of conducting business become entrenched in law'.[49] Laws being examined include the *Corporations Act*, *ASIC Act*, *NCCP Act, Banking Act 1959* (Cth), *Insurance Act 1973* (Cth), *Life Insurance Act 1995* (Cth), *SIS Act*, and *Competition and Consumer Act*. A particular focus is on: communications between businesses, customers, and investors; communications with regulators; signature requirements; record-keeping requirements; and payments.[50]

Defined terms and navigability

6.64 **Background Paper FSL3** discusses the importance of making legislation as navigable as possible and the range of techniques that can be used to aid navigability. The use of defined terms unavoidably makes legislation less navigable, because a reader must look somewhere other than the provision they are reading to understand the meaning of the defined term. As discussed in **Background Paper FSL3**, there are accepted methods for indicating when a term is defined and guidance about where definitions should be located. There is not, however, any widely used or

46 Nick Cook, *From Innovation Hub to Innovation Culture* (Speech, 6th Central Bank Executive Summit, 4 June 2019).

47 Armour (n 45).

48 Department of Prime Minister and Cabinet, 'Modernising Business Communications Consultation Paper', *Deregulation Taskforce* <www.pmc.gov.au/domestic-policy/deregulation-taskforce/modernising-business-communications-consultation-paper>.

49 Department of Treasury (Cth), *Modernising Business Communications: Improving the Technology Neutrality of Treasury Portfolio Laws* (2020) 2.

50 Ibid 4.

accepted method to indicate to a reader of legislation when a defined term is used in legislation.

Identifying terms when they are defined

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'.

6.65 There is considerable guidance about how to indicate to a reader that a term has a statutory definition.[51] These include interpretation provisions (or dictionaries), particular formatting (such as bold and italics as used in Commonwealth legislation), and using the word 'definition' in the heading of a section devoted to defining a term.

6.66 Currently, there is no comprehensive dictionary provision in the *Corporations Act*. Section 9 is the most extensive in the Act, but is only one of several 'dictionary' provisions scattered throughout the *Corporations Act*. Many consultees emphasised that this makes it very difficult for readers to locate the relevant definition for a term. While s 7 of the *Corporations Act* indicates that several interpretation provisions are spread throughout the Act, this provision has only limited utility.[52]

6.67 Furthermore, dictionaries in the *Corporations Act* do not consistently or uniformly signpost the location of other defined terms. As discussed in **Chapter 5** in relation to terms with multiple meanings, the lack of a comprehensive dictionary or index listing the location of all definitions given to a term impedes navigability and can make it difficult to determine when a definition applies in a given case.

6.68 In preparing a single glossary of defined terms for the *Corporations Act*, Treasury and OPC should give consideration to the scope of such a glossary and conveying that scope to readers. For example, it may be impractical (and of little assistance to readers) to include in the glossary terms that are defined within an

51 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [33]–[45].

52 Ibid [37].

operative section and only for the purposes of that section. The task of preparing and maintaining a comprehensive glossary may also be aided, without significantly reducing the glossary's utility, by excluding Chapter 10 (Transitional provisions) and Schedule 2 (Insolvency Practice Schedule (Corporations)) from the scope of the glossary.

6.69 The task of preparing a glossary for all defined terms in the *Corporations Act* would usefully identify all terms with more than one meaning in the Act. Navigability would be improved by signposting each of these definitions in a glossary. As a further and more substantial undertaking, consideration could also be given as to whether any of those definitions could be rationalised.

6.70 One way of drawing attention to definitions is to include the word 'definition' in the heading of any provision dedicated to defining one or more terms.[53] Provisions in the *Corporations Act* currently use terms such as 'Dictionary',[54] or 'Meaning of' in headings to sections that define terms.[55] In other cases, the section heading does not include any indication that the section defines a term (for example: 'Doing acts'),[56] or the heading is expressed as a question (for example: 'What is a subsidiary').[57] Standardising headings by including the word 'definition' in all sections that define a term would aid readers in identifying when and where a term is defined.

Drawing attention to defined terms when they are used

Principle: It should be clear whether a word or phrase is defined, and where the definition can be found.

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

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

53 See Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [149] in relation to whole sections devoted to defining a single term.
54 See, eg, *Corporations Act 2001* (Cth) s 9.
55 See, eg, ibid pt 1.2 div 6A.
56 Ibid s 52.
57 Ibid s 46.

6.71 The ALRC recommends that, as a first and relatively modest step towards improving navigability, OPC should investigate developing guidance for identifying defined terms when they are used in corporations and financial services legislation. In developing this guidance, regard should be had to the wide range of users of legislation, including those who are visually impaired or others for whom purely visual or text-based presentations are challenging, and the need to ensure that legislation remains accessible.

6.72 Relevant guidance already exists for the legislation comprising the Tax Code and a small number of other Acts, in which asterisks are used to identify defined terms.[58] The ALRC does not recommend that any particular technique be applied to the corporations and financial services legislation, leaving open the question as to whether asterisking or another technique may be used.

6.73 As an alternative to asterisking, a form of underlining could be applied. One option is to underline *every* use of a defined term in legislation, regardless of whether a term is used in its defined sense or not. This has the benefit of alerting a reader to the *existence* of a defined term and the need to consult the Act's dictionary to determine whether the definition applies to the instant use of the term.

6.74 In the absence of empirical research to date, the ALRC suggests that user feedback be sought and used to assess (as well as improve) the effectiveness of marking defined terms when they are used. In seeking feedback, particular attention should be paid to whether readers are aware of the limitations on the extent of markings applied and understand the parameters of the marks that have been applied, and what markings would be most effective in terms of not being obtrusive.

6.75 As part of developing the drafting guidance, stakeholder feedback should be sought on the question of whether markings should be applied either as part of the law itself or in publication after the law has been passed by Parliament. Depending on the drafting technology available, the need to mark defined terms may impose some extra burden on drafters (if the markings were to form part of the legislation itself). However, during the drafting process, drafters are acutely aware when a defined term is being used, so the additional burden would be limited to applying the markings in drafting (something already done, though to a lesser extent than proposed, in tax legislation that uses asterisks).[59] If markings were applied only in publication, then it is possible that a more automated and potentially less resource-intensive method may be available. Applying markings by technological means may also allow for a reader to choose how they wish to view the legislation, namely with or without markings, depending on their preference. These questions can best be addressed through further consultation during the process of developing the proposed drafting guidelines.

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58 Office of Parliamentary Counsel (Cth), Drafting Direction 1.6, 'Asterisking to identify defined terms' (Document release 1.1, September 2020); Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006).

59 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [48].

6.76 An alternative option is that defined terms be identified *only* where they are used in their defined sense. This would likely have advantages for the reader, but may have significant implications for the workload of drafters, who would need either to apply the marking during the drafting process, or to rigorously check any markings applied by other (potentially automated) means.

6.77 A further consideration is whether different grammatical forms of defined terms could be underlined when they are used. For example, whether related terms such as 'carried on', 'carrying on', and 'carries on' could be identified and underlined when they are used, to indicate that their meaning is to be derived from the defined term 'carry on'. In addition, different grammatical forms of a defined term could be signposted in an Act's dictionary. For example, OPC Drafting Direction 1.8 advises drafters to include signpost definitions for different grammatical forms of defined terms.[60] As the Drafting Direction 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'.[61]

6.78 While **Recommendation 10** may in some respects appear to overlap with **Recommendations 7**, **8**, and **9**, implementing all of these recommendations would in fact be complementary. **Recommendations 7**, **8**, and **9** are primarily directed at making it easier to identify where and when a term is *defined*. **Recommendation 10** is primarily directed at making it easier to identify when a defined term is *used*. Without more, such as hyperlinking, identifying the use of a defined term does not aid a reader identify where the definition is located. A single glossary of defined terms (**Recommendation 7**), for example, would make finding any 'marked' defined term (**Recommendation 10**) easier.[62] Furthermore, different techniques have different effects depending on the format in which legislation is viewed. For example, as discussed in **Background Paper FSL3**, the footnote that appears on each page of the *ITA Act 1997* to indicate where the definition of asterisked terms can be found is only displayed in a PDF, Microsoft Word, or printed copy of the Act, and not if viewed on the Federal Register of Legislation. Different people may also have different knowledge, experience, or preferences about navigating legislation. Using multiple complementary techniques to improve the navigability of legislation can help to ensure that the greatest number of users benefit.

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

61 Ibid.

62 This is the case, for example, in the *ITA Act 1997*: the comprehensive dictionary contained in s 995-1 of that Act complements the use of asterisks that identify defined terms when they are used.

6.79 **Background Paper FSL3** discusses the following examples of methods that are used to alert readers to the use of defined terms, namely:

- notes that identify important defined terms;
- asterisks, as used in Commonwealth tax legislation but otherwise rarely used; and
- automated hyperlinking of legislation published on the AustLII website.[63]

Example: The use of notes

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.***

63 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [48]–[55].

Example: Asterisk

Section 15-2 *ITA Act 1997*

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).

(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.

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.

[This example reflects the hyperlinking on the AustLII website as at July 2021. As at November 2021, fewer words in this section are hyperlinked on the AustLII website.]

6.80 Several limitations of these methods are demonstrated by the examples:

- First, in the case of the example using a note, not all of the terms that are defined in the provision are listed — only those that the drafter considered sufficiently important are noted. The note does not indicate, for example, that the term 'public company' is also defined.
- Second, in the case of asterisks, it is not apparent whether only the single word before which the asterisk is placed is defined or whether the definition comprises multiple words. While it may become apparent from the context that the defined terms in the example are 'superannuation lump sum' or 'unused long service leave payment', this is not immediately apparent and is not definitive. Similarly, while the fact that the word 'provided' is asterisked suggests that the single word may be defined (see sub-ss (1) and (2) of the example), it is possible that in fact the separate phrases 'provided to you' or 'provided in money or any other form' may be separately defined terms.
- Third, in the case of the AustLII hyperlinking example, the automated heuristic software used to produce the hyperlinks often produces links to definitions out of context.[64] In the example immediately above, the term 'holder' links to the definition of the term 'hold' in s 9 ('holder' being a different grammatical form to 'hold'). However, 'hold' is a relational definition, in that the term 'hold' is defined only in relation to a 'copy of a licence'. The definition of 'hold' is therefore not applicable in s 171. As discussed in **Chapter 5**, the word 'of' is defined in a relational way in the *Corporations Act*. In the example of above, the word 'of' is not being used in its relationally defined sense, but unlike the term 'holder' (which also is not being used in its defined sense), the word 'of' has not been underlined.
- Fourth, in the case of both asterisking and the AustLII hyperlinking, the markings are quite obtrusive. OPC guidance acknowledges this, stating that OPC has not yet found a way of 'marking [defined terms] without distracting the eye from the main text or causing other problems'.[65]

6.81 One method to identify defined terms in a way that is less distracting or obtrusive than the examples above may be the use of a 'faint' or dotted underline (potentially presented in grey as opposed to black, as text is usually presented).[66] If the markings were applied only in publishing and not drafting, then technology may helpfully be used to offer readers a choice between viewing a version with or without markings that identify defined terms. Such an underline could also indicate the presence of a hyperlink or 'hover box' offering the reader access to the term's definition.

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64 Ibid [52].

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

66 This technique would presumably remain apparent if, for example, a person inverted the colour presentation so as to produce white text on a black background.

6.82 Three examples using this method are set out below, using the same provisions as above: s 208 of the *Corporations Act*, s 15-2 *ITA Act 1997*, and s 171 of the *Corporations Act*. For present purposes, each defined term is underlined on each occasion it is used, but terms not being used in their defined sense are not underlined. For example, in the case of the *Corporations Act* provisions, this means the word 'of' has not been underlined. For s 208, Note 1 is rendered unnecessary by the underlining (and so is struck through) and defined terms in the remaining note have not been underlined. The note has similarly been struck through in the third example. Asterisks have been deleted from the *ITA Act 1997* example.

Example 1: Underlining

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 2: Underlining

Section 15-2 *ITA Act 1997*

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).

(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.

Example 3: Underlining

Section 171 *Corporations Act*

171 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.

6.83 An advantage in the first example is that all defined terms are identified, and not only the four that were identified in Note 1. One downside is that the location of the definitions is not immediately apparent (as they were in Note 1), although

this could be overcome by the use of hyperlinking or a 'hover' function in electronic presentations.

6.84 Advantages in the second example include that underlining may be less obtrusive than asterisks, the whole of a defined term is apparent, and commonly used defined terms (such as 'assessable income') that were not asterisked are now underlined.

6.85 Advantages in the third example include the less obtrusive marking than the bright blue underlined hyperlink and the removal of hyperlinking (not replaced by underlining) for the term 'holder'. One downside is that the location of the definition of 'debenture' (identified in the note) has been struck through, although this could be overcome by the use of hyperlinking or a 'hover' function in electronic presentations.

6.86 Stakeholder feedback should be sought on whether *every* term contained in an Act's dictionary should be identified, regardless of whether of it is used in its defined sense, or only terms used in their defined sense. From a reader's perspective, one advantage to identifying *every* use of a term (in its defined sense or not) is that the reader can be confident that they have identified all potentially defined terms. From the drafter's perspective, an advantage is that they have not had to exercise any judgement to determine whether a term is used in its defined sense — it is enough to simply identify that a term is defined. Disadvantages include that a reader may gain the impression that a term is being used in its defined sense when it is not, and that applying extensive markings may be obtrusive or distracting. For example, if **Recommendation 4** were to be implemented, and the definitions of 'for' and 'of' were removed from the *Corporations Act*, then underlining every use of defined terms in that Act may not be so ubiquitous as to be distracting or meaningless. The situation could be further improved by investigating whether other commonly used words may be defined unnecessarily and therefore removed.

6.87 Importantly, the meaning of terms used in a legislative provision may be affected by a wide range of material contained outside the provision itself. It would not be possible to identify in a legislative provision (or at all) every other piece of material that affects the meaning of every term used. For example, the meaning of a term may (or may not) be affected by:

- other definitions within the same Act;
- rules of interpretation within the same Act;
- definitions in related Acts;
- definitions and rules of interpretation in an Interpretation Act;
- matters prescribed in delegated legislation for the purposes of the definition;
- notional amendments contained in delegated legislation;
- judicial interpretation of the term as used in the Act;
- judicial interpretation of the term as used in a related Act;
- judicial interpretation of the definition in an Interpretation Act;
- Explanatory Memoranda and other relevant Parliamentary material; and

- dictionary entries and other material affecting the ordinary meaning of the term.

6.88 Consequently, alerting the reader to the definition of the term contained within the same Act is necessarily of limited assistance to the reader in interpreting the term.[67] Indeed, it may make the other sources of interpretive material even less visible in contrast, and inadvertently mislead a reader as to the proper interpretation of the term. However, when a term is defined in a particular piece of legislation, there would be significant value in alerting the reader to that fact. Furthermore, if markings are to be applied in an Act, then a provision (or a note on the Federal Register of Legislation) could be inserted to explain the parameters of what has been marked up and to remind readers about other interpretive provisions in the *Acts Interpretation Act* and potentially other materials relevant to interpretation.[68]

A more detailed index to defined terms

6.89 A further potential aid to navigation, which does not appear to have been used to date, may be an index of all defined terms indicating both where a term is defined and all provisions in a piece of legislation in which the term is used in its defined sense. This would enable a reader, and a drafter, to immediately see the 'reach' and impact of a defined term. It would also enable a reader to know, for a particular provision, whether or not the term is being used in its defined sense.

6.90 A further benefit may be providing industry participants and their advisers with a more efficient way to understand obligations. For example, in the case of the *Corporations Act*, a person that provides services to retail clients could consult this type of index to identify all provisions that used the term 'retail client'. This may assist that person to identify, understand, and ultimately comply with their obligations.

6.91 The use of technology, in particular XML (as discussed in **Background Paper FSL3** and below), could greatly assist in preparing such an index. **Background Paper FSL3** discusses an example from the UK legislation website which creates a list of all provisions in an Act that confer power on a person.[69] The use of XML facilitates this, and depending on the markup applied could facilitate the creation of any manner of lists by extracting the provisions associated with particular markup. This approach could, therefore, potentially be applied to defined terms if appropriate markup was used in drafting the legislation.

Producing legislation in XML

6.92 Globally, legislation is increasingly being published in XML, which brings significant benefits for the users of legislation, parliamentarians, and drafters. Commonwealth legislation is therefore increasingly an outlier in not using XML.

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

68 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [55].

69 Ibid [123].

Jurisdictions such as the UK, New Zealand, the US, and three Australian states have now introduced XML for legislation.

6.93 XML is a machine readable language that 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 it is reading 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. Documents written in XML can also be published in PDF or a range of other human-readable forms. For a full description of XML, see **Background Paper FSL3**.[70]

6.94 XML brings significant benefits for users of legislation. In particular, XML allows for 'semantic searching', which means a human can search for types of information in a piece of legislation. For example, definitions can be 'marked-up' in legislation, making them searchable by a person using the search function on a website. Queensland and New South Wales, which use XML, allow for users of legislation to search across seven content types: 'All Content', 'Title', 'All Headings', 'Part/ Division Headings', 'Schedule Headings', 'Defined Terms', or 'Historical Title'.[71] The Tasmanian legislation website, another jurisdiction that uses XML, offers 11 content types in its search function.[72] Cross-references are also commonly marked-up and hyperlinked by jurisdictions using XML, making it significantly easier to navigate within an Act or across legislation that includes external cross-references. The ability to markup definitions and uses of defined terms, while potentially hyperlinking uses to the definition, mean that implementation of XML could support other proposals in this chapter.

6.95 The 'extensibility' of XML also means that an endless amount of semantic information can be associated with text in legislation. For example, XML could be used to markup a standard range of legislative features in the version published by OPC: for example, definitions, obligations, and prohibitions in an Act, or civil penalty and offence provisions. In addition, markup could be used to indicate whether a particular provision is currently in force, or the dates between which it was in force. Other users or publishers of legislation (including potentially RegTech providers, as noted below) could then add further markup to produce a version tailored to their needs. Markup then makes the relevant features searchable by a person. Equally importantly, this information would be readable by a computer, which could therefore identify and process the text of legislation to identify obligations, prohibitions, defined terms, and other 'marked-up' information.

6.96 By making legislation machine-readable, XML is therefore a step that can support the development of a range of regulatory technologies (sometimes referred

70 Ibid [139]–[151].

71 Queensland Government, 'Search', *Queensland Legislation* <www.legislation.qld.gov.au/search/inforce>; New South Wales Government, 'Search', *New South Wales Legislation* <www.legislation.nsw.gov.au/search>.

72 Tasmanian Government, 'Search', *Tasmanian Legislation* <www.legislation.tas.gov.au/search>.

to as 'RegTech') and eventually, if desirable, 'rules as code'.[73] For example, RegTech providers can take the step of adding additional markup to legislation, and design computer programs to process XML information in ways that assist businesses and consumers in understanding their rights and obligations. 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.

6.97 In particular, 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 industry 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.

6.98 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 to developers of RegTech.

6.99 Moving to XML can also benefit drafters, parliamentarians, and consultees participating in the lawmaking process. For example, Queensland now 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. 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.

6.100 In consultation with the ALRC, the Office of the Queensland Parliamentary Counsel ('OQPC') suggested that their move to XML brought a range of benefits, including rationalising and repurposing resources, and removing 'repetitive, mundane, and non-rewarding manual tasks, processes and steps'.[74] They also suggested it assisted in 'streamlining the production processes to meet tighter turn-around times required by government'.[75] Scholars have also identified similar benefits in other jurisdictions that have introduced XML, particularly for 'public access, online

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73 Some consultees indicated that Chapter 7 of the *Corporations Act* is an area of law that could be particularly appropriate to be published in the form of 'rules as code'. For a brief introduction to the concept of 'rules as code', see New South Wales Government, 'Emerging Technology Guide: Rules as Code', *Digital.NSW* <www.digital.nsw.gov.au/digital-transformation/policy-lab/rules-code>.

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

75 Ibid.

publishing and automation' and streamlining of 'in-house processes for both drafting and publishing'.[76]

6.101 Moving to XML would represent a significant body of work for OPC. Importantly, OPC publishes a greater volume of legislation than is published in state and territory jurisdictions. Proper resourcing would be required to ensure adequate quality control in any conversion of existing legislation to XML, and to ensure that XML is used in a way that is fit for purpose. A range of issues would need to be considered, including the scope of XML publication. For example, would all older compilations be converted to XML, and how would this be prioritised relative to converting more modern or new laws to XML? Would all gazetted instruments and notifiable instruments be prepared in XML? Would all delegated legislation be prepared in XML, or just delegated legislation drafted by OPC? If all delegated legislation were to be produced in XML, all Commonwealth agencies would need to be required to use an XML template, because much delegated legislation is not drafted by OPC. Having all delegated legislation in XML would be preferable, for example to avoid potentially needing to locate OPC-drafted delegated legislation separately from other delegated legislation on the Federal Register of Legislation, and to enable consistent identification of the use of defined terms.[77] However, achieving uniformity across multiple agencies may be challenging.

6.102 Regardless of the types of legislation published in XML, the XML vocabulary (or schema) should be consistent across Commonwealth legislation and within particular legislative texts published in XML. To ensure this, XML should be validated. This could be achieved by using a document type definition (sometimes referred to as 'DTD'). Similarly, XML would have the greatest benefits if markup is used consistently between all jurisdictions in Australia, although there may be challenges in this regard. At a minimum, the use of XML should enable 'interoperability' between jurisdictions.[78]

6.103 The experience from a range of international and domestic jurisdictions suggest that these questions can all be answered, and the challenges of implementing XML can be addressed. Much has already been done in Australia and overseas to develop XML standards for publishing legislation, and a range of software exists to support the transition. Moreover, a body of literature explaining this transition and the issues it involves has developed.[79]

6.104 Nonetheless, making the transition would require additional resourcing for OPC. OQPC received specific funding to support their transition as part of a broader eLegislation project. Their transition required 'intensive training … to transition all

76 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) 8. See also Monica Palmirani, *Legislative XML: Principles and Technical Tools* (Discussion Paper No IDB-DP-222, Inter-American Development Bank, May 2012) 16–18.

77 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [62].

78 Ibid [167]–[170].

79 See, eg, Palmirani (n 76).

staff from unstructured to structured document creation and understanding validation of documents'.[80] The ALRC understands that New Zealand's transition to XML was also a significant project. Reports on transitioning also suggest it can be resource-intensive in the short- to medium-term.[81] However, the ALRC considers that the potential benefits after implementation for users of legislation and the potential development of innovations warrant further investigation and detailed consideration of using XML for the purposes of developing Commonwealth legislation.

6.105 A review into the feasibility of XML could also consider broader improvements that could be made to the Federal Register of Legislation to ensure it offers users of legislation the best experience and supports innovation in legal and regulatory technologies. This should be premised on a Federal Register of Legislation that is interactive, user-focused, and capable of innovating in its own use of technology.

6.106 Experiences overseas suggest that a range of other steps can be taken to improve the way users understand and interact with legislation. For example, the European Union's European Legislation Identifier ('ELI') seeks to support legislation that is more interactive and a statute book that is more navigable. The ELI provides information (metadata) about legislation, linking together legislation through metadata such as what the legislation amends, authorises, repeals, corrects, and authorises. While some of this information is available through the Federal Register of Legislation, it is often at a high level. For example, the 'Series' webpage for an amending Act has a list of Acts that are amended by the first Act. In contrast, the European Union and UK legislation websites provide information about each provision that is being amended, and the date from which the changes take effect.[82] For regulated entities, it is therefore easier to track changes in obligations, and for RegTech providers to develop solutions that can automatically identify changes to legislation across the entire statute book. The European Union website also labels legislation with topics, so it is easier to find all legislation associated with 'financial instruments' or 'financial services', for example.

Further empirical research and user-testing

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

6.107 As discussed in **Background Paper FSL3**, there has been limited research examining how readers of legislation interact with it, at least since the 2010 Australian

80 Office of the Queensland Parliamentary Counsel, Advice Correspondence (23 September 2021).
81 Palmirani (n 76) 18–21.
82 See European Union, *EUR-Lex* <www.eur-lex.europa.eu>; The National Archives (UK) <www.legislation.gov.uk>.

OPC Study and 2013 UK study discussed there.[83] Given the complexity of drafting legislation and the importance of a drafter's judgement in performing the task,[84] it is perhaps not surprising that there has been limited empirical research on whether particular navigability aids and other drafting techniques are effective. As **Chapter 3** and **Background Paper FSL3** demonstrate, however, data-driven research can offer important insights into legislative complexity and the potential for improvement.[85] While anecdotal experience 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 QC hoped that OPC would be able to undertake further research in the future.[86] The UK 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.

6.108 The UK study also demonstrates that it is possible to obtain information about the users of legislation and use that information to improve the drafting and presentation of legislation. OPC drafting guidance acknowledges that legislation's intended audience is important, advising drafters that 'it helps to know you who your readers are and why they read the law':

> Sometimes you can decide who most of the users of a law will be, and then deliberately aim at them, as in the case of the *Social Security Act 1991*. However, we usually write for a variety of users, and all our laws are also read by administrators, members of Parliament, lawyers and the judiciary. Legislative drafters are possibly the only people who habitually write highly technical documents for such a wide range of readers.[87]

6.109 Better data about the users of legislation, both generally and in regard to particular Acts, would help legislative drafters make informed decisions about their audience.

6.110 Further research on how users access and read legislation may also assist in designing more navigable legislation and ensuring that all, or as many readers as possible, benefit. There appears to be a trend, for example, towards more users accessing legislation electronically as opposed to hard copy. For the period 2012–2013, the UK legislation website (legislation.gov.uk) had approximately 2 million separate visitors per month and more than 400 million page impressions per year.[88] Writing in 2012, Rubacki observed that subscribers to hard copy

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83 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [12]–[23].

84 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.

85 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [24]–[25].

86 Peter Quiggin, 'A Survey of User Attitudes to the Use of Aids to Understanding in Legislation' [2011] (1) *The Loophole* 96, 102.

87 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [48], [50].

88 Alison Bertlin, 'What Works Best for the Reader? A Study on Drafting and Presenting Legislation' [2014] (2) *The Loophole* 25, 27.

publications produced by Australian legislation drafting offices had been reducing each year and that the rate of reduction accelerated whenever an online collection of legislation was authorised (that is, made authoritative).[89] In New South Wales, the number of subscribers to hard copy legislation and Gazette reprints had dropped from around 1,000 in 2000 to below 100 in 2012.[90] Further data confirming that readers of legislation both access and read legislation electronically would reinforce the benefits of using technological means to make legislation easier to navigate. More detailed data about how users access, or would prefer to access, legislation in electronic form (such as using an internet browser or by downloading a document) may also be instructive.

6.111 Importantly, none of the options for reform discussed above forecloses the printing of hard copy legislation or accessing and downloading various electronic forms (such as Portable Document Format ('PDF') and Microsoft Word format). This means readers' preferences for different formats, as well as any particularities of parliamentary processes, can be accommodated. Writing in 2008, the New Zealand Law Commission observed that hard copy 'does some things better for all readers. It is easier to gain an appreciation of the overall scheme of an Act if one can turn physical pages; research also shows there are cognitive advantages in reading from a printed page.'[91] Regardless of whether this observation holds true for *all* readers of legislation, it may hold true for at least some.

89 Rubacki (n 76) 17.

90 Ibid.

91 New Zealand Law Commission, *Presentation of New Zealand Statute Law* (Report No 104, 2008) [22].

PART THREE: KEY CONCEPTS IN FINANCIAL SERVICES

7. Definitions of 'Financial Product' and 'Financial Service'

Contents

Introduction

7.1 This chapter makes proposals to reduce complexity in the definitions of 'financial product' and 'financial service', including by simplifying how these terms are used in both the *Corporations Act* and the *ASIC Act*. The use of the defined terms 'financial product' and 'financial service' to determine the scope of regulation, and the inconsistent use of the legislative hierarchy, currently create significant unnecessary complexity.

7.2 The definitions of 'financial product' and 'financial service' are complex for three principal reasons:

- there are extensive lists of inclusions and exclusions for the definitions of the two terms in the *Corporations Act* and the *ASIC Act*, many of which contain further defined terms and create a series of interconnected definitions;

- the definitions vary for the purposes of different provisions, obligations, and prohibitions in Chapter 7 of the *Corporations Act*, and the definitions are different again for the *ASIC Act*; and
- the extent and nature of variations to the definitions are difficult to ascertain as a result of incoherent use of the legislative hierarchy and, in particular, the creation of alternative regulatory regimes and notional amendments to provisions in the *Corporations Act*.

7.3 The ALRC proposes a functional definition of 'financial product' that relies less on interconnected defined concepts and does not rely on specific inclusions. The ALRC proposes using application provisions to accommodate varying scopes 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 specified provisions apply. Current examples in Chapter 7 of the *Corporations Act* include ss 900A, 961, and 1019D.

7.4 Inclusions and exclusions from the definitions of 'financial product' and 'financial service' are currently spread across a number of 'layers' (or 'levels') of the legislative hierarchy — the *Corporations Act*, the *Corporations Regulations,* and ASIC legislative instruments. Exemptions from obligations are similarly spread across the legislative hierarchy. Application provisions would allow for exclusions and exemptions to be consolidated at a single level of the legislative hierarchy.

7.5 The proposals in this chapter are designed to achieve:

- the consistent use of terminology to reflect the same or similar concepts;
- a coherent regulatory design and hierarchy of laws;
- a clear, coherent, and effective legislative framework — particularly for consumers and regulated entities;
- a reduction in legislative complexity; and
- a mechanism for appropriately managing complexity over time.

This chapter in context

7.6 The Terms of Reference for this Inquiry ask the ALRC to consider the use of definitions in corporations and financial services legislation in this Interim Report, and to address the coherence of the regulatory design and hierarchy of laws in Interim Report B. This chapter and the following three chapters illustrate how the two topics are interrelated.

7.7 These four chapters demonstrate how the use of inclusions, exclusions, and exemptions spread across the legislative hierarchy is a significant driver of complexity.[1] In the context of 'financial product' and 'financial service', the legislative

1 As outlined in **Table 2.1**, the ALRC has endeavoured to use each of the terms 'exclusions' and 'exemptions' consistently throughout this Interim Report. The use of these terms is particularly important in this and the following chapters. In some contexts the terms 'exclusion' and 'exemption' may be used interchangeably. Exclusions and exemptions can achieve similar results, and the

hierarchy is central to both the causes of, and potential solutions to, much of the present complexity. This is also the case in respect of the AFSL regime (discussed in **Chapter 8**) and disclosure (discussed in **Chapter 9**). **Chapter 10** therefore sets out a proposed legislative architecture for better managing exclusions, exemptions, and notional amendments.

7.8 These chapters foreshadow a more detailed discussion about relevant principles for the use of the legislative hierarchy in Interim Report B. Nonetheless, the ALRC has expressed preliminary views about the 'level' of the hierarchy at which parts of the law may be placed. Doing so helps to illustrate the model put forward by the ALRC in **Chapter 10** and give it a more 'concrete' form. This may assist stakeholders in providing initial feedback.

The defined terms 'financial product' and 'financial service'

7.9 This section discusses the background to the concepts of 'financial product' and 'financial service' and their functions in the *Corporations Act* and the *ASIC Act*, before discussing how these concepts are defined for the purposes of the *Corporations Act*.

Financial product and financial service as legal concepts

7.10 The expression 'financial products and services' is used in the legislation passed by each state that made a referral of these matters to the Commonwealth under s 51(xxxvii) of the *Constitution*.[2] This referral of matters partly underpins the Commonwealth's legislative power to enact the *Corporations Act* and *ASIC Act*. However, neither the expression 'financial products and services' nor its component terms — 'financial product' and 'financial service' — are defined in the state referral legislation. The terms also do not appear to have a generally accepted ordinary meaning. Neither the Macquarie Dictionary nor the Oxford English Dictionary defines the terms. Therefore, when used in Commonwealth legislation, 'financial product' and 'financial service' take their meaning from the definitions that the Commonwealth Parliament has given them in each Act.

7.11 The definitions in the *Corporations Act* and the *ASIC Act* are intended to be expansive and flexible.[3] Expansiveness is currently achieved by a functional definition

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distinction can be difficult to draw. For example, a person may be exempt from an obligation but only in relation to particular products or services.

2 Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021).

3 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.24]. The present definitions of 'financial product' in the *Corporations Act* and *ASIC Act* originally arose out of Recommendation 19 of the Wallis Inquiry that the law adopt a broad definition of 'financial product' supplemented by specific regulation for particular classes of products. This was premised on the underlying policy that the law should 'provide similar regulatory treatment for functionally equivalent products to achieve the most consistent regime possible': Stan Wallis et al, *Financial*

of 'financial product' and the listing of a broad range of conduct under the definition of 'financial service'. Flexibility is reflected in powers to include or exclude matters from the definitions of 'financial product' and 'financial service' by delegated legislation. Flexibility is also achieved by varying the definitions of 'financial product' and 'financial service' for the purposes of discrete provisions of Chapter 7 of the *Corporations Act*. These variations change the scope of particular areas of regulation. Powers to change the definitions of 'financial product' and 'financial service' by including or excluding particular products or services are supplemented by powers to grant relief from areas of regulation in the *Corporations Act*.

7.12 The High Court has observed that the legislative scheme implemented in Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*

> has two significant characteristics. One is overinclusiveness. Rights and liabilities are drawn in overtly broad terms, on the footing that instances of overreach which become apparent in the administration of the legislation may be remedied by adjustments to the Act made not by remedial legislation but by exercise of powers conferred upon the Executive Government or bodies such as the Australian Securities and Investments Commission. The second characteristic is the creation by the legislation of rights and liabilities by means of criteria which reflect fluid market and economic usage rather than any ascertainable and stable meaning in the law.[4]

7.13 The design of the defined terms 'financial product' and 'financial service' illustrates these characteristics.

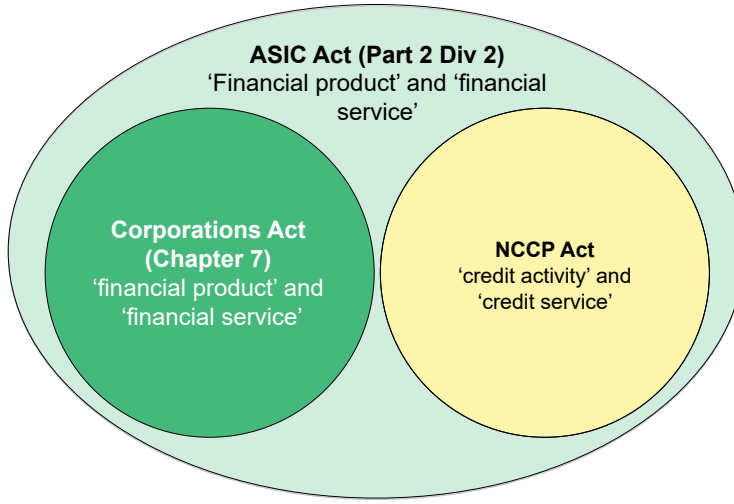
The current regulatory boundaries

7.14 'Financial product' and 'financial service' establish the boundaries of regulation in Part 2 Div 2 of the *ASIC Act* and for significant parts of Chapter 7 of the *Corporations Act*. If something does not meet those definitions, then it is not regulated by a range of important provisions in those Acts. As the boundaries of more specific regulatory regimes within those Acts (disclosure, for example) change, so too do the definitions. At a high level, the *ASIC Act* definitions of 'financial product' and 'financial service' are broader than the definitions in the *Corporations Act*. This reflects the intention that the consumer protection provisions in the *ASIC Act* should apply more broadly than obligations contained in the *Corporations Act*. 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 7.1** illustrates the overlap in products and services regulated by Chapter 7 of the *Corporations Act*, Part 2 Div 2 of the *ASIC Act*, and the *NCCP Act*.

System Inquiry (Final Report, 1997) 279. The Wallis Inquiry understood financial services to be the services provided by financial institutions to effect the exchange of financial promises: ibid 183. The Wallis Inquiry did not otherwise attempt to define, or propose a statutory definition for, the term 'financial service'.

4 *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed) & Ors* (2012) 246 CLR 455 [5].

Figure 7.1: Products and services regulated by financial services legislation



7.15 In the *Corporations Act*, 'financial service' is used to determine the application of Part 7.6 (financial services licensing), Part 7.7 (financial services disclosure), and Part 7.8 (provisions relating to conduct connected with financial products and services). Part 7.10A, on external dispute resolution, is also indirectly affected by the definition of 'financial service' because only AFS Licensees are ordinarily required to be a member of an external dispute resolution ('EDR') scheme.[5] 'Financial product' is used to determine the scope of Part 7.8A (design and distribution obligations), Part 7.9 (financial product disclosure), and Part 7.9A (product intervention orders). The application of certain conduct-related provisions within Part 7.10 (market misconduct and other prohibited conduct relating to financial products and financial services) is also determined through the use of the terms 'financial product' and 'financial service'.

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

7.17 Both 'financial product' and 'financial service' are also used outside of the above Parts of the *Corporations Act* in provisions relating to obligations and regulatory powers. In those provisions, the defined terms are not used to determine

5 Currently, the only EDR scheme is AFCA.

the scope of regulation.[6] In total, 'financial service' is used as a defined term 423 times across 126 sections of the *Corporations Act*, while 'financial product' is used 1,316 times across 278 sections.[7]

'Financial product'

7.18 The definition of 'financial product' in the *Corporations Act* is informed by eleven sections in Part 7.1 Div 3 comprising 3,150 words.[8] But this is not the full story. To understand the full definition, and the regulatory scope of significant parts of Chapter 7, a reader needs to understand the general functional definition of 'financial product', specific inclusions, specific exclusions, and any notional amendments made by the *Corporations Regulations* and ASIC legislative instruments.

The functional definition

7.19 Section 763A provides that a financial product is a 'facility' (defined in s 762C) 'through which, or through the acquisition of which, a person does one or more of the following':

- 'makes a financial investment';
- 'manages financial risk'; or
- 'makes noncash payments'.

7.20 Sections 763B, 763C, and 763D define each of these concepts, with notes containing examples of facilities that will or will not satisfy the definition. Each of these definitions is focused on a particular function of a financial product and is therefore capable of capturing new or evolving financial products that perform any of the three functions. The functional definition of 'financial product' gives effect to the policy that new and emerging products that perform a function consistent within the definitions in ss 763B, 763C, and 763D should be regulated irrespective of their label, newness, or novelty.[9] This means that new financial products come to be regulated without the need for legislative amendment.[10]

7.21 The breadth of the functional definition is first limited by s 763E. This section provides, for the purposes of s 763A, that incidental products are not financial products. The incidental products exclusion seeks to 'ensure that the definition of "financial product" does not pick up a range of consumer transactions that have an

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6 For example, 'financial service' is used in obligations placed on market licensees. Section 792B(2)(a) of the *Corporations Act* provides that a market licensee must give written notice to ASIC 'if the licensee provides a new class of financial service incidental to the operation of the market'.

7 This excludes uses of the terms in other concepts such as 'financial services guide' and 'financial product advice', where the terms form part of another definition and are not used in their defined sense.

8 Word counts exclude numbering and lettering of structural elements below sections such as for subsections and paragraphs.

9 This can be contrasted to the position in other jurisdictions where specific financial products may need to be specifically brought within the 'regulatory perimeter' as they develop.

10 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [6.45].

element, but not the primary purpose, of for example managing a financial risk'.[11] This could include, for example, a warranty issued by the seller of goods.[12] If a component of a facility had a 'financial product purpose' as its main purpose and accordingly satisfied any limb of the functional definition, the relevant component of the facility (but not the whole facility) would be regulated as a financial product.[13]

7.22 The incidental product exclusion in s 763E only overrides the functional definition of 'financial product' in s 763A. A product that is specifically included as a financial product in s 764A therefore cannot be an incidental product. In other words, a product that appears in the list of specific inclusions will *always be* a 'financial product', even if it is incidental, *unless* it is specifically excluded (as discussed below).

Specific inclusions and exclusions in the Corporations Act

7.23 The general functional definition of 'financial product' is qualified by lists of specific inclusions (s 764A) and specific exclusions (s 765A). Specific exclusions (to the extent of any overlap) override the specific inclusions.[14]

7.24 The specific exclusions in ss 765A(1)(a)–(x) are used by Parliament to remove products from the scope of the *Corporations Act* that would otherwise functionally be a 'financial product' under s 763A. Exclusions contained in the Act accordingly narrow the functional definition.[15] Some excluded products are captured by other Commonwealth regulatory regimes (for example, private health insurance is regulated by the *Private Health Insurance Act 2007* (Cth)),[16] while other products are not regulated by the Commonwealth (for example, retirement village-related managed investment schemes are regulated by state and territory legislation).[17]

7.25 Specific inclusions are intended to provide guidance on the functional definition and potentially also 'to include products which it is considered should be regulated under the regime notwithstanding that they do not fall within the general definition'.[18] Explanatory materials for the *Corporations Act* do not identify which, if any, of the specifically included financial products may not be captured by the functional definition. This question is discussed further below.[19]

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11 Ibid [6.54].
12 Ibid.
13 *Corporations Act 2001* (Cth) s 762B.
14 Ibid ss 764A(1), 765A(1).
15 Department of the Treasury (Cth), *Financial Products, Service Providers and Markets: Implementing CLERP 6* (Consultation Paper, 1999) 13.
16 *Corporations Act 2001* (Cth) s 765A(1)(c).
17 Retirement village-related managed investment schemes are excluded because they are an 'excluded security': ibid ss 9 and 765A(1)(a).
18 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [6.69].
19 See [7.116]–[7.123].

Changes in regulations and other legislative instruments

7.26 In addition, products can be included or excluded from the definition of 'financial product' by regulations.[20] Regulations can also exclude products from particular provisions of Chapter 7 of the *Corporations Act*.[21]

7.27 The *Corporations Regulations* also provide detail necessary for the delineation of certain inclusions or exclusions in the *Corporations Act*. For example, the definition of 'credit facility', an excluded financial product, is provided in reg 7.1.06 of the *Corporations Regulations*. Likewise, the definition of an 'exempt public sector superannuation scheme' is provided by reg 7.1.05.

7.28 Section 765A(2) of the *Corporations Act* enables ASIC to declare that a specified facility, interest, or other thing is not a 'financial product' for the purposes of Chapter 7. ASIC is not given the ability to *include* products within the definition of 'financial product'.

'Financial service'

7.29 The meaning of 'financial service' is provided in the first instance by eight sections in Part 7.1 Div 4 of the *Corporations Act* comprising 3,000 words.

7.30 Unlike 'financial product', no functional definition is given to the term 'financial service'. There is no overarching definition that attempts to capture the core of what it means to provide a 'financial service', although aspects of the definition rely on functional concepts, such as 'dealing in a financial product'. Instead, 'financial service' is defined in s 766A(1) to include eight distinct activities, as well as any other conduct of a kind specified in regulations. The activities listed in s 766A capture a diverse range of conduct:

- providing financial product advice;
- dealing in a financial product;
- making a market for a financial product;
- operating a registered scheme;
- providing a custodial or depository service;
- providing a crowd-funding service;
- providing a claims handling and settling service; and
- providing a superannuation trustee service.

7.31 Each type of 'financial service' is itself a defined term. These terms are defined in sections immediately following s 766A, except for the service of 'operating a registered scheme'. Although it is not positively defined, 'operating a registered scheme' has a meaning affected by the definition of 'registered scheme' in s 9. The definition of 'registered scheme' in turn relies on the complex definition of 'managed

20 *Corporations Act 2001* (Cth) ss 764A(1)(m), 765A(1)(y).
21 Ibid s 765A(3).

investment scheme' in s 9, as affected by the *Corporations Regulations*.[22] In addition, s 766A(4) (titled 'meaning of operating a registered scheme'), negatively defines the term by listing certain activities that do not constitute operating a registered scheme.

7.32 The definition for each type of financial service contains a significant number of defined terms and concepts, which frequently require resort to other definitions. Notably, to understand 'dealing in a financial product', 'making a market for a financial product', or 'providing financial product advice', a reader must understand the definition of 'financial product'.

7.33 In addition to prescribing additional financial services, regulations may set out:

- the circumstances in which persons facilitating the provision of a financial service (for example, by publishing information relating to the service) are taken also to provide that service; or
- the circumstances in which persons are taken to provide, or are taken not to provide, a financial service.[23]

7.34 Regulations can also prescribe matters relating to traditional trustee company services of a particular class (s 766A(1B)).

7.35 Several of the defined terms that comprise the definition of 'financial service' are also affected by regulations and ASIC legislative instruments. For example, the definition of 'dealing in a financial product' in s 766C is affected by five regulations,[24] while the definition of 'providing a custodial or depository service' in s 766E is affected by 12 exemptions in one regulation.[25] Likewise, *ASIC Corporations (Margin Lending Relief for Exchange-Traded Instalment Warrants) Instrument 2021/194* provides that certain facilities are not margin lending facilities. This has the consequence that these facilities are not financial products under s 765A(1)(h)(i) and, for example, dealing in them is not a financial service.

The artificiality of 'financial service'

7.36 The concept of a 'financial service' functions solely as a label for a range of activities that the Commonwealth Parliament has determined should be regulated alike. The term has no other meaning beyond the list of specific activities in s 766A, and does not incorporate a functional definition that can evolve over time.[26] Including a service within the definition is used to attract standard licensing, disclosure, and conduct obligations that apply to all financial services.

7.37 The malleability of 'financial service' was demonstrated in 2020 by the inclusion of providing 'a claims handling and settling service' and 'a superannuation trustee

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22 See *Corporations Regulations 2001* (Cth) reg 5C.11.01.
23 *Corporations Act 2001* (Cth) s 766A(2).
24 *Corporations Regulations 2001* (Cth) regs 7.1.34, 7.1.35, 7.1.35A, 7.1.35B, 7.1.35C.
25 Ibid reg 7.1.40.
26 Although the inclusion of activities related to 'financial products' (for example, dealing in or making a market for a financial product) means that there is some possibility for evolution in the scope of 'financial service' as new financial products emerge.

service' within the definition.[27] Including these activities was seen as a means of applying licensing and consumer protections to conduct that the Parliament regarded as under-regulated. This followed findings and recommendations from the Financial Services Royal Commission.[28]

7.38 In comments that reflected the use of 'financial service' as a 'hook' for obligations, the Financial Services Royal Commission noted that there 'can be no basis in principle or in practice to say that obliging an insurer to handle claims efficiently, honestly and fairly is to impose … a burden it should not bear'.[29] Relatedly, the Financial Services Royal Commission noted that the (then current) exemption for claims handling from the definition of 'financial service' meant that 'ASIC is limited in the regulatory interventions it can take in this regard'.[30]

7.39 Similarly, the Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Cth) justified making the provision of a superannuation trustee service a 'financial service' on the basis that doing so was

> a simple and effective way of ensuring that ASIC has access to appropriate powers and enforcement tools, and can successfully perform its expanded role as the superannuation regulator responsible for consumer protection and market integrity regulation.[31]

International comparators

7.40 Comparing Australia's legislative framework for financial services with other jurisdictions illustrates the different approaches taken to describing or defining the range of matters that each jurisdiction seeks to regulate. The analysis later in this chapter in support of proposed reforms to the terms 'financial product' and 'financial service' draws on the comparisons discussed below.

7.41 Legislation from the UK, European Union, New Zealand, South Africa, Singapore, and Hong Kong is discussed below. These jurisdictions have been selected for comparison for a number of reasons. First, several of the jurisdictions are recognised global financial centres (the UK, Singapore, and Hong Kong) or regulate a range of important financial centres (the European Union). Secondly, like Australia, several share a British parliamentary and common law heritage, enabling closer comparison of legislative styles. Third, some of the jurisdictions (such as New Zealand and South Africa) have implemented reforms to their financial services regulation more recently than the most significant reforms that took place in Australia

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27 *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) schs 7, 9.

28 See Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019) rec 4.8 in respect of the handling and settlement of insurance claims.

29 Ibid 309.

30 Ibid.

31 Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Cth) [9.6].

in 2001. The New Zealand and South African legislation (in some respects at least) also use terminology consistent with the *Corporations Act,* suggesting that their drafters may have had regard to Australian legislation.

United Kingdom

7.42 The *FSM Act* (UK) does not use the terms 'financial product' or 'financial service'. The *FSM Act* (UK) instead refers to 'regulated activities'. Section 19 of the *FSM Act* (UK) provides that a person must be authorised by the Financial Conduct Authority, or otherwise be exempt, if they wish to carry on a 'regulated activity'.

7.43 Section 22 of the *FSM Act* (UK) defines 'regulated activities' as: activities specified in delegated legislation relating to investments of a kind specified in delegated legislation; and other specified activities that relate to property, information about a person's financial standing, administering a benchmark, or claims management services. 'Investment' is defined to 'include any asset, right or interest'. 'Specified activities' is given substance by the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (UK) ('*Regulated Activities Order*'), which is prepared by the UK Treasury. Part II of the *Regulated Activities Order* exhaustively lists the activities, and exclusions from those activities, covered by s 22 of the *FSM Act* (UK). Part III of the *Regulated Activities Order* then lists the specified kinds of investment for the purposes of s 22(1)(a) of the Act. In summary, the UK uses a list approach rather than a functional definition to describe the activities and products that are subject to regulation.

European Union

7.44 The scope of the Markets in Financial Instruments Directive (MiFID II) is determined principally by three defined terms: 'financial instruments', 'investment services and activities', and 'ancillary services'.[32] The terms are defined, respectively, in Sections A, B, and C of Annex I to the Directive.

7.45 Each of the terms is defined by reference to a list of specific inclusions, though several of the inclusions are expressed at a high level of generality or are not themselves defined. For example, 'money-market instruments' are specifically included as financial instruments. 'Money-market instruments' is defined to mean 'those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment'.[33]

7.46 Specific inclusions can also contain exceptions within their definition. For example, 'transferable securities', a type of financial instrument, is defined to mean 'those classes of securities which are negotiable on the capital market'.[34] However,

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32 *Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU* [2014] OJ L 173/349.

33 Ibid art 4(1)(17).

34 Ibid art 4(1)(44)(a).

this does not include 'instruments of payment, such as … shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares'.[35]

7.47 Further exemptions also mean that MiFID II does not apply to persons providing particular types of financial instruments and investment services. For example, Article 2 exempts 'persons providing investment services consisting exclusively in the administration of employee-participation schemes',[36] in addition to 'collective investment undertakings and pension funds'.[37]

New Zealand

7.48 Section 7 of the *FMC Act* (NZ) defines 'financial product' as:

(a) a debt security; or

(b) an equity security; or

(c) a managed investment product; or

(d) derivative.

7.49 Each of those terms is, in turn, defined by s 8 of the *FMC Act* (NZ).[38]

7.50 The term 'security' is also defined to mean 'an arrangement or a facility that has, or is intended to have, the effect of a person making an investment or managing a financial risk', and among other things includes 'a financial product'.[39] This definition of 'security' reflects the first two limbs of the functional definition of 'financial product' in the *Corporations Act* and *ASIC Act*. Unlike the Australian legislation, the terms 'arrangement', 'facility', 'making a financial investment', and 'managing a financial risk' are not defined in the *FMC Act* (NZ).

7.51 The defined term 'security' in the *FMC Act* (NZ) performs a different role to the functional definition of 'financial product' in the *Corporations Act* and *ASIC Act*. Section 562 of the *FMC Act* (NZ) grants the New Zealand regulator, the Financial Markets Authority ('FMA'), the power to declare that a security is, or is not, a financial product. The term 'security' therefore limits the field of matters that can be brought within the regulatory regime by the FMA, but does not otherwise qualify the definition of 'financial product' in the *FMC Act* (NZ). In summary, every financial product under the *FMC Act* (NZ) is a security, but not every security is a financial product. Regulations may also declare that an interest or right is not a security for

35 Ibid art 4(1)(44).
36 Ibid art 2(1)(f).
37 Ibid art 2(1)(i).
38 'Debt security' is defined as 'a right to be repaid money or paid interest on money that is, or is to be, deposited with, lent to, or otherwise owing by, any person', with specific inclusions and exclusions. 'Equity security' is defined to mean a share in a company, an industrial and provident society, or a building society. 'Managed investment product' means an interest in a managed investment scheme, which is defined in s 9(1). 'Derivative' is defined by reference to an agreement satisfying certain conditions and with some specific inclusions.
39 *Financial Markets Conduct Act 2013* (NZ) s 6.

the purposes of the *FMC Act* (NZ), with the consequence that the interest or right is not a financial product.[40]

7.52 The term 'financial services' in the *FMC Act* (NZ) has the same meaning as in s 5 of the *Financial Services Providers (Registration and Dispute Resolution) Act 2008* (NZ) ('*FSP Act* (NZ)'). Section 5 of the *FSP Act* (NZ) contains an exhaustive list of financial services, including, for example, a financial advice service and offering or issuing products regulated by the *FMC Act* (NZ). The *FMC Act* (NZ) definition of 'financial service' in s 6 adds to the *FSP Act* (NZ) definition of 'financial services' by including 'market services' (defined by s 6 of the *FMC Act* (NZ)) and provides that services or classes of services may be excluded by regulations.

7.53 Like the *Corporations Act*, the *FMC Act* (NZ) also defines 'dealing' for the purposes of the expression 'dealing in financial products'. The *FMC Act* (NZ) definition uses similar terms to the *Corporations Act*, although it is potentially broader, including 'anything that is preparatory to, or related to, any dealing in financial products'.

7.54 Unlike the *Corporations Act*, 'dealing in financial products' is not specifically a 'financial service'. However, the term 'dealing in financial products' is used only in operative provisions of the *FMC Act* (NZ) that apply to financial services, effectively achieving the same outcome as in the *Corporations Act*. For example, ss 19 and 22 contain prohibitions on misleading or deceptive conduct and making false or misleading representations that are applicable to both dealing in financial products and financial services. 'Dealing in financial products' is otherwise also used in the heading to Part 5 ('Dealing in financial products on markets') and as part of one defined term ('relevant transaction' in cl 49 of Schedule 1).

7.55 The *FMC Act* (NZ) contains annotations that suggest comparing various provisions with particular sections of the *Corporations Act*, indicating that the drafters of the *FMC Act* (NZ) had specific regard to the *Corporations Act*. This is also apparent from the language used to define 'financial product' and 'financial service'.

South Africa

7.56 Section 2 of the *Financial Sector Regulation Act 2017* (South Africa) defines 'financial product' by reference to an exhaustive list that can be supplemented by regulations. Section 3 of the Act defines 'financial service' by reference to an exhaustive list of activities that can also be supplemented by regulations. Like the *Corporations Act* definition, the South African definition includes certain activities in relation to financial products and other more specific services.

7.57 In relation to financial services, s 3 of the *Financial Sector Regulation Act 2017* (South Africa) includes activities such as 'offering, promoting, marketing or distributing', 'providing advice, recommendations or guidance', and 'operating or managing' in relation to a financial product, foreign financial product, financial instrument, or a foreign financial instrument. The definition also includes 'dealing or

40 *Financial Markets Conduct Act 2013* (NZ) s 6, paragraph (c) of definition of 'security'.

making a market' in financial products. 'Dealing' and 'making a market' are defined as part of the definition of 'financial services' in s 3. Other relevant terms such as 'payment services' and 'securities services' are defined in s 1.

7.58 As more recently enacted legislation, the *Financial Sector Regulation Act 2017* (South Africa) contains language suggesting that its drafters may have had regard to both the Australian and New Zealand legislation.

Singapore

7.59 Financial services regulation in Singapore is spread across several pieces of legislation. Section 2 of the *Consumer Protection (Fair Trading) Act* (Singapore) defines the terms 'financial product' and 'financial services'.[41] 'Financial product' is defined to include

> any arrangement, transaction or contract regulated, or supplied by any person regulated, under:
>
> (a) any written law administered by the Monetary Authority of Singapore;
>
> (b) the Commodity Trading Act (Cap. 48A); or
>
> (c) such other written law as the Minister may by order prescribe.

7.60 'Financial services' is defined to include 'any services regulated, or supplied by any person regulated' under those same laws. The terms 'financial product' and 'financial service' are not used in operative provisions of the *Consumer Protection (Fair Trading) Act* (Singapore), but are included within the definitions of 'goods' and 'services' in s 2.

7.61 The *Securities and Futures Act* (Singapore) contains requirements relating to licensing, custody of assets, and other conduct of business requirements.[42] Section 2 of that Act defines 'capital markets products' to mean

> any securities, units in a collective investment scheme, derivatives contracts, spot foreign exchange contracts for the purposes of leveraged foreign exchange trading, and such other products as the Authority may prescribe as capital markets products.

7.62 Several of the terms referred to in the above definition are, in turn, further defined.

Hong Kong

7.63 Schedule 1 to the *Securities and Futures Ordinance* (Hong Kong) defines 'financial products' as meaning:

> (a) any securities;
>
> (b) any futures contract;

41 *Consumer Protection (Fair Trading) Act* (Singapore, cap 52A, 2009 rev ed) s 2.
42 *Securities and Futures Act* (Singapore, cap 289, 2006 rev ed).

(c) any collective investment scheme;

(d) any leveraged foreign exchange contract;

(e) any structured product.[43]

7.64 Each of the terms referred to in the above definition is, in turn, further defined. The term 'financial service' is used in two objects clauses, but is not otherwise defined or used in any substantive provisions.

Comparative analysis

7.65 None of the European Union, New Zealand, South African, or Hong Kong legislation attempts to rely on any natural or non-exhaustive meaning that might be given to the terms 'financial product' or 'financial service', or like terms (for example, 'financial instrument' in the European Union). All rely on exhaustive lists of the matters that comprise financial products or services. In some instances, those lists themselves employ terms that are not exhaustively defined, with the effect that the categories of products are not completely closed. For example, the definition of 'derivative' in the *FMC Act* (NZ) is defined to include a range of undefined, and therefore potentially evolving, terms.[44] The same is true for several types of financial instruments and investment services in the European Union.[45]

7.66 Among these jurisdictions, Australia is unique in relying on a broad, functional definition of 'financial product'. The Australian legislation is not unique in the way 'financial service' is defined by reference to both activities in relation to financial products and other more specific activities.

7.67 Although Singaporean legislation defines financial products and services inclusively, it does not otherwise expand on what the terms 'financial product' or 'financial service' mean. Unlike the *Corporations Act* and *ASIC Act*, those terms are not used in any operative provisions of the *Consumer Protection (Fair Trading) Act* (Singapore), and are only used to inform other definitions, which are in turn used to enliven consumer (or investor) protection provisions.

7.68 Consistent with the *Corporations Act* and the *ASIC Act*, the legislation in New Zealand and South Africa uses 'financial product' and 'financial service' to determine the scope of regulation. The European Union similarly uses 'financial instruments',

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43 *Securities and Futures Ordinance* (Hong Kong) cap 571, sch 1.

44 See, eg, *Financial Markets Conduct Act 2013* (NZ) s 8(4)(b). This paragraph states that the definition of derivative 'includes a transaction that is recurrently entered into in the financial markets in New Zealand or overseas and is commonly referred to in those markets' as: 'a futures contract or forward'; 'an option (other than an option to acquire by way of issue an equity security, a debt security, or a managed investment product'; 'a swap agreement'; 'a contract for difference, margin contract, or rolling spot contract'; or 'a cap, collar, floor, or spread'.

45 See, for example, the inclusion of 'any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF': *Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU* [2014] OJ L 173/349 Annex I, s C(10).

'investment services and activities', and 'ancillary services' to determine the scope of various provisions of MiFID II.[46] In all cases, the scope of regulated financial products and services is prescribed by relatively closed categories.

7.69 The *FSM Act* (UK) is unique among the legislation examined in that it does not rely on a concept of 'financial products', 'financial services', or equivalent term, and instead refers to 'regulated activities'. Nonetheless, the specified activities and investments exhaustively define the matters to be regulated. The *FSM Act* (UK) differs from all jurisdictions outlined above, and Australia, in that the *FSM Act* (UK) itself contains little detail about the substance of activities it seeks to regulate, with that detail contained instead in delegated legislation.

7.70 The *FMC Act* (NZ) differs from the *Corporations Act* by using the term 'market services' to attract licensing obligations as opposed to 'financial services'. As noted above, 'market services' are defined by the *FMC Act* (NZ) and represent a subset of 'financial services'. The definition of 'market services' contains an exhaustive list, and includes some services that would be considered 'financial services' within the *Corporations Act* (such as acting as a manager of a registered scheme, acting as a derivatives issuer, and acting as a provider of a financial advice service) and others that would not (such as acting as an administrator of a financial benchmark, which would instead be covered by the financial benchmark licensing regime in Part 7.5B of the *Corporations Act*). The *FSP Act* (NZ) does, however, rely on the term 'financial service' to impose registration and dispute resolution membership requirements on those who conduct a business of providing financial services.

7.71 The *FMC Act* (NZ) also differs from the *Corporations Act* and *ASIC Act* in that it does not use the term 'financial service' in provisions that grant power to the New Zealand regulator, the FMA. That is not to say, however, that the concept of financial services is irrelevant to the FMA's functions and powers. For example, 'financial service' is used in several important definitions in the *Financial Markets Authority Act 2011* (NZ), such as the definition of 'financial markets' and 'financial markets participant', as well as the FMA's functions set out in s 9 of that Act.

7.72 Jurisdictions differ in terms of the respective powers granted to include or exclude matters within the definitions by way of regulations or regulator-made legislative instruments. In the *FSM Act* (UK), the definition of 'regulated activities' and therefore the field of regulation is given substance only by way of delegated legislation made by the Treasury.[47] In New Zealand, regulations may exclude matters from the definition of 'financial product', but not include matters.[48] The New Zealand FMA, however, may declare certain 'securities' (as that term is defined) to be, or not

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46 See, for example, the requirement that an 'investment firm which manufactures financial instruments for sale to clients shall maintain, operate and review a process for the approval of each financial instrument and significant adaptations of existing financial instruments before it is marketed or distributed to clients': ibid art 16(3).

47 *Financial Services and Markets Act 2000* (UK) s 22.

48 *Financial Markets Conduct Act 2013* (NZ) s 7(2).

to be, financial products. While ASIC may declare certain products are not financial products, it cannot *include* products; this power is reserved to regulations.[49]

7.73 This analysis highlights not only the differing terminology across jurisdictions, but also the different definitional approaches and uses of legislative hierarchy.

Using the defined terms consistently

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'.

7.74 'Financial product' and 'financial service' should have only one meaning across corporations and financial services legislation. A single meaning for each of financial product and financial service would facilitate the removal of provision-specific variations to the definition. Application provisions (**Proposal A4**, discussed below) could instead narrow the scope of a particular provision by excluding certain types of financial products, services, or circumstances. The definition itself, however, would not change. This approach is consistent with the principles discussed in **Chapter 4** and **Chapter 5** of this Interim Report.

Different definitions in the *Corporations Act* and *ASIC Act*

7.75 Though structured differently, both the *Corporations Act* and *ASIC Act* use similar language to define 'financial product' and 'financial service'. The definitions of 'financial product' and 'financial service' in both Acts provide for the inclusion or exclusion of certain matters by regulation. Under s 5 of the *ASIC Act*, different definitions of 'financial product' and 'financial service' apply within that Act. The *ASIC Act* definitions only apply to Part 2 Div 2 of that Act; otherwise the *ASIC Act* uses the *Corporations Act* definitions. Different definitions between (and within) the *Corporations Act* and *ASIC Act* are a source of complexity.

7.76 The definitions of 'financial service' and 'financial product' in Part 2 Div 2 of the *ASIC Act* are broader than the *Corporations Act* definitions in three main respects. First, s 12BAB(1)(g) of the *ASIC Act*, which is not replicated in the *Corporations Act*, includes 'a service … that is otherwise supplied in relation to a financial product' within the definition of 'financial service'. The effect of s 12BAB(1)(g) is to capture a broader range of conduct ('services') in relation to financial products than the specified activities such as 'dealing' in financial products.[50] Secondly, credit facilities

49 Note that the Minister has power to determine classes of derivative financial products to be the subject of ASIC's power to make derivative transaction rules under Part 7.5A: *Corporations Act 2001* (Cth) s 901B.

50 Ibid ss 766A(1)(b), 766C; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAB(1)(b), (7).

are expressly included within the *ASIC Act* definition of 'financial product', meaning financial services in relation to credit facilities are captured.[51] Thirdly, the *ASIC Act* definition of 'financial product' does not include an exemption for incidental financial products. Financial products that fall outside the *Corporations Act* definition because they are incidental are therefore subject to consumer protections as financial products in Part 2 Div 2 of the *ASIC Act*.

7.77 Part 2 Div 2 of the *ASIC Act* contains prohibitions on conduct in relation to financial services, which are aimed at protecting consumers. As discussed further in **Chapter 13**, several of these obligations replicate equivalent provisions in the *Corporations Act*,[52] while others apply in relation to more specific conduct.[53] The *ASIC Act* provisions differ from the *Corporations Act* provisions in that most apply only to 'financial services', whereas the equivalent *Corporations Act* provisions apply to both 'financial products' and 'financial services'. This suggests that the purpose behind s 12BAB(1)(g) of the *ASIC Act* is both to broaden the scope of services that attract consumer protection and to ensure those protections apply in relation to financial products. Since 2018, s 12BAB(1AA) has also provided that, for the purposes of Part 2 Div 2 of the *ASIC Act*, 'a financial product is a financial service'. Section 12BAB(1AA) was introduced in 2018 to make it clear that the *ASIC Act* consumer protection provisions, which were intended to mirror the *Australian Consumer Law* protections applicable to both goods and services, expressly applied to both financial services and financial products.[54]

7.78 Section 12BAB(1AA) of the *ASIC Act* effectively removes any distinction between the two defined terms, which are treated as distinct concepts in the *Corporations Act* and elsewhere in the *ASIC Act*. This non-intuitive drafting highlights the complexity that can be created by artificially varying a defined term to determine the scope of obligations.

7.79 Other noteworthy differences between the respective definitions of 'financial product' are:

- the *Corporations Act* expressly defines the term 'facility', whereas the *ASIC Act* definition does not. As a result, a reader needs to rely on s 5(2) of the *ASIC Act* to determine that 'facility' has the same meaning in that Act as in the *Corporations Act*, leaving the reader to consult the inclusive definition at s 762C in the *Corporations Act*;

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51 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA(7)(k); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B.

52 For example, s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth). This replicates s 1041H of the *Corporations Act 2001* (Cth). Both provisions prohibit misleading or deceptive conduct.

53 For example, s 12DE of the Ibid. This provision applies in relation to offering rebates, gifts and prizes.

54 Revised Explanatory Memorandum, Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018 (Cth) [1.70]–[1.75]; Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Final Report, 2017) 74–5.

- specific inclusions vary as between s 764A of the *Corporations Act* and s 12BAA(7) of the *ASIC Act*. So too do the specific exclusions vary as between s 765A of the *Corporations Act* and s 12BAA(8) of the *ASIC Act*. This is most notable in respect of credit, as discussed below; and
- section 765A(2) of the *Corporations Act* empowers ASIC to declare that a specified facility, interest, or other thing is not a financial product for the purposes of Chapter 7 of the *Corporations Act*. The *ASIC Act* definition contains no equivalent.

7.80 Other noteworthy differences between the respective definitions of 'financial service' in each Act are:

- The general definition in s 12BAB(1)(f) of the *ASIC Act* includes operating a financial market or a clearing and settlement facility, whereas the *Corporations Act* does not. This reflects the different licensing regimes contained in Chapter 7 of the *Corporations Act* for operators of a financial market or clearing and settlement facility, distinct from the AFSL regime (as discussed in greater detail in **Chapter 8**). The terms 'financial market' and 'clearing and settlement facility' are nonetheless defined in similar terms, but for other purposes, in Part 7.1 Divs 5 and 6 of the *Corporations Act*; and
- The *ASIC Act* definition of 'financial product advice' (contained within the definition of 'financial service' in s 12BAB(5)) does not distinguish between general and personal advice as in the *Corporations Act* definition.[55]

7.81 The definition of 'financial service' contained in s 766A(1) of the *Corporations Act* should be the basis for a single definition of financial service. This would mean the inclusions in ss 12BAB(1)(f)–(g) of the *ASIC Act*, which are not replicated in the *Corporations Act*, would no longer appear in the definition of 'financial service'. However, consistent with the existing design, the consumer protections in Part 2 Div 2 of the *ASIC Act* should still apply to operating a financial market or a clearing and settlement facility, as well as to services currently covered by s 12BAB(1)(g). These activities could therefore be included in an application provision for the Part 2 Div 2 consumer protections.[56] This would ensure consumer and investor rights protections are unchanged in substance, notwithstanding the creation of a single definition of 'financial service'.

Inclusion of 'credit'

7.82 Credit facilities are currently financial products for the purposes of the *ASIC Act*, but are specifically excluded from the definition of financial product in the *Corporations Act* (with the exception of margin lending).[57] The ALRC proposes that 'credit' be incorporated into the uniform, functional definition of 'financial product' (**Proposal A3**). The form this may take is discussed further below (**Proposal A6**).[58]

55 The definition of 'financial product advice' is discussed in **Chapter 11**.
56 See [7.165]–[7.167]
57 *Corporations Act 2001* (Cth) s 765A(1)(h)(i).
58 See [7.194]–[7.212].

7.83 Creating a uniform definition of 'financial product' would facilitate merging Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. Application provisions in the *Corporations Act* could still exclude 'credit' from the scope of provisions as necessary. This reflects the principle that definitions should serve to elucidate meaning rather than be used to determine the varying scope of obligations. Creating a uniform definition would enable the regulation of financial products and services by one piece of legislation rather than two. This would achieve significant simplification.

7.84 Furthermore, incorporating 'credit' within the uniform definition of 'financial product' could also facilitate merging the subject matter of the *NCCP Act* with both Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. The following section briefly considers how such consolidation could occur, noting that detailed consideration will be given to these possibilities in Interim Report C.

The potential to consolidate financial services regulation

7.85 The spread of financial services regulation across the *Corporations Act*, *ASIC Act*, and *NCCP Act* is a considerable source of complexity, as regulated entities must navigate multiple legislative schemes with overlapping provisions and inconsistent definitions. The current legislative arrangements seem attributable to history rather than principle or good legislative design. Among comparable jurisdictions, Australia is anomalous in placing the most significant element of its financial services regulatory regime within a piece of legislation that is otherwise focused on corporations and in splitting financial services conduct and disclosure regulation across multiple Acts. Consolidation could therefore reduce complexity and improve navigability.

7.86 **Background Paper FSL4** shows how the current *Corporations Act* is the latest of several attempts, over multiple decades, to provide for the uniform, national regulation of corporations and financial services. By virtue of two separate referrals of matters from the states in relation to corporations and financial services (including credit), the state parliaments have evinced a clear intention that the Commonwealth regulate in relation to those matters. Some aspects of the referrals, as discussed in **Background Paper FSL4**, potentially prevent achieving greater consolidation and simplification.

7.87 It appears arguable that under the current constitutional framework and referrals of matters, the Commonwealth could legislate so as to consolidate the subject matter of Chapter 7 of the *Corporations Act* and the *NCCP Act* into what is presently the *ASIC Act*. The *ASIC Act* could then be renamed to appropriately reflect its new contents and role, such as the '*Financial Services and Markets Act*'. As discussed in **Background Paper FSL4**, it does not seem possible for the Commonwealth to create other standalone Acts dealing with corporations and financial services under the current referrals of matters.

7.88 The current referral of matters underpinning the *Corporations Act* and *ASIC Act* was negotiated against the backdrop of considerable constitutional uncertainty and concern following the decisions of the High Court in *Re Wakim; Ex parte*

McNally and *R v Hughes*.[59] The ALRC's Inquiry presents an opportunity for the Commonwealth and states and territories to revisit that constitutional framework without the urgency to address constitutional uncertainty that existed in 2000, and with the benefit of 20 years' experience of the referrals in practice.[60] This could lead to potential amendment or re-statement (by enacting new referral legislation) of the current referrals framework.

Using defined terms to set regulatory boundaries

7.89 The terms 'financial product' and 'financial service' are used to set the regulatory boundaries for significant parts of Chapter 7 of the *Corporations Act* and the *ASIC Act*. They do this by determining the products, services, persons, and circumstances to which many provisions of Chapter 7 apply.

7.90 Exclusions, inclusions, and other changes to the general definitions of these terms in the *Corporations Act*, as reflected in ss 763A and 766A, are made by the *Corporations Act*, regulations, and legislative instruments made by ASIC. The existence of multiple changes to the definitions across so many locations is a significant source of complexity.

7.91 Provisions of the *Corporations Act* may also be subject to exemptions that apply in certain circumstances in which products or services are provided. These exemptions can also be created by the *Corporations Act*, regulations, or ASIC legislative instruments. Regulations and other legislative instruments granting exemptions often use notional amendments or conditions to create alternative regulatory regimes, which operate in parallel with, or to the exclusion of, the provisions of the *Corporations Act*. Sometimes, notional amendments insert entirely new provisions of the *Corporations Act*, or notionally amend existing notional provisions inserted by other instruments. This not only makes the law difficult to find and to navigate, it also means that a reader of Chapter 7 of the *Corporations Act* cannot rely on the text of the *Corporations Act* as an accurate statement of the law (a problem discussed further and addressed in **Chapter 10**).

59 *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535.

60 Although only states may refer matters to the Commonwealth pursuant to s 51(xxxvii) of the *Constitution*, both the Northern Territory and the Australian Capital Territory are parties to the Corporations Agreement 2002, which underpins the present constitutional framework: see Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021).

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'.

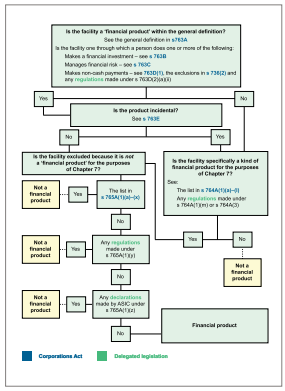
7.92 **Proposal A4** seeks to eliminate the use of Act-specific and provision-specific inclusions, exclusions, and other variations to the definitions of 'financial product' and 'financial service'. These inclusions, exclusions, and other variations result in both 'financial product' and 'financial service' being unnecessarily complex, and mean that both terms are not used consistently throughout the *Corporations Act* and *ASIC Act*. The frequent variation of terms by provisions of the Act, as well as by regulations and other legislative instruments, also undermines the coherence of the regulatory design for financial services law, and therefore undermines the establishment of a clear, coherent, and effective regulatory regime for consumers and regulated entities.

7.93 **Proposal A4** also seeks to ensure that where changes in the application of a provision that uses 'financial product' or 'financial service' are necessary, these occur through clear changes using application provisions rather than by altering the definitions of 'financial product' or 'financial service'. This reflects the ALRC's objectives of ensuring that: legislative complexity can be minimised as far as

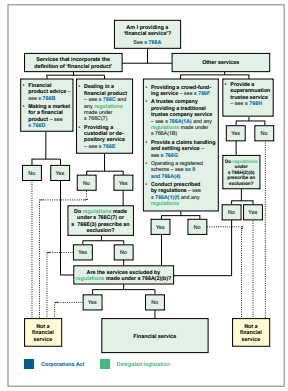
possible; unavoidable complexity can be appropriately managed over time; and, the regulatory framework can accommodate developments in policy and innovation.

7.94 Two diagrams at **Appendix C.6** ('financial product') and **Appendix C.7** ('financial service') illustrate the existing complexity of the defined terms 'financial product' and 'financial service' in Chapter 7 of the *Corporations Act*. These diagrams show how the current spread of exclusions, and other changes across different levels of the legislative hierarchy, create numerous 'exit ramps' from the regulatory regime. Each dotted line represents an 'exit ramp', showing that there are four exit ramps from the definition of 'financial product' and seven exit ramps from the definition of 'financial service'. The diagrams also illustrate the complex 'journey' a reader must follow to conclusively determine the application of large parts of Chapter 7.

Appendix C.6



Appendix C.7



Variations to definitions — Proposal A4(a), (b), and (c)

7.95 The following sections discuss the analysis underpinning **Proposal A4(a), (b), and (c)**. Where a particular section relates to one or more aspect of the proposal, this will be indicated in the heading to that section.

7.96 The focus of **Proposal A4(a), (b), and (c)** is the complexity created by the specific inclusions, exclusions, and other variations to the definitions of 'financial product' and 'financial service'. Inclusions, exclusions, and other variations effectively create several different definitions of each of the two terms. Arguably, the extensive use of specific inclusions, exclusions, and variations reflects a desire for certainty and prescription which, as recognised by the Financial Services Royal Commission, has ultimately led to complexity and the obscuring of fundamental norms.

Act-level changes in the Corporations Act: 'financial product'

7.97 The definition of 'financial product' in s 763A of the *Corporations Act* is subject to various inclusions (s 764A) and exclusions (s 765A), which are operative with respect to the Act as a whole. The lists of inclusions and exclusions use a range of

further defined terms. These include defined terms for particular financial products, including 'securities', 'derivatives', 'life policies', 'funeral benefits', 'foreign exchange contracts', 'margin lending facilities', and 'excluded securities'. Defined terms that do not relate to specific products are also used in these sections, including 'financial market', 'clearing and settlement facilities', 'derivative trade repositories', 'notified foreign passport fund', 'managed investment scheme', 'registered scheme', 'arrangement', 'interest', 'provides', 'transmission', 'payment', 'acquire', 'issue', and 'benefit'. These are terms defined within various sections of the *Corporations Act*.

7.98 The inclusions and exclusions for 'financial product' also use concepts from other Commonwealth Acts. Acts referred to in the definition include the *Fair Work (Registered Organisations) Act 2009* (Cth), the *Payment Systems and Netting Act 1998* (Cth), the *Export Finance and Insurance Corporation Act 1991* (Cth), the *Private Health Insurance Act 2007* (Cth), the *Retirement Savings Accounts Act 1997* (Cth), the *SIS Act*, the *Life Insurance Act 1995* (Cth), and the *Banking Act 1959* (Cth). Likewise, the definitions in s 761A of 'Australian carbon credit unit' and 'eligible international emissions unit', which are specifically included as financial products by s 764A, refer a reader to the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) and the *Australian National Registry of Emissions Units Act 2011* (Cth), respectively. In many cases, when a reader consults the dictionary of one of those Acts, the reader is simply referred to other provisions of the Act that must then be interpreted to give the relevant term meaning.[61]

7.99 Understanding this number of terms and concepts, which are defined across various parts of the *Corporations Act* and other Commonwealth legislation, is a significant challenge. However, this challenge is made worse by the complexity of some of the defined terms and their variability across the *Corporations Act*. Two examples illustrate the unnecessary complexity that specific inclusions add to the definition of 'financial product', which suggests that a greater reliance on the functional definition may be appropriate.

Security

7.100 A 'security' is a specifically included 'financial product' (s 764A(1)(a)). The term 'security' is given five different meanings across the *Corporations Act*. Three different meanings are provided for in s 92 (relating to Part 1.2A, Chapters 6–6CA, and Chapter 6D) and two are provided for in s 761A (relating to Chapter 7, excluding Part 7.11, and a broader definition for Part 7.11).[62] Like 'financial product', the definition of 'security' has provision-specific variations, and therefore shares the problem of having multiple meanings.

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61 See, eg, *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 5, 147.

62 For a discussion of the differences, see Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis Butterworths, 10th ed, 2021) 118–120.

Example: Specific inclusion of 'securities'

For the purposes of specifically including 'securities' as a 'financial product' in s 764A, the general definition of 'security' in s 761A applies. Relevantly, this definition comprises seven specifically included products and two specific exclusions. These inclusions and exclusions use several defined terms, identified in bold below:

> ***security*** means:
>
> (a) a share in a **body**; or
>
> (b) a **debenture** of a **body**; or
>
> (c) a legal or equitable **right** or interest in a security covered by paragraph (a) or (b); or
>
> (d) an option to **acquire**, by way of **issue**, a security covered by paragraph (a), (b) or (c); or
>
> (e) a **right** (whether existing or future and whether contingent or not) to **acquire**, by way of **issue**, the following under a **rights issue**:
>
> (i) a security covered by paragraph (a), (b), (c) or (d);
>
> (ii) an interest or **right** covered by paragraph 764A(1)(b), (ba) or (bb); or
>
> (f) a **CGS depository interest**; or
>
> (g) a **simple corporate bonds depository interest**;
>
> but does not include an **excluded security** or a **foreign passport fund product** …

7.101 Several of the defined terms used in this definition of 'security' also contain other defined terms in their own definitions, creating a cascading series of interconnected defined terms necessary for understanding a 'security'. For example, 'security' takes a reader to a 'simple corporate bonds depository interest', which then takes the reader to the definition of a 'simple corporate bond', which then means consulting s 9 and eventually s 713A. Similarly, 'security' takes a reader to the definition of 'debenture' in s 9, which is over 200 words long and uses numerous defined terms (such as 'property', 'security interest', and 'Australian ADI').

7.102 The use of interconnected definitions as densely as in the definition of 'security' creates complexity. It leads readers along a circuitous path of cross-references that may include multiple sections spread throughout the *Corporations Act*.

7.103 Interconnected definitions can also be useful. 'Security' is a necessary label for a range of products that Parliament considers should be regulated alike, and the products that are included within it are often given definitions because they too seek to capture some complex arrangements while excluding others. While any term

should only have one definition in the *Corporations Act* (as discussed in **Chapter 5**), the definition of 'security' will likely remain a bundle of other defined terms unless Parliament's intended scope of 'security' changes. Both 'financial product' and 'security' illustrate defined terms that are used to give effect to policy decisions about the field of regulation, as discussed in **Chapter 4** and **Chapter 10** of this Interim Report.

7.104 In the context of the definition of 'financial product', however, the use of the defined term 'security' adds unnecessary complexity. It distracts from the reality that arrangements that fall within the definition of 'security' are already likely to be captured by the functional definition of 'making a financial investment'. It is difficult to imagine a situation where acquiring, or obtaining an option to acquire, a share or debenture, or rights or interests in such arrangements, would not constitute the making of a financial investment, either in the terms of s 763B or on an ordinary reading of 'making of a financial investment'. If there is a type of 'security' currently captured by the definition in s 761A that does not involve making a financial investment, the functional definition may need revision, or the product may not be appropriately regulated as a 'financial product'.

Derivative

7.105 Derivatives are specifically included as financial products in s 764A(1)(c), and the defined term is also used in two specific exclusions from the definition of 'financial product'. 'Derivative' is defined in s 761D of the *Corporations Act* and is also used in other provisions of the Act, notably Part 7.5A regulating derivative transactions and derivative trade repositories.

7.106 The definition of 'derivative' is technically complex, and that complexity is exacerbated by the extent to which the definition, and inclusions or exclusions from it, are spread across various provisions of the *Corporations Act* and *Corporations Regulations*.

Example: Specific inclusion of 'derivatives'

The definition of 'derivatives' relies on a broad definition as well as several specific inclusions and exclusions. The broad definition provides that an arrangement will be a 'derivative' if it satisfies three conditions in ss 761D(1)(a)–(c). These conditions are that

(a) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time consideration of a particular kind or kinds to someone; and

(b) that future time is not less than the number of days, prescribed by regulations made for the purposes of this paragraph, after the day on which the arrangement is entered into; and

(c) the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, one or more of the following:

(i) an asset;

(ii) a rate (including an interest rate or exchange rate);

(iii) an index;

(iv) a commodity.

7.107 A reader must have regard to the *Corporations Regulations* to understand the condition in s 761(1)(b). Regulation 7.1.04(1) provides that the prescribed period is three business days for a foreign exchange contract or one business day in any other case.

7.108 Section 761D(2) then provides that products can be specifically included as derivatives through the regulations. Regulation 7.1.04(2) provides for a complex specific inclusion that is then subject to several exclusions in regs 7.1.04(4)–(7).

7.109 In addition to the general definition and the specific inclusions (which are subject to exclusions), the *Corporations Act* and the *Corporations Regulations* provide for specific exclusions from the general definition. Five exclusions are provided in the Act (ss 761D(3)–(4)) and three are provided in the regulations (reg 7.1.04(8)).

7.110 In total, to understand if something is a 'derivative' and therefore a 'financial product' regulated by the *Corporations Act*, a reader needs to look at the specific inclusions to 'financial product', then look to the definitions section of Chapter 7 in s 761A, then find the definition of 'derivative' in s 761D, then work their way through the general definition and the inclusions and exclusions to that definition, which are spread across the Act and regulations.

7.111 The complexity of the definition was demonstrated in *International Litigation Partners Pte Ltd v Chameleon Mining NL*,[63] where the New South Wales Court of Appeal split both on the interpretation of the definition of 'derivative' and its application to litigation funding agreements. While Young and Hodgson JJA agreed that such arrangements were not derivatives, they adopted different interpretations of the scope of the general definition in s 761D(1).[64] By contrast, Giles JA found that the litigation funding arrangements were derivatives.[65] Each judge had to consider not only whether the arrangement was a facility for 'managing financial risk', but also whether it was a 'derivative', as a finding that it was a derivative would prevent it from being an 'incidental' financial product. This illustrates the fact-intensive process of applying the definition of 'derivative', and that, notwithstanding the exhaustive drafting of the definition of 'derivative', there remains contestability as to its scope. Ultimately, the High Court concluded that the litigation funding agreement in question was a form of credit and therefore excluded from the definition of 'financial product' in the *Corporations Act*.[66]

7.112 The use of 'derivative' is unavoidable in some cases (for example Part 7.5A), and while its technical complexity may be unavoidable, simplification of its structure and drafting seems possible. The specific inclusion of 'derivatives' in the definition of 'financial product', like that for 'security', adds unnecessary complexity to the definition of 'financial product'. This is because a 'derivative' will be a financial product under the functional definition of financial product, as either a facility for managing financial risk or making financial investments. This was acknowledged in the Revised Explanatory Memorandum to the FSR Bill, which suggested that, because of s 763A(2), derivatives would always be a 'financial product' because 'the [derivative] transaction will be regarded as one for managing a financial risk since persons commonly acquire such products to manage financial risks'.[67] The same logic can be applied to many of the specific inclusions to 'financial product', as they are all commonly acquired for at least one of the purposes of making financial investments, managing financial risks, or making non-cash payments.

Act-level changes in delegated legislation: 'financial product'

7.113 At the level of the *Corporations Act*, 14 regulations and one ASIC legislative instrument directly affect the scope of the definition of 'financial product' that appears in Part 7.1 Div 3.[68] A further 10 prescribe specific exclusions from the definition of 'financial product',[69] and one (reg 7.1.04N) specifically includes a type of 'financial

63 *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 248 FLR 149.
64 Ibid [129]–[133] (Hodgson JA), [222]–[243] (Young JA).
65 Ibid [46]–[75] (Giles JA).
66 *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed) & Ors* (2012) 246 CLR 455.
67 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) 6.52.
68 *Corporations Regulations 2001* (Cth) regs 7.1.04N, 7.1.05, 7.1.06, 7.1.06A, 7.1.07, 7.1.07A, 7.1.07B, 7.1.07C, 7.1.07E, 7.1.07F, 7.1.07G, 7.1.07H, 7.1.07I, 7.1.07J; *ASIC Corporations (Non-Cash Payment Facilities) Instrument 2016/211*.
69 *Corporations Regulations 2001* (Cth) regs 7.1.07, 7.1.07A, 7.1.07B, 7.1.07C, 7.1.07E, 7.1.07F, 7.1.07G, 7.1.07H, 7.1.07I, 7.1.07J.

product'. Likewise, 21 regulations affect the definition of 'financial service' in Part 7.1 Div 4 or the services that comprise it.[70] For example, five regulations relate to 'dealing in a financial product'.[71]

7.114 Several regulations give meaning to, or affect the meaning of, a number of terms used in the definitions of 'financial product' and 'financial service'. As noted above, 'credit facility' (an exempt product) is defined in the *Corporations Regulations* (reg 7.1.06 for s 765A(1)(h) of the Act). The *Corporations Regulations* also prescribe exempt superannuation interests (reg 7.1.05 for s 765A(1)(q) of the Act). Changes to the meaning of 'financial product', and to specific types of 'financial product', also flow through to 'financial service' because dealing in a financial product, making a market for a financial product, and providing financial product advice are financial services that rely upon the definition of 'financial product'.

Removing specific inclusions of 'financial products' — Proposal A4(a)

7.115 As discussed above, the use of specific inclusions creates significant complexity in applying the definition of financial product. The prevalence of further defined terms within these specific inclusions and the overlap between the specific inclusions and the functional definition of financial product add particular complexity. Removing specific inclusions could greatly simplify the definition of financial product by requiring a reader to consult only the functional definition and exclusions from that definition. This is captured by the expression, used further below, 'it's in, unless it's out'.[72]

7.116 The list of specifically included financial products in s 764A of the *Corporations Act* and s 12BAA(7) of the *ASIC Act* are intended to 'provide examples of products that fall within the general definition' and to allow for products to be brought 'within the regime whether they fall within the general definition or not'.[73] The Revised Explanatory Memorandum to the FSR Bill does not explain which, if any, of the specific inclusions may not fall within the functional definition. Similarly, the explanatory materials to later amendments that have added to the list of specific inclusions do not identify any specific inclusions that fall outside of the functional definition.

7.117 Removing the list of specific inclusions raises the question of whether, in fact, any of the current specific inclusions do not fall within the functional definition. Three illustrations highlight this possibility. First, while any deposit-taking facility made available by an authorised deposit-taking institution is a specific inclusion,[74] a non-interest bearing deposit account may not fall within the current statutory definitions of 'making a financial investment', 'managing financial risk', or 'making non-cash

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70 Ibid regs 7.1.08AA, 7.1.08, 7.1.28AA, 7.1.28A, 7.1.29, 7.1.30, 7.1.31, 7.1.32, 7.1.33A, 7.1.33B, 7.1.33D, 7.1.33E, 7.1.33F, 7.1.33G, 7.1.33H, 7.1.34, 7.1.35, 7.1.35A, 7.1.35B, 7.1.35C, 7.1.40.

71 Ibid regs 7.1.34, 7.1.35, 7.1.35A, 7.1.35B, 7.1.35C.

72 See [7.180]–[7.193].

73 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [6.44].

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

payments'. Secondly, an Australian carbon credit unit may not meet those definitions where it is acquired for the purpose of offsetting carbon emissions.[75]

7.118 These two examples might be addressed by the current s 763A(2) of the *Corporations Act* and s 12BAA(2) of the *ASIC Act*, both of which provide in effect that a particular person's purpose is irrelevant if a facility is commonly acquired for one of the purposes outlined above. The inclusion of this subsection was explained by reference to the following example:

> For example, a particular person may enter into a derivatives transaction with a speculative purpose in mind. Notwithstanding this, the transaction will be regarded as one for managing a financial risk since persons commonly acquire such products to manage financial risks.[76]

7.119 Clearly, the question of whether something is commonly acquired for a particular purpose may be difficult to answer in some cases. It usefully serves, however, to return a reader's focus to the core function that financial products are said to fulfil and therefore encourages coherence in the regulatory regime.

7.120 A third illustration is the express inclusion of all foreign exchange contracts within the *ASIC Act* definition of financial product. This would include foreign exchange contracts that settle immediately. These are excluded from the *Corporations Act* definition.[77] It is difficult to envisage how an immediately settled foreign exchange contract, such as an over-the-counter exchange of Australian currency for foreign currency, for example, would fall within the limbs of the functional definition.

7.121 Removing specific inclusions could reduce certainty. On balance, the ALRC considers that using specific inclusions only shifts uncertainty to other specifically defined terms used to describe inclusions and exclusions from the general definition, rather than assisting to resolve uncertainty inherent in the functional definition. Moreover, the scope of uncertainty may be reduced by using an exclusion-only approach rather than the current inclusion and exclusion approach. Simplifying exclusions may also help to reduce uncertainty.

7.122 Residual uncertainty left by removing specific inclusions could be partly addressed in three ways:

- the range of examples in notes to the definition could be expanded. Notes to the current ss 763B, 763C, and 763D currently contain examples. As demonstrated by the prototype legislation at **Appendix E,** these could be retained. Unlike regulatory guidance, these examples would have interpretive effect.[78] Caution would need to be exercised in taking this approach to avoid the perception that specific inclusions were being 'reinstated';

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75 *Corporations Act 2001* (Cth) s 764A(1)(ka); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B.

76 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [6.52].

77 *Corporations Act 2001* (Cth) s 764A(1)(k).

78 The utility of this approach would be affected by whether s 15AD of the *Acts Interpretation Act* applied as in force on 1 January 2005 or as currently in force. As discussed in **Background**

- regulatory guidance could be used to clarify whether the regulator considers particular products to be regulated. While regulatory guidance may serve to communicate the regulator's view that certain products meet the functional definition, this would not be relevant in the case of litigation; or
- the current functional definition could be amended to the extent necessary to capture current specific inclusions. This should only be done if any amendment or addition to the functional definition relies on the ordinary meaning of the term introduced. It should not be perceived as a way of 'reinstating' specific inclusions.

7.123 This discussion again serves to highlight the intractable difficulty of dealing with questions at the boundary of regulation, as well as the need to balance prescription and certainty while discouraging regulatory arbitrage. The complexity created by combining specific inclusions with a functional definition, qualified by specific exclusions, strongly suggests that specific inclusions should be eliminated. This is also supported by the desirability of coherence within the regulatory regime. A legislative architecture that sets out to regulate functionally equivalent financial products that allows for the specific inclusion of matters that do not meet a functional definition permits policy incoherence in that regime. The existence of financial products that do not meet a functional definition may suggest a problem with the current policy settings, reflected in the scope of regulation, as opposed to problems with a functional definition itself.

Act-level changes in regulations: 'financial service' — Proposal A4(b) and (c)

7.124 The definition of 'financial service' relies on specific inclusions. Nevertheless, several of the limbs that comprise those inclusions can be affected by regulations so as to affect the scope or application of the definition of 'financial service' for the purposes of the whole Act. Section 766A of the *Corporations Act* contains a number of provisions that enable this:

- Section 7661A(1B): The regulations may, in relation to a traditional trustee company service of a particular class, prescribe the person or persons to whom a service of that class is taken to be provided. One regulation is in force under this provision.[79]
- Section 766A(1)(f): The regulations may prescribe conduct that is the provision of a financial service. One regulation is in force under this provision.[80]
- Section 766A(2)(a): The regulations may set out the circumstances in which persons facilitating the provision of a financial service are taken also to provide that service. No regulations are in force under this provision.

Paper FSL4 and **Chapter 5**, while s 15AD currently states that an example may 'extend the operation of [a] provision', the version applicable to the *Corporations Act* (that is, s 15AD as in force on 1 January 2005) states that if an 'example is inconsistent with the provision, the provision prevails'. In **Chapter 5**, the ALRC proposes that the sections of the *Corporations Act* and *ASIC Act* that 'freeze' the *Acts Interpretation Act* be repealed (**Recommendation 5**).

79 *Corporations Regulations 2001* (Cth) reg 7.1.28A.

80 Ibid reg 7.1.28AA.

- Section 766A(2)(b): The regulations may set out the circumstances in which persons are taken to provide, or are taken not to provide, a financial service. Ten regulations have been made under this provision.[81] Just one regulation provides for certain conduct to be 'taken to provide a financial service'.[82] This regulation also contains an exclusion. The other 9 regulations only provide for exclusions, with several containing multiple exclusions.[83]

7.125 Equivalent provisions are contained within the definition of 'financial service' in s 12BAB of the *ASIC Act*.[84] Currently, only reg 2C of the *Australian Securities and Investments Commission Regulations 2001* (Cth) ('*ASIC Regulations*') is in force under s 12BAB(1)(h) so as to include an activity as a 'financial service'.

7.126 Section 766C of the *Corporations Act* defines 'dealing' for the purposes of 'dealing in a financial product' in s 766A(1)(b). Section 766C(7) provides that regulations may prescribe conduct that is taken to be, or not to be, dealing in a financial product. Five regulations have been made under this provision.[85] All are exemptions. There are presently no regulations in force under the equivalent provision in s 12BAB(7) of the *ASIC Act*.

7.127 These powers mean that a person has to consult the inclusions in the Act, any potential inclusions in regulations, and the significant number of exclusions contained in regulations. This could be simplified by removing the ability to specifically include activities within the various limbs comprising the definition of 'financial service'. This is demonstrated by the definition of 'financial service' contained in the prototype legislation at **Appendix E**.

7.128 For policy reasons, s 766A(1B) should be retained in a simplified definition of 'financial service'. There is no simpler means through which to specify circumstances in which traditional trustee company services are provided to a person.

7.129 Consistent with a model in which specific inclusions are not contained in delegated legislation, s 766A(1)(f) should be omitted. Specific inclusions should be contained in one location — namely the list of conduct in s 766A(1). Amending this list, rather than using the regulation-making power in s 766A(1)(f), has been the principal means of expanding the type of conduct that constitutes providing a financial service. For example, the provision of claims handling and settling services and superannuation trustee services were made financial services through amendments to the *Corporations Act* rather than by regulations.[86] Amending the Act rather than creating delegated legislation is also arguably more appropriate given

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81 Ibid regs 7.1.06A, 7.1.29, 7.1.30, 7.1.31, 7.1.32, 7.1.33, 7.1.33A, 7.1.33B, 7.1.33D, 7.1.33E, 7.1.33F.

82 Ibid reg 7.1.33B.

83 See, for example, reg 7.1.33A, which provides an exclusion in relation to the 'financial product advice' limb in s 766A(1)(a) for certain conduct in relation to a list of financial products.

84 *Australian Securities and Investments Commission Regulations 2001* (Cth) ss 12BAB(1)(h), 12BAB(1B), 12BAB(2).

85 *Corporations Regulations 2001* (Cth) regs 7.1.34, 7.1.35, 7.1.35A, 7.1.35B, 7.1.35C.

86 *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) schs 7, 9.

that making something a 'financial service' has significant implications, such as attracting licensing and a range of conduct obligations. Omitting s 766A(1)(f) would therefore contribute to both simplification and a more principled legislative hierarchy.

7.130 The one regulation currently made under s 766A(1)(f) — namely, reg 7.1.28AA — appears unnecessary, and could be repealed. This regulation provides that 'financial product advice to an employer about the choice of a fund to which to contribute for the benefit of those employees for whom there is no chosen fund' is a financial service. However, financial product advice is already a financial service under s 766A(1)(a). This was recognised in the Explanatory Statement to the instrument inserting the regulation:

> regulation 7.1.28AA does not alter the categories of financial services in subsection 766A(1) of the Act, as regulation 7.1.28AA is a form of financial product advice also covered by subsection 766A(1) of the Act.[87]

7.131 The one regulation in force under s 12BAB(1)(h) of the *ASIC Act* — namely, reg 2C — specifically includes unsolicited off-market offers to purchase a financial product from a person who acquired that product as a retail client.[88] The history of this regulation and the different legislative approach taken in the *Corporations Act* illustrate how an application provision can be used in place of a definition to more clearly establish scope.

Example: Using an application provision instead of a definition

Regulation 2C of the *ASIC Regulations* was introduced in 2001 in order to replicate an equivalent regulation in the *Corporations Regulations* (reg 7.1.33C). The regulations were both introduced in response to a market practice 'whereby persons approach shareholders off-market and make offers to purchase shares well below market value, essentially trading on the potential ignorance of those shareholders'.[89] Like reg 2C of the *ASIC Regulations*, reg 7.1.33C of the *Corporations Regulations* specifically included unsolicited off-market offers within the definition of 'financial service', pursuant to s 766A(1)(f) of the *Corporations Act*. Regulation 7.1.33C was repealed in 2003 to coincide with the introduction of Part 7.9 Div 5A of the *Corporations Act*, which specifically regulates unsolicited offers to purchase financial products off-market.[90] Part 7.9 Div 5A does not regulate unsolicited off-market offers by including them within the definition of 'financial service', but rather by way of an application provision in s 1019D.

87 Explanatory Statement, *Corporations Amendment (Financial Advice) Regulation 2015* (Cth).
88 *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2C.
89 Explanatory Statement, *Australian Securities and Investments Commission Amendment Regulations 2003 (No. 1) 2003* (Cth).
90 Explanatory Statement, *Corporations Amendment Regulations 2003 (No. 11)* (Cth).

7.132 Regulation 2C of the *ASIC Regulations* could be replicated in an amended *ASIC Act* in one of two ways. First, it could be subject to the consumer protection provisions in Part 2 Div 2 of the *ASIC Act* by way of an application provision in a similar manner to s 1019D in Part 7.9 Div 5A of the *Corporations Act*. Alternatively, the drafting of s 12BAB(1)(g), which currently captures 'services' that are 'otherwise supplied in relation to a financial product', could be expanded to capture the conduct sought to be regulated by reg 2C of the *ASIC Regulations*. The first of these options would appear to be the simplest way and would not depend on attempting to enlarge the scope of s 12BAB(1)(g), potentially creating further complexity or indeterminacy.

7.133 Section 766A(2)(b) of the *Corporations Act* and s 12BAB(2)(b) of the *ASIC Act* should be amended so that regulations cannot specify the circumstances in which a person is taken to provide a financial service. This is consistent with the move away from specific inclusions to the definition of 'financial service' in delegated legislation.

7.134 The ability to provide exemptions from the definition of financial service, currently contained in s 766A(2)(b) and in relation to which 11 regulations have been made, should be maintained through a general exemption power.[91] This power would also eliminate the need for s 766C(7) of the *Corporations Act* and s 12BAB(10) of the *ASIC Act*, under which regulations may provide inclusions and exclusions from the definition of 'dealing' in a financial product. The ability to provide inclusions to this definition would fall away with the repeal of those provisions.

7.135 The remaining effect of s 766A(2) should be preserved by providing that delegated legislation may set out, for the purposes of specified provisions of Chapter 7:

(a) the circumstances in which persons facilitating the provision of a financial service (for example, by publishing information) are taken also to provide that service; or

(b) the circumstances in which persons are taken to provide a financial service instead of the persons who would otherwise be taken to provide it.

7.136 Subsection (b) above would be the basis for the continued operation of reg 7.1.33B of the *Corporations Regulations*, which currently relies on the power in s 766A(2)(b) to prescribe that a financial service is provided in certain circumstances.

7.137 Overall, these proposals would not change the substantive scope of the current definition, and would retain the flexibility to exclude from particular provisions of the *Corporations Act* certain financial services or circumstances in which a financial service is provided. However, this would occur in a simpler legislative architecture that eliminates the (largely unused) powers to create specific inclusions in delegated legislation. Consistent with the definition of financial product, a general definition would be contained in the Act while exclusions would be in delegated legislation.

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91 See **Chapter 10**. No regulations are currently in force pursuant to s 12BAB(2)(b) of the *ASIC Act*, the equivalent to s 766A(2)(b) of the *Corporations Act*.

Provision-level exclusions, exemptions, and variations in the Act and in delegated legislation: 'financial product' and 'financial service'

7.138 'Financial product' and 'financial service' are often used to determine the scope of particular provisions, including Parts and sections. For example, Part 7.6 (AFS Licensing, which is discussed in greater detail in **Chapter 8** of this Interim Report) uses the definition of 'financial service' to determine its scope. As a starting point, a person who carries on a 'financial services business', which means 'a business of providing financial services' (s 761A) must hold an AFS Licence (s 911A). This requires, first, understanding and applying the complex definition of 'financial service' in the Act and delegated legislation, which may also require understanding various interconnected definitions, including 'financial product'. A person, having gone through the labyrinthine definition, may determine they carry on a business of providing 'financial services' and need to hold a licence under s 911A.

7.139 However, that person will then need to grapple with the dozens of exemptions that may apply to the requirement to hold an AFS Licence. These exemptions relate to particular types of financial services and products. A range of exemptions can first be found in the Act. In s 911A(2), 23 paragraphs provide exemptions from the obligation to hold a licence for particular financial services, or circumstances relating to the provision of services. One paragraph, s 911A(2)(f), includes 12 distinct exemptions.

7.140 In addition to the exemptions in s 911A(2) of the *Corporations Act*, reg 7.6.01(1) of the *Corporations Regulations* includes 26 paragraphs that provide further exemptions for a variety of specific circumstances relating to the provision of a 'financial service'. Many of these exemptions relate to specific financial products (for example, regs 7.6.01(1)(lc), (m), (ma), (mb)). Regulation 7.6.01AAA provides that the exemption in s 911A(2)(b) of the Act does not apply to margin lending facilities, effectively creating an inclusion by carving margin lending facilities out from an exemption that appears in the Act.

7.141 Furthermore, notwithstanding that the *Corporations Regulations* are structured and numbered so as to reflect the structure of the *Corporations Act*, regulations do not always appear where a reader may expect to find them in the *Corporations Regulations*. For example, reg 7.1.08A appears in Part 7.1 (Preliminary) of the Regulations rather than Part 7.6 of the Regulations relating to licensing. Regulation 7.1.08A notionally amends the definition of 'making a market', a defined term within financial service, to provide an exclusion. However, the exclusion only applies for the purposes of Part 7.6.

7.142 Lastly, a further 46 ASIC legislative instruments provide exemptions from the AFSL regime for particular circumstances in which certain financial services are provided.[92]

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92 Australian Law Reform Commission, 'ASIC-Made Legislative Instruments (Qualitative) – 30 June 2021' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/legislative-data>.

7.143 In addition to exemptions from entire regimes (such as the AFSL regime), a range of regulations and ASIC legislative instruments also provide exclusions or exemptions from particular provisions of the *Corporations Act*. For example, reg 7.9.15D of the *Corporations Regulations* provides that certain content requirements relating to PDSs, the application of which are determined through the definition of 'financial product', do not apply to a general insurance product. Likewise, several ASIC legislative instruments grant relief from the prohibition on hawking financial products in s 992A.[93] These provision-specific exclusions and exemptions can be particularly problematic because a regulated entity, consumer, or investor will struggle to identify them across the Act, regulations, and other instruments. This is because readers are unlikely to be conscious of the fact that particular provisions, rather than whole regimes such as licensing and disclosure, are subject to exemptions and notional amendments. Section 992A, for example, does not alert a reader to the possibility that exemptions and notional amendments can be made, let alone to their existence. Readers are instead required to be aware of the various exemption and notional amendment powers and to locate instances where they have been used.

Removing the incidental product exclusion — Proposal A4(d)

7.144 The incidental product exclusion in s 763E is an unnecessary source of complexity. The policy objective of excluding incidental products could better be achieved by specific exclusions or exemptions. For example, an exclusion could be provided for warranties issued by the seller of a good or service. The European Union's MiFID II also provides an incidental product exclusion in certain circumstances without specifically changing the definition of 'financial instrument'; instead it introduces the exclusion through an application provision.[94]

7.145 Presently, having determined that a product is functionally a 'financial product' under s 763A, a reader must then determine whether the product is an 'incidental product' under s 763E. If so, it will be excluded and fall outside the definition of 'financial product'. However, that exclusion may be overridden by the specific product inclusions in s 764A; that is, it will be brought back within the definition of 'financial product'. Even if a person determines the incidental product exclusion does not apply, the list of specific exclusions in s 765A may still exclude the product. As the diagram of 'financial product' in **Appendix C.6** shows, the incidental product exclusion significantly complicates the process of establishing whether something is a 'financial product' — and is not wholly determinative of whether something is or is not within the definition.

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93 See, eg, *ASIC Corporations (Non-Cash Payment Facilities) Instrument 2016/211*; *ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2017/184*; *ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/869*.

94 *Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU* [2014] OJ L 173/349, art 2(1)(c).

7.146 The incidental product exclusion has also proven difficult to apply in practice, and is highly fact-dependent. The New South Wales Court of Appeal in *International Litigation Partners Pte Ltd v Chameleon Mining NL* split on whether the risk management component of a litigation funding agreement was incidental to finance provided for litigation.[95] The majority (Hodgson and Young JJA) found that it was not incidental, with Giles JA suggesting that it was incidental. The dispute came down to whether s 763E of the *Corporations Act* requires that 'the main purpose considered as a whole [is] *in fact* not managing financial risk' or whether it requires that '"it is reasonable to assume" this to be the case'.[96]

7.147 Likewise, the potential indeterminacy and contextual nature of the 'incidental' product concept was highlighted in *Barclay MIS Group of Companies Pty Ltd v Australian Securities and Investments Commission* ('*Barclay MIS*').[97]

95 *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 248 FLR 149.

96 Ibid [126].

97 *Barclay MIS Group of Companies Pty Ltd v Australian Securities and Investments Commission* (2002) 125 FCR 374.

Example: Applying the incidental product exclusion in Barclay MIS

Barclay provided services to landlords as part of annual fee-based plans. One of these plans, the Basic Plan ($33 p.a.), provided a range of services in the event of default by a tenant.[98] However, it also provided access 'to "Fast Track", the Barclay MIS National Tenancy Database that highlights delinquent tenants as well as exemplary ones'.[99]

ASIC argued that this plan, along with three others, were facilities for managing financial risk, namely the risk of a tenant defaulting.[100] The Court, after giving close attention to the nature of the product and the way in which it was distributed, found that the Basic Plan had a purpose other than managing a financial risk, which was the prevention of tenant default.[101] The Court then considered whether the financial product was incidental, using the Shorter Oxford Dictionary definition of 'incidental'. Dowsett J concluded that the Basic Plan was excluded as an incidental product.

The Court found that the three other plans, which offered payments to landlords in the event of unpaid rent or damage to the property, were principally risk management products and therefore not incidental.[102] The plans were therefore financial products.

Barclay also proposed to issue two other products, the Basic Assistance and Total Assistance plans. The Court noted that both lacked access to the National Tenancy Database, which was determinative of both plans being a financial product. Neither plan included any other facilities to which the risk management function could be incidental.[103]

7.148 The Federal Court's fact-intensive analysis of the plans in *Barclay MIS* underlines the complexity of the current incidental product exclusion. Issuers of financial products have to engage in similarly detailed analysis in relation to each product they consider may meet the incidental product exclusion, and regulators and lawyers for consumers challenging this view need to conduct such analysis as well. They also need to do so while keeping in mind that an incidental product may be specifically included as a financial product in s 764A. An alternative set of specific exclusions for products issued in particular circumstances may involve a simpler analysis in determining whether the exemption is satisfied.

98 Ibid [2].
99 Ibid [20].
100 Ibid.
101 Ibid.
102 Ibid [25].
103 Ibid [41], [43].

Definitions and the regulatory perimeter — Proposal A4(e) and (f)

7.149 A fundamental question posed by the use of definitions and the current legislative design is how to promote robust regulatory boundaries. Central to this question is how the *Corporations Act* and particular provisions within it are applied to the financial products and services that the Commonwealth Parliament considers should be regulated under that Act. As discussed, this is currently done through a complex definition of 'financial product' and a less complex definition of 'financial service', in conjunction with a large number of variations to these definitions across the *Corporations Act*, *Corporations Regulations*, and other legislative instruments. Both of these definitions expand and contract as they relate to different parts of Chapter 7 of the *Corporations Act* and different areas of regulation. To a lesser extent, a similar problem applies in respect of the *ASIC Act*.

7.150 As discussed in **Chapter 4**, part of the challenge reform in this area faces is the reality that language is inherently uncertain, particularly when used to describe complex things. That difficulty is amplified when trying to use terms in legislation for the purposes of describing and regulating conduct. This points to the key problem underpinning the use of defined terms more generally; namely, the need to describe and articulate the field of regulation using language. The result is that somewhat artificial terms like 'financial product' and 'financial service' are used, out of necessity, to capture a range of complex things in terms that a reader can keep in mind when reading legislative provisions about those things.

7.151 Using defined terms to establish the perimeter of legislation is a common function of definitions in Australian legislation. The alternative to using defined terms to determine the application of an Act or provisions within an Act is to repeatedly list in detail the circumstances or persons to which the Act, or provisions within it, apply. For example, instead of a provision applying in relation to a 'consumer' as defined, a provision would have to repeat the elements of the concept of a 'consumer' as part of the provision's text and any concepts 'nested' within that definition. This deconstructive approach would be impractical, leading to ever longer Acts with dense and highly complex provisions. Defined terms perform the role of giving a reader an indication of the provision's subject matter in as few words as possible while enabling comprehension of the provision as a whole. Ultimately, as discussed in **Chapter 4**, a balance must be struck between giving a reader sufficient detail on the one hand and maintaining overall readability of the text on the other hand.

7.152 Instead of proposing to eliminate the role of defined terms in determining the regulatory perimeter of Chapter 7 of the *Corporations Act*, this section considers how defined terms can better serve this purpose, particularly alongside the use of a principled legislative hierarchy that minimises duplication and overlap. A better approach to establishing the regulatory perimeter for the Act and its provisions is necessary if the Wallis Inquiry's objective of regulating functionally equivalent products and services is to be implemented as simply, adaptively, and efficiently as possible.

Alternative regulatory regimes

7.153 The legislative hierarchy of the *Corporations Act* has proven problematic and has developed inconsistently. Several examples of this have already been discussed, including the proliferation of exemptions and variations to the definitions of 'financial product' and 'financial service' at all levels of the hierarchy, with no principled basis for their location.

7.154 The prescriptiveness of the *Corporations Act* has combined with the expansiveness of the definitions used by Chapter 7 to create a source of complexity that undermines the accessibility, consistency and coherence of the whole Act — namely, 'alternative regulatory regimes' in dozens of legislative instruments and regulations.

7.155 Exemptions have multiplied over the past 20 years for particular types of financial products and services because these terms determine the scope of significant regimes and provisions in Chapter 7. However, significant numbers of these exemptions, particularly in ASIC legislative instruments, include conditions for reliance on the exemption, or are tied to notional amendments to the Act. These conditions or notional amendments may create alternative regulatory regimes for the persons subject to the exemption.

7.156 Such regimes can be voluntary or compulsory, and instruments may include a mix of voluntary or compulsory regimes. An alternative regulatory regime will be voluntary where regulated persons have a choice whether to comply with the conditions in the instrument. For example, an instrument may exempt a person from the requirement to hold an AFS Licence, but to rely on this exemption the person must comply with a range of conditions in the instrument. The person can therefore choose whether to comply with the exemption or to obtain a licence as required by the Act. It will often be beneficial to rely on the exemption because the conditions on doing so are less onerous than the Act's provisions. An alternative regulatory regime will be compulsory where the exempt person does not have a choice as to whether to comply with the alternative regulatory regime. Compulsory regimes are implemented through notional amendments to the Act.

7.157 These alternative regulatory regimes have typically been created to address perceived issues arising from the breadth and prescriptiveness of the *Corporations Act*, often in response to stakeholder demands. In its submission in response to the Financial Services Royal Commission Interim Report, Treasury noted there had been

> requests by financial firms, and the legal professionals advising them, for certainty of how laws are to apply. Reflecting these demands and the increased complexity of financial markets and products, the legislative framework has become increasingly tailored for particular segments of the regulated

> populations, resulting in a large number of exceptions, carve-outs or entirely bespoke regimes within the broader legislative framework.[104]

7.158 Notional amendments, and the exemptions that frequently accompany them, reflect a policy decision that a particular rule or set of rules should not apply or should apply in a tailored form to a particular class of products or persons. The fact that these amendments may encompass policy decisions is reflected in the Australian Government's 'Statement of Expectations' regarding ASIC, released in August 2021, which stated that:

> In achieving its objectives, carrying out its functions and exercising its powers, the Government also expects ASIC to … consult with the Government and Treasury in exercising *its policy-related functions*, such as the use of its exemption and modification [notional amendment] powers, other rule-making powers, and guidance.[105]

Example: Alternative regulatory regime

An alternative regulatory regime is contained in *ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968* ('*Instrument 2016/968*'). This instrument provides an alternative regulatory regime for managed discretionary account services ('MDAs'), which are 'financial products' falling within the definition of both managed investment schemes (s 9) and facilities for making financial investments (s 763B). ASIC first provided an exemption and alternative regime for these products in 2004,[106] and that same relief, with some changes, remains in force in *Instrument 2016/968*. This instrument notionally inserts 15 sections into the *Corporations Act*, containing more than 50 subsections, 140 paragraphs, 90 subparagraphs, and 30 sub-subparagraphs of 11,000 words.[107] The instrument is 15,000 words long and includes over 50 defined terms and tags.

7.159 The alternative regulatory regime in *Instrument 2016/968* was created by ASIC shortly

> after the commencement of the financial services regulatory regime [because] it became apparent that applying the regulatory requirements for managed investment schemes to the regulation of MDAs do not reflect the risks associated with the operation of MDAs.[108]

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104 Department of the Treasury (Cth), Submission to the Financial Services Royal Commission (Interim Report)*, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (undated) [23].

105 Australian Government, *Statement of Expectations: Australian Securities and Investments Commission* (2021) [3.3] (emphasis added).

106 *ASIC Class Order — Managed Discretionary Accounts* (CO 04/194).

107 Notionally inserted sections are ss 912AE, 912AEA, 912AEB, 912AEC, 912AED, 912AEE, 912AEF, 912AEG, 912AF, 912AFA, 912AFB, 912AFC, 912AFD, 912AFE and 912AG.

108 Australian Securities and Investments Commission, Explanatory Statement, *ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968*, 2.

7.160 ASIC therefore sought

> to allow for flexibility in the structuring of MDAs by ensuring that our requirements for MDA Providers are appropriate and therefore tailored to take into account the nature of the financial products and services involved in providing the MDA.[109]

7.161 To achieve this, ASIC

> adopted a tailored regulatory regime for MDA providers, exempting them from the managed investments provisions in Chapter 5C of the Act; and product disclosure provisions and fundraising in Chapter 6D and in Part 7.9 of the Act. Simultaneously [ASIC] imposed some disclosure obligations on MDA providers to ensure that clients receive adequate information when determining whether to enter into a MDA; and imposed requirements on MDA providers and external MDA custodians to ensure client money is adequately protected and potential conflicts of interest are managed.[110]

7.162 Notional amendments made to the *Corporations Act* by *Instrument 2016/968* apply a compulsory tailored regulatory regime. Those notional amendments are compulsory because a person has to comply with the notionally amended sections. *Instrument 2016/968* also contains conditional exemptions from provisions of the *Corporations Act*. A person may therefore choose to rely on the conditional exemptions in the instrument, but if they do not (or do not satisfy the conditions), then that person must nonetheless comply with both the *Corporations Act* and the (compulsory) alternative regulatory regime created by way of notional amendments.

7.163 Instruments that impose alternative regulatory regimes, particularly through notional amendments, are a serious source of complexity. ALRC analysis has identified approximately 66 instruments that grant relief and that also notionally amend the text of the Act.[111] A further 30 amend the Act without granting relief.[112] The *Corporations Regulations* also include several alternative regulatory regimes for particular products, services, and circumstances that operate in parallel to the Act. To identify the alternative regimes that may apply to them, a person theoretically needs to be across the detail of the over 300 ASIC legislative instruments currently in force,[113] as well as the *Corporations Regulations*.

7.164 Further examples in the context of financial services licensing and disclosure are discussed in **Chapter 8** and **Chapter 9** of this Interim Report.

Application provisions, and consolidating exemptions and exclusions

7.165 Changes to, or variations in, the definitions of ‘financial product’ and ‘financial service’ for particular provisions or Acts could be eliminated through the use of

109 Ibid 3.
110 Ibid.
111 Australian Law Reform Commission (n 92).
112 Ibid.
113 Ibid.

application provisions. These application provisions would allow for exclusions for certain products, services, and circumstances from the scope of a substantive provision (which may be a part, division, or section, for example). Where exclusions or exemptions are permitted, the content of these exclusions and exemptions should generally be consolidated in delegated legislation. Readers of legislation should not need to consult the Act, regulations, and dozens of other legislative instruments to understand the application of a provision.

7.166 Chapter 7 of the *Corporations Act* and specific provisions (for example financial product disclosure and financial services licensing) would therefore use exclusions and exemptions to achieve the same policy outcome of regulating only certain financial products and services. In licensing, for example, this would see the consolidation of almost one hundred exclusions and exemptions in a clearly identifiable legislative instrument, the presence of which is indicated by a clear application provision in the Act. Structural exemptions that reflect key policies, such as the exemption for authorised representatives from the requirement to hold an AFS Licence, may still be included in the Act. This is further discussed in **Chapter 10**.

7.167 As discussed above, using application provisions, and not variations to defined terms, could facilitate a uniform definition of financial product across Commonwealth Acts, notably in the *Corporations Act* and *ASIC Act* (**Proposal A3**). The definition would remain consistent, but the application of particular provisions to financial products and financial services could be adapted through application provisions.

Simplifying and restructuring exclusions and exemptions

7.168 As part of the process of consolidating provision-specific exclusions and exemptions in delegated legislation, these exclusions and exemptions should be simplified and restructured. These generally relate to types of financial products and services, including circumstances in which they are provided. Simplification could be achieved by consolidating and rationalising exclusions and exemptions which have been introduced in a piecemeal way over the past 20 years. Implementation of this proposal will be discussed in the following chapters relating to financial services licensing (**Chapter 8**) and financial product and services disclosure (**Chapter 9**), as well as in **Chapter 11** in relation to advice-related exclusions and exemptions. The prototype legislative drafting at **Appendix E** illustrates how exclusions and exemptions could be consolidated and rationalised in delegated legislation.

7.169 Simplification of financial product exclusions in what is currently s 765A of the *Corporations Act* could be achieved by reducing cross-references to other provisions of the *Corporations Act* or other Acts and limiting reliance on defined terms. For example, cross-references could be reduced by including the full detail of what is being excluded (for example, replacing ss 765A(1)(r)(i), (1)(n), and (1)(p)). Likewise, 'excluded security' should be replaced with a more intuitive label given it only covers securities relating to retirement village schemes. Similar concepts could also be consolidated, such as by replacing s 765A(1)(d)–(f) with an intuitive defined term, such as 'Government insurance'. The exclusions in s 765A(1)(c)–(ca) could be

replaced with an exclusion for 'health insurance', which is an intuitive defined term capturing multiple current exclusions.

The functional definition of 'financial product'

Proposal A5 The *Corporations Act 2001* (Cth) and *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)).

7.170 **Proposal A5** seeks to improve the design of the functional definition of 'financial product', consistent with promoting robust regulatory boundaries, understanding, and general compliance with the law. The ALRC considers that Proposal A5 would reduce the complexity of the definition of 'financial product' by reducing the number of detailed defined concepts that a reader must understand. The proposal is consistent with earlier proposals to reduce the number of defined terms relevant to understanding the core concept of a 'financial product', including through the removal of specific inclusions and the incidental product exclusions, as well as the simplification of remaining exclusions. **Proposal A5** is illustrated by the definition of 'financial product' contained in the prototype legislation at **Appendix E**.

7.171 Among comparable jurisdictions, Australia is unique in its use of a functional definition to define 'financial product'.[114] At this stage of its Inquiry, the ALRC considers that the functional definition of financial product better reflects current policy settings than the alternative specific list approach. Before considering how the functional definition could be simplified, it is useful to consider in detail the alternative; namely, the specific list approach.

'If it's in, it's in; if it's not in, it's out': The specific list approach

7.172 An alternative to using a broad, functional definition of financial product would be to adopt an approach that uses only specific inclusions to determine the scope

114 See [7.65]–[7.73].

of Chapter 7 of the *Corporations Act* and specific provisions within it. This approach would eliminate the functional concept of a 'financial product' and instead use a list of specific financial products or categories of products. This is the approach currently adopted for 'financial service', which has no functional definition. Although they vary in some respects, legislation in each of the UK, New Zealand, and South Africa use specific lists of matters to establish their regulatory perimeters.[115]

7.173 Under a specific list only approach, the scope of different regulatory regimes, such as the licensing or disclosure regimes, that apply to only a subset of regulated products or services could be exhaustively described. One perceived advantage of the specific list approach, therefore, is certainty. This is captured in the phrase 'if it's in, it's in; if it's not in, it's out', meaning that the boundaries of regulation are clearly staked out. In some respects, the current list of specific inclusions performs this role, but those inclusions are subject to numerous exclusions which means that they are not definitive. Furthermore, there are broad areas of overlap between the functional definition and specific inclusions.

7.174 Arguably, the specific list approach brings only the illusion of certainty because specific inclusions themselves will inevitably provoke litigation and regulatory arbitrage. This is demonstrated by the example of derivatives, discussed above, which is one of several defined terms used to describe specifically included products. Similarly, legislation in the UK, as well as South Africa,[116] relies on interconnected defined terms, the boundaries of which may be disputable. While the definitions of 'debt security', 'equity security', 'managed investment product', and 'derivative' in the *FMC Act* (NZ) do not rely heavily on statutorily defined terms, they nonetheless rely on terms that take on particular, potentially open-ended meanings. For example, a 'debt security' includes 'a security commonly referred to in the financial markets as a debenture, bond, or note' and the definition of 'derivative' includes a transaction that is 'recurrently entered into in the financial markets in New Zealand or overseas and is commonly referred to in those markets' as 'a futures contract or forward' or 'an option', among several other terms.[117]

7.175 The specific inclusions themselves would also likely need to contain exclusions or carve-outs — as shown by both the UK and New Zealand legislation. Many of the specified activities and investment types set out in the UK's *Regulated Activities Order* are subject to exclusions, such as the specified activity in s 25 (Arranging deals in investment) and the type of investment in s 77 (Instruments creating or acknowledging indebtedness). Definitions in s 8 of the *FMC Act* (NZ) are similarly subject to exclusions.

7.176 Moving to a specific list of regulated matters would require a significant shift in policy approach. The current policy underpinning the definition of 'financial

115 See [7.42]–[7.58].

116 See, eg, *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (UK) SI 2001/544, s 21 (Dealing in investment as agent); *Financial Sector Regulation Act 2017* (South Africa) s 2.

117 *Financial Markets Conduct Act 2013* (NZ) s 8.

product' is that it should capture functionally equivalent products without the need for legislative amendment, and that flexibility should be provided by excluding products via regulation or ASIC instrument.[118] Difficulties in designing a definition such as 'financial product' are not new, and were recognised by the National Corporations and Securities Commission in a 1985 report in which it discussed the term 'securities' (the predecessor to the term 'financial product'):

> Historically problems related to the definition of securities in the United States and Canada arose from the fact that early definitions adopted an approach of listing specific products. This necessitated a change to the legislation as new products developed. The current trend is for a broad definition of securities which is intended to cover all products and activities to be regulated.[119]

7.177 According to CLERP Proposals Paper No 6, a 'more efficient regulatory framework for the investment industry [would] be achieved by focussing on the functions of financial markets and products'.[120]

7.178 While the problems posed by legislative amendment may be partially addressed by having inclusions prescribed only by regulations, as in the UK, this too would represent a policy shift whereby the executive arm of government exclusively determines the outer boundaries of regulation. At present in Australia, that role is shared between Parliament (by way of the functional definition, specific inclusions, and specific exclusions contained in the *Corporations Act*) and the executive arm (by way of delegated legislative authority exercisable by regulations and other legislative instruments), subject to Parliamentary disallowance.

7.179 The Wallis Inquiry had also noted an ongoing 'quest for regulatory arbitrage [that] will increasingly demand regulatory review and reform'.[121] The move to a functional definition of financial product in the *Corporations Act*, rather than one based solely on inclusions as in the UK, reduced the scope for such arbitrage and the necessity of a reactive approach to regulatory review and reform. It did not, however, eliminate the need for reforms.

'It's in, unless it's out': Retaining the functional definition

7.180 The ALRC currently proposes retaining a functional definition of 'financial product'. One way to potentially broaden and, at the same time, simplify the current functional definition may be to allow the expressions 'makes a financial investment', 'manages a financial risk', and 'makes non-cash payments' to bear their ordinary meaning, rather than being defined.

7.181 One consequence of using specific inclusions and exclusions within the definition of 'financial product' to date is that most litigation and judicial interpretation

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118 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [4.3].
119 National Companies and Securities Commission, *A Review of the Licensing Provisions of the Securities Industry Act and Codes* (1985) [4.4].
120 Department of the Treasury (Cth) (n 15) 30.
121 Wallis et al (n 3) 172.

has centred on the meaning of terms used to describe those inclusions and exclusions. As a result, relatively little judicial attention has been given to the elements of the functional definition: 'makes a financial investment', 'manages financial risk', and 'makes non-cash payments'. These terms are defined, respectively, by ss 763B, 763C, and 763D of the *Corporations* Act and ss 12BAA(4), (5), and (6) of the *ASIC Act*.

7.182 AFCA determinations (including determinations of predecessor external dispute resolution bodies) have considered the application of the functional definition of 'financial product'. However, these determinations, and the conclusions they reach in relation to particular products, have limited utility for regulated entities and consumers in applying the functional definition and they cannot be relied upon to conclusively determine the meaning of 'financial product' in the *Corporations Act*.[122]

7.183 One of the few judgments considering the functional definition of 'financial product', *Australian Securities and Investments Commission v Money for Living (Aust) Pty Ltd (Administrators Appointed) (No 2)* ('*ASIC v Money for Living*'),[123] highlights the potential difficulty in attempting to statutorily define expressions that also bear an ordinary meaning. In that case, Finkelstein J considered whether interests in a relatively novel investment scheme met the definition of 'making a financial investment' in s 12BAA(4) of the *ASIC Act*. In summary, the scheme involved participants selling their residential property to a company for a price paid in instalments. These instalment payments were advertised as being like an income stream. The sale was subject to a 'lease-back' arrangement, which entitled the participants to a life tenancy of the residential property for a rental price of $1.00 per year. The scheme collapsed before many investors had received the purchase price owing on the sale of their properties and ASIC commenced proceedings against the company alleging it had engaged in misleading or deceptive conduct in relation to financial products and services, in contravention of the *Corporations Act* and *ASIC Act*.[124] That, in turn, depended on the definitions of 'financial service' and 'financial product'. Finkelstein J noted that the question of whether the arrangements in question constituted 'making a financial investment', and therefore were a financial product, was 'not an easy question to answer'.[125]

7.184 Section 12BAA(4) of the *ASIC Act* provides that a person (the investor) makes a financial investment if:

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122 This is the case because: determinations by AFCA do not have the same status as judgments of a court; AFCA does not operate under a precedent-based system, so earlier determinations are not binding on decision makers; and, AFCA's determinations do not need to be based exclusively on the law: see Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (2021) r A.14.2.

123 *Australian Securities and Investments Commission v Money for Living (Aust) Pty Ltd (No 2)* (2006) 155 FCR 349.

124 *Corporations Act 2001* (Cth) s 1041H; *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA.

125 *Australian Securities and Investments Commission v Money for Living (Aust) Pty Ltd (No 2)* (2006) 155 FCR 349 [21].

(a) the investor gives money or money's worth (the contribution) to another person and any of the following apply:

(i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;

(ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);

(iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor; and

(b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

7.185 Justice Finkelstein characterised the 'key elements' of the definition as being:

> (1) handing over (the statutory word is 'gives') an asset (money or money's worth) to another person; and (2) applying or intending to apply the asset to produce an advantage for the investor (the advantage being a 'financial return' or some other 'benefit').[126]

7.186 His Honour continued:

> At a superficial level it is clear what is intended; a financial investment is when a person lays out money or capital for the purpose of getting a return. This is what a businessperson would understand as a 'financial investment'. On this view, the mere sale or purchase of a home for its exchange value is not covered. This is because the simple conversion of an asset of one kind (for example land) into an equivalent asset of a different kind (for example cash) has no element of putting the asset to use to gain a return, at least not in a business sense.[127]

7.187 Citing *Australian Softwood Forests Pty Ltd v Attorney-General (NSW)*,[128] Finkelstein J stated that the provisions should be construed broadly. After considering in some detail the potential benefits to an 'investor' in the relevant scheme, his Honour turned to the question of whether 'the word "gives" in the phrase "gives money or money's worth" includes a sale with a lease-back'.[129] His Honour stated:

> Ordinarily the word 'gives' would not carry that meaning. I observe, however, that in the note to s 12BAA there are examples of what acts constitute making a financial investment. One example is the subscription of money for shares in a company. In substance this is the acquisition of an asset for its exchange value in the hope of making either a capital profit or receiving income. If 'gives' includes the purchase of an asset there is no reason why it should not also include a sale.[130]

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126 Ibid [20].
127 Ibid [20].
128 *Australian Softwood Forests Pty Ltd v Attorney General (NSW); Ex rel Corporate Affairs Commission* (1981) 148 CLR 121.
129 *Australian Securities and Investments Commission v Money for Living (Aust) Pty Ltd (No 2)* (2006) 155 FCR 349 [22].
130 Ibid.

7.188 The comments of Finkelstein J illustrate that the current statutory definition of 'makes a financial investment' may in fact create complexity in construing a term that, as his Honour acknowledged, is capable of bearing a meaning in accordance with its ordinary terms.

7.189 The ALRC considers that Finkelstein J's comments highlight the possibility that repealing the current definitions of 'makes a financial investment', 'manages financial risk', and 'makes non-cash payments' may produce less complex legislation. In the case of 'makes a financial investment', Finkelstein J's comments in *ASIC v Money For Living* suggest that removing the definition of that expression would not restrict the term's scope, and therefore not alter the current policy. In the absence of judicial interpretation, it is difficult to be conclusive about the terms 'manages financial risk' and 'makes non-cash payments'.

7.190 New Zealand and South African financial services legislation both use the expressions 'making a financial investment' and 'managing a financial risk' without further definition.[131] In New Zealand, the terms are used as part of the definition of 'security', which takes on significance by being used to describe the range of matters which the New Zealand FMA can declare to be 'financial products' pursuant to the power in s 562 of the *FMC Act* (NZ). Similarly, the terms take on significance in s 3(3) of the *Financial Sector Regulation Act 2017* (South Africa), which allows for regulations to declare certain matters to be financial services, including services relating to arrangements for making a financial investment or managing a financial risk. Although used in different contexts to the Australian legislation, and not in a way that determines the core meaning of 'financial product' (as in the Australian legislation), it is clear that the terms are permitted to take their ordinary meaning.

7.191 Presently, s 763D of the *Corporations Act* and s 12BAA(6) of the *ASIC Act* provide that 'a person makes non-cash payments if they make payments, or cause payments to be made, otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins'. As demonstrated by the prototype drafting at **Appendix E**, the ALRC proposes that these provisions be repealed and the expression 'non-cash payments' be given its ordinary meaning in the functional definition of 'financial product'. The exclusions from the definition of 'makes a non-cash payment' currently contained in s 763D(2) can be accommodated as exclusions using an application provision, rather than exclusions from a defined term. The ALRC notes, for example, that the Payments System Review*,* commissioned by the Australian Government and completed in June 2021, defined a 'non-cash payment facility' as 'a facility through which, or through the acquisition of which, a person makes *non-cash payments*'.[132] Similarly, the definition of 'financial service' in the current AFCA Rules (discussed in more detail further below) also refers to a facility through which a person makes 'non-cash payments' without defining that term. If the

131 *Financial Markets Conduct Act 2013* (NZ) s 2 (definition of 'security'); *Financial Sector Regulation Act 2017* (South Africa) s 3(3).

132 Australian Government, *Payment Systems Review: From System to Ecosystem* (2021) 95 (emphasis added).

expression 'non-cash payments' were thought to be unclear or produce significant doubt, then the current wording of s 763D could be imported into the functional definition of 'financial product'.

7.192 The Payments System Review recognised the dynamic nature of the payments ecosystem and made several recommendations regarding its regulatory architecture. Those recommendations and any subsequent policy development may also bear upon the regulation of non-cash payment facilities, or payment systems more generally, as 'financial products'. In this respect, it is also worth observing that the CLERP 6 Consultation Paper that preceded the FSR Bill proposed a concept of 'means of payment', which was to be defined as 'a facility that allows [a person] to make or receive payments other than through notes and coins'.[133] This would have meant that both the *making* and *receiving* of a means of payment would fall within the definition of 'financial product'.[134] Commentary by Treasury on an exposure draft of the FSR Bill explained the decision not to include the receiving of non-cash payments as follows:

> Covering the receiving end of the transaction was intended to pick up the relationship between the institution offering the means of payment facility and the business using it to facilitate consumer payments. However, submissions were particularly concerned about the appropriateness of applying the regime to the purely banker-business side of the transaction. This element has therefore been removed from the draft provisions. Only the provision of the facility to effect a payment by a person, either a consumer or a business, is now brought within the provisions (see proposed section 763D).[135]

7.193 One consultee observed that the present definition of non-cash payments nonetheless creates potential uncertainty where intermediaries may be involved in a non-cash payment made from one party to another. In these situations, there may be several points at which different intermediaries could be thought to either 'receive' or 'make' a non-cash payment, with the result that it was unclear at which point the definition of non-cash payment was satisfied. According to the consultee, this could be contrasted with anti-money laundering legislation (the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)), which more clearly describes the roles of participants in a payment chain and their obligations.

133 Department of the Treasury (Cth) (n 15) 12.

134 Department of the Treasury (Cth), *Financial Services Reform Bill: Commentary on the Draft Provisions* (2000) 12.

135 Ibid.

A functional definition of 'credit'

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).

7.194 Presently, 'credit facilities' (with the exception of margin lending) are *excluded* from the *Corporations Act* definition but *included* in the *ASIC Act* definition.[136] Regulations made under each Act provide a definition of a 'credit facility' for the purposes of the exclusion in the case of the *Corporations Act*, or inclusion in the case of the *ASIC Act*.[137]

7.195 The ALRC currently proposes that the definition of 'financial product' in the *Corporations Act* and *ASIC Act* adopt a definition of 'credit' based on reg 2B(3)(a) of the *ASIC Act* and s 3(1) of the *National Credit Code*. As discussed below, implementing this definition of 'credit' would change the scope of products caught by specific inclusions within the present definitions of 'credit facility' and 'credit'. These may include mortgages, guarantees and leases. However, there are other ways in which these could be regulated without artificially expanding the definition of 'credit'. The ALRC also seeks stakeholder feedback on whether the proposed definition of 'credit' otherwise sufficiently captures the range of credit products sought to be regulated under the current s 12BAA(7)(k) of the *ASIC Act*.

Current definitions of 'credit' and 'credit facility'

7.196 Both the *Corporations Regulations* and the *ASIC Regulations* define the term 'credit facility' using similar terms. This is comprised of two key elements. The first is a general inclusion of 'the provision of credit' as a 'credit facility', which will be discussed below. The second is a further list of facilities that are deemed to be 'credit

136 *Corporations Act 2001* (Cth) s 765A(1)(h)(i); *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA(7)(k).

137 *Corporations Regulations 2001* (Cth) reg 7.1.06; *Australian Securities and Investments Commission Regulations 2001* (Cth) regs 2B, 2BA.

facilities'.[138] These create an arguably unintuitive and artificially broad definition of 'credit facility'. For example, guarantees are deemed to be credit facilities by the two regulations.[139] The *NCCP Act* does not regulate these as a form of 'credit', and instead separately regulates guarantees.[140]

7.197 The *ASIC Regulations* define 'credit facility' in the following terms:

> (a) the provision of credit:
>
> (i) for any period; and
>
> (ii) with or without prior agreement between the credit provider and the debtor; and
>
> (iii) whether or not both credit and debit facilities are available; ...[141]

7.198 Both sets of Regulations, in turn, define 'credit' in identical terms using a general definition supplemented by 14 specific inclusions. 'Credit' means

> a contract, arrangement or understanding:
>
> (i) under which payment of a debt owed by one person (a ***debtor***) to another person (a ***credit provider***) is deferred; or
>
> (ii) one person (a ***debtor***) incurs a deferred debt to another person (a ***credit provider***); …[142]

7.199 This definition is in similar terms to the following definition of 'credit' in s 3(1) of the *National Credit Code*, which applies for the purposes of the *NCCP Act:*

> For the purposes of this Code, ***credit*** is provided if under a contract:
>
> (a) payment of a debt owed by one person (a ***debtor***) to another person (a ***credit provider***) is deferred; or
>
> (b) one person (a ***debtor***) incurs a deferred debt to another person (a ***credit provider***).[143]

7.200 The definition of 'credit' in the *Corporations Regulations* and *ASIC Regulations* also contains a list of specifically included matters. At least some of these inclusions arguably fall outside the general definition of 'credit', and as noted above are separately regulated in the *NCCP Act*. For example, 'granting or taking a lease over

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138 *Corporations Regulations 2001* (Cth) reg 7.1.06(1)(b)–(h); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B(1)(b)–(i).

139 *Corporations Regulations 2001* (Cth) reg 7.1.06(1)(f)–(g); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B(1)(f)–(g).

140 *National Consumer Credit Protection Act 2009* (Cth) sch 1 pt 3 ('*National Credit Code*').

141 *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B(1).

142 *Corporations Regulations 2001* (Cth) reg 7.1.06(3)(b)(i); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B(3)(b)(i).

143 One point of difference is that while the definitions contained in the *Corporations Regulations* and *ASIC Regulations* refer to 'a contract, agreement or understanding', the *National Credit Code* definition refers only to credit provided under a 'contract'. The term 'contract' is, however, defined so as to include 'a series or combination of contracts, or contracts and arrangements': *National Credit Code* (n 140) pt 13.

real or personal property' may not be a form of credit,[144] and consumer leases are regulated separately to credit in the *NCCP Act*.[145] Consumer leases are generally not credit because they do not involve a debt. Leases are instead a rental arrangement under which goods can be retained so long as periodic payment is made by a lessee.

7.201 The meaning of 'credit facility' in the *ASIC Act* and *Corporations Act* is therefore artificially expanded through both the inclusion of a list of specific 'credit facilities' and through the specific inclusions in the meaning of 'credit'. The definition of 'credit facility' has therefore been treated as label in which a range of conduct related to credit is included. In the *ASIC Act*, this has been a useful way to attach obligations. In the *Corporations Act*, it has been a means to remove credit-related activities from the ambit of the Act.

7.202 Consistent with **Proposal A6(b)**, the ALRC proposes that there be a general definition of credit, that is not supplemented by specific inclusions, to form part of the functional definition of 'financial product'. This is illustrated by the prototype legislation at **Appendix E**.

7.203 The ALRC seeks stakeholder feedback on the form of the general definition of 'credit'. Adopting a definition in similar terms to the *NCCP Act* may be the simplest avenue of reform and would produce consistency. This definition has been a feature of consumer credit legislation for some time, forming part of the Uniform Consumer Credit Code that was part of state law until the introduction of the *NCCP Act*, and broadly being replicated in the first limb of the definition of 'credit' in the *ASIC Regulations* and *Corporations Regulations*.

7.204 Three specific inclusions in the meaning of 'credit' that may fall within the general definition without needing to be specifically included are 'any form of financial accommodation',[146] 'a hire purchase agreement',[147] and 'credit provided for the purchase of goods or services'.[148] Australian legislation is not unique, however, in referring to 'financial accommodation' as part of the definition of credit. Section 9 of the *Consumer Credit Act 1974* (UK), for example, defines 'credit' to include 'a cash loan, and any other form of financial accommodation'. Section 6 of the *Credit Contracts and Consumer Finance Act 2003* (NZ), by contrast, defines credit by stating that

> credit is provided under a contract if a right is granted by a person to another person to—
>
> (a) defer payment of a debt; or

144 *Corporations Regulations 2001* (Cth) reg 7.1.06(3)(b)(xiii); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B(3)(b)(xiii).

145 *National Credit Code* (n 140) pt 11.

146 *Corporations Regulations 2001* (Cth) reg 7.1.06(3)(b)(i); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B(3)(b)(i).

147 *Corporations Regulations 2001* (Cth) reg 7.1.06(3)(b)(ii); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B(3)(b)(ii).

148 *Corporations Regulations 2001* (Cth) reg 7.1.06(3)(b)(iii); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B(3)(b)(iii).

(b) incur a debt and defer its payment; or

(c) purchase property or services and defer payment for that purchase (in whole or in part).

7.205 The New Zealand definition more closely resembles the current definition of 'credit' in Australian legislation, whereas the UK definition relies on the ordinary meaning of the word 'credit' supplemented by two inclusions.

7.206 Depending on stakeholder feedback and as an alternative to the proposed definition, more fundamental reform could see this functional definition of credit revised.

7.207 In the context of the *Corporations Act,* a functional definition of credit would mean that some facilities that are currently deemed to be 'credit facilities' but are excluded would likely not be captured. As a consequence, exclusions for such products would no longer be necessary (unless they fell within any of the other limbs of the definition of 'financial product'). An exclusion for 'credit' would be necessary for provisions that apply to financial products where it is thought the provisions should not apply to credit, such as provisions concerning financial product disclosure.

7.208 In the *ASIC Act*, repealing the definition of 'credit facility' contained in reg 2B of the *ASIC Regulations* and replacing it with a functional definition of credit in the definition of financial product would mean that the consumer protections applying to 'financial products' and 'financial services' would apply to a narrower range of credit-related activities. Facilities such as guarantees, and any other 'credit facilities' that may not meet a functional definition of 'credit' (or any other limb of the definition of 'financial product'), would be excluded.

7.209 This would represent a change to current policy. However, the current policy settings could be maintained in one of three ways. The first would be to create a new functional limb to the definition of financial service that captures credit-related activities. This may be difficult to design, and should not be a means through which to create a list of specific inclusions. The second option would be to apply the *Australian Consumer Law* to these credit-related arrangements. The protections in the *Australian Consumer Law* broadly replicate those in the *ASIC Act*. If mortgages, guarantees, and other credit-related activities were not financial products they would no longer fall into the exemption for financial products and services in the *Australian Consumer Law*. However, this would be a major change, resulting in a different regulator and more complex arrangements for reforming the law.

7.210 The third, and perhaps simplest option, would be to use application provisions in the *ASIC Act* to apply the consumer protections in Part 2 Div 2 of the *ASIC Act* to guarantees, consumer leases, and other credit-related activities currently captured by the definition of 'credit facility', in addition to financial products and services.

7.211 The separate regimes, for financial products generally in the *Corporations Act* and *ASIC Act*, and credit in particular in the *NCCP Act*, could continue to operate independently. This is currently the case. However, in addition to simplifying the

definition of financial product by removing 'credit facilities', including a functional definition of 'credit' in the definition of financial product would lay the basis for potentially consolidating at least parts of the *NCCP Act, Corporations Act,* and *ASIC Act*. This could include, for example, consolidating the licensing regimes for AFS Licensees and Credit Licensees. This is discussed further in **Chapter 8** of this Interim Report. A consolidated regime could accommodate provisions that only apply to credit-related financial products. For example, provisions of the *National Credit Code* that only have relevance to credit products and related activities could be accommodated by application provisions specifying that they only apply to relevant activities. A consolidated regime can therefore tailor elements of the law to particular products while reducing duplication and overlap for more generally applicable provisions.

7.212 More immediate simplification could be achieved by removing the current inclusion of 'credit facilities' and adding a functional limb for 'credit' to the definition of financial product, as proposed. This would reduce the artificiality and improve the intuitiveness of 'financial product' as it relates to credit, while application provisions could ensure that consumer protections still apply to mortgages, guarantees, consumer leases, and other credit-related activities in a transparent way. Readers would not be required to navigate the *Corporations Act* and the dense definitions of 'credit facilities' in regulations to determine that a range of non-credit facilities are captured by the *ASIC Act* and excluded from the *Corporations Act*.

Use of the terms in other Acts

Other Commonwealth legislation

7.213 The terms 'financial product' and 'financial service' are currently used in other Commonwealth Acts.[149]

7.214 All Commonwealth Acts appear to use the term 'financial product' as it is defined in the *Corporations Act*, except the *PPS Act*. The *PPS Act* uses the *Corporations Act* definition in relation to 'investment instruments', but also creates a bespoke definition of 'financial product' in s 10. The *Banking Act 1959* (Cth) uses the term 'financial product' as part of the term 'covered financial product'. A covered financial product is one specified in a legislative instrument made by the Minister.[150]

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149 A summary of those Acts is available on the ALRC website: <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-FSL-Summary-of-Cth-Acts-financial-product-or-financial-service.pdf>. The terms 'financial product' and 'financial service' also appear individually and together in certain state and territory legislation. For example, ss 53(3) and 54(2) of the *Electoral Funding Act 2018* (NSW) defines 'financial institution' as 'an entity whose principal business is the provision of financial services or financial products, and includes an authorised deposit-taking institution'. Section 6.6 of the *Government Sector Finance Act 2018* (NSW) has its own definition of 'financial services'.

150 *Banking Act 1959* (Cth) s 5(8).

The rules of AFCA and predecessor external dispute resolution schemes

7.215 Section 912A(1)(g) of the *Corporations Act* requires that any AFS Licensee that provides services to persons as retail clients must be a member of AFCA, the relevant EDR body. The *NCCP Act* also requires Credit Licensees to be a member of AFCA.[151]

7.216 The AFCA Complaint Resolution Scheme Rules ('AFCA Rules') govern AFCA's jurisdiction and processes to resolve the complaints it receives. AFCA's jurisdiction includes complaints that 'arise from or relate to … the provision of a Financial Service by [a] Financial Firm to the Complainant'.[152] Paragraph (b) of the definition of 'Financial Service' in Rule E1.1 defines 'Financial Service' to mean, among other things:

> a product or service that is financial in nature, including a product or service which is or is in connection with'…
>
> (ii) a deposit including a term deposit or a fund management deposit; …
>
> (vii) an insurance policy;
>
> (viii) a financial investment (such as life insurance, a security, an Annuity Policy, a RSA, an interest in a registered managed investment scheme or a superannuation fund);
>
> (ix) a facility under which a person seeks to manage financial risk or to avoid or limit the financial consequences of fluctuations in, or in the value of, an asset, receipts or costs (such as a derivatives contract or a foreign currency contract);
>
> (x) a facility under which a person may make, or cause to be made, a non-cash payment (such as a direct debit arrangement or a facility relating to cheques, bills of exchange, travellers cheques or a stored value card); …[153]

7.217 This definition relies upon the ordinary meaning of the terms 'product', 'service', and 'financial' in the phrase 'a product or service that is financial in nature'. Although the term 'financial product' is not used, the definition uses similar concepts that are used to define 'financial product' in the *Corporations Act* and *ASIC Act*: 'financial investment', 'a facility under which a person seeks to manage financial risk', and 'a facility under which a person may make, or cause to be made, a non-cash payment'.

7.218 By using the undefined terms 'product', 'service', and 'financial in nature', as well as the broad expression 'in connection with', the definition of 'financial service' in the AFCA Rules appears to be broader than the definition of 'financial service' in the *Corporations Act* and *ASIC Act*. When regard is had to the broad range of other

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151 *National Consumer Credit Protection Act 2009* (Cth) s 47(1)(i).

152 Australian Financial Complaints Authority (n 122) r B.2.1. Defined terms are capitalised in this excerpt.

153 A similar definition appeared in the Financial Ombudsman Service, *Terms of Reference* (1 January 2018), an immediate predecessor to AFCA.

matters about which AFCA can resolve complaints, it is apparent that the intention behind the definition of 'financial service' is to establish an expansive jurisdiction.

7.219 Two examples illustrate this breadth. First, in a determination by the Financial Ombudsman Service ('FOS', a predecessor EDR scheme to AFCA) considering a similar definition, it was observed that 'the definition of "Financial Service" in the Terms of Reference is broader than that found in the *Corporations Act*'.[154] FOS' jurisdiction was therefore considered wide enough to encapsulate matters that were associated with the provision of financial advice — in that case, the purchase of a property and a loan related to that purchase, notwithstanding that neither the property purchase nor the loan were (in FOS' view) financial products within the *Corporations Act* meaning.[155] Secondly, an AFCA determination illustrates that the broader definition of 'financial service' may apply to matters excluded from the *Corporations Act*.[156] In that case, it was considered that a firm provided a service that was 'financial in nature' by operating a points-based rewards scheme under which 'those points virtually have a cash value'.[157] While rewards or loyalty schemes may fall within the *Corporations Act* definition of 'financial product' as a non-cash payment facility, some are excluded from that definition by ASIC legislative instrument.[158]

7.220 A similar definition of 'financial service' was considered in *Financial Industry Complaints Service Ltd v Deakin Financial Services Pty Ltd*,[159] which concerned the rules of FOS as in force at an earlier time. Those rules defined the term 'financial services' to mean 'all forms of services, advice or products provided by a person participating in the financial service industry'. The term 'financial services industry' was also defined; however, the term 'financial product' was not.

7.221 Contrasting the terms used in the rules with the statutory definitions in the *Corporations Act*, Finkelstein J observed that:

> The definition of 'financial product' in s 763A, together with the additions in s 764A and the exclusions in s 765A, give that expression a much wider meaning than it could have in ordinary usage. The same can be said of the expression 'financial service' which is defined in s 766A and which in turn picks up the meaning of 'financial product advice' in s 766B and 'dealing' in s 766C.[160]

7.222 Ultimately, Finkelstein J concluded that the terms 'financial service' or 'product' as used in the rules should bear their ordinary meaning and, that the terms used in the rules had not adopted the statutory definitions.[161] On that basis, Finkelstein J stated:

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154 Financial Ombudsman Service, Determination in Case Number 222855 (13 February 2012) [57].
155 Ibid [51], [57].
156 Australian Financial Complaints Authority, Determination in Case Number 663712 (10 January 2020).
157 Ibid 4.
158 Ibid.
159 *Financial Industry Complaints Service Ltd v Deakin Financial Services Pty Ltd* (2006) 157 FCR 229.
160 Ibid [20].
161 Ibid [50].

> … I am in no doubt that a promissory note issued by a Westpoint group company is a 'financial product'. This is not an expression that has, as far as I am aware, been judicially defined. *It is, in any event, probably incapable of a precise definition*. A promissory note is an unconditional promise to pay a certain sum on a certain date or dates. … They are aptly described as a 'financial product'.[162]

7.223 The comments of Finkelstein J highlight the difficulty in giving the terms 'financial product' and 'financial service' an ordinary meaning, and underline the arguably deliberate legislative artificiality of the two defined terms.

162 Ibid (emphasis added).

8. Licensing

Contents

Introduction

8.1 The AFSL regime is a core component of the financial services regulatory ecosystem. The current AFSL regime in Part 7.6 of the *Corporations Act* has its origins in recommendations of the Wallis Inquiry.

8.2 Licensing regimes regulate the conduct of industry participants through 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.

8.3 The focus of this chapter is on the nature and structure of the AFSL 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. This chapter only briefly discusses the conduct obligations placed on AFS Licensees, which are the focus of **Chapter 13**.

8.4 Consistent with the proposals discussed in **Chapter 7**, much of the complexity created by the numerous carve-outs from the AFSL regime may be significantly reduced and better managed through the use of application provisions and a principled legislative hierarchy. Building on the proposals discussed in **Chapter 11** and in **Chapter 13**, there is also considerable scope for clarifying the policy goals of financial services licensing and the norms of conduct it seeks to promote. The

proposal to create a single definition of financial product that incorporates credit also provides an opportunity to consolidate the currently separate financial services and credit licensing regimes.

The breadth of the AFSL regime

8.5 The AFSL regime was introduced when Chapter 7 of the *Corporations Act* was overhauled by the *FSR Act*. The new single licensing regime replaced pre-existing licensing requirements in the *Corporations Act*,[1] *Insurance (Agents and Brokers) Act 1984* (Cth),[2] and *Banking (Foreign Exchange) Regulations 1959* (Cth).[3] The new regime also captured product issuers in various circumstances.[4] Specific conduct and disclosure standards were then applied to all licensees, allowing for 'some flexibility to tailor requirements to different services, and with additional obligations' with regard to retail clients.[5] The breadth of the regime, as well as the in-built flexibility, is a driver of the complexity as discussed below.

8.6 Section 911A(1) of the *Corporations Act* contains the obligation to hold an AFS Licence, providing that 'a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services'. By default, therefore, the AFSL regime applies to the provision of *all* financial services in the course of a business, whether conducted for profit or not.[6]

8.7 Like the definitions of 'financial product' and 'financial service', the AFSL regime has a very wide scope. The AFSL regime covers a wide variety of industry participants and business models. Black and Hanrahan have noted that the requirement to hold an AFS Licence applies to

> brokers, dealers, market makers, underwriters, financial advisers … credit rating agencies, custodians and depositories, crowd-sourced funding (CSF) platform operators, margin lenders, responsible entities of registered managed investment schemes (listed and unlisted) and operators of direct distribution foreign passport funds, issuers of exchange traded funds (ETFs), derivatives and structured products, and litigation funders. [The] requirement also applies to product issuers who sell banking, insurance and non-cash payment (but not credit) products directly to clients or engage representatives to do so and to life insurance companies and general insurance companies; deposit-taking institutions and foreign exchange dealers; providers of non-cash payment

1 Licensing requirements in the *Corporations Act* at that time included those applying to securities dealers, investment advisers, futures brokers and futures advisers, and their proper authority holders: Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.43].

2 Licensing requirements in the *Insurance (Agents and Brokers) Act 1984* (Cth) provided for the registration of general insurance and life insurance brokers and the regulation of insurance agents: Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.43].

3 Applicable to foreign exchange dealers: ibid.

4 Under the new regime, product issuers include life insurance companies, friendly societies, general insurance companies, banks, and superannuation funds: ibid [2.44].

5 Ibid [2.46].

6 See [8.94] below for further discussion of the term 'financial services business'.

> facilities; underwriting agencies; and those representatives of financial services providers that may operate as principals such as multi-agents for insurers.[7]

8.8 As at October 2021, there were 6,226 AFS Licensees and 59,161 authorised representatives of those AFS Licensees recorded with ASIC. The nearly 60,000 authorised representatives include 19,387 financial advisers providing 'personal advice' (discussed in detail in **Chapter 11**).

8.9 In the period from 1 July 2020 to 30 June 2021, ASIC approved 339 new AFS Licence applications and 437 applications for variations of an AFS Licence under the *Corporations Act*. During the same time period, ASIC cancelled 41 AFS Licences, suspended 12 AFS Licences, and rejected 59 new AFS Licence applications.[8] Additionally, 42 new AFS Licence applications were withdrawn before the start of the application assessment, four were withdrawn after the start of assessment, and none were refused after assessment.[9]

8.10 ASIC will generally recommend refusal of licence applications where:

> there is reason to believe that the licensee cannot demonstrate organisational competence in the financial services proposed to be provided; the fit and proper person test is not met by the applicant; information provided in the application is, or is potentially, false or misleading; or there is reason to believe that the licensee cannot do all things necessary to provide services efficiently, honestly and fairly, or comply with the financial services laws.[10]

8.11 As discussed in **Chapter 7**, credit is specifically excluded from the scope of Chapter 7 of the *Corporations Act*, and therefore the AFSL regime.[11] The Australian credit licensing regime contained in the *NCCP Act* provides a separate licensing regime for credit activities. The interaction between the AFSL and Australian credit licensing regimes is discussed further below, as well as in **Chapter 13**.

8.12 Like most industries, the financial services industry is ever-changing. In its 1985 review of securities industry licensing, the National Companies and Securities Commission observed that the nature of the industry then had 'been altered so

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7 Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis Butterworths, 10th ed, 2021) [10.1].

8 Australian Securities and Investments Commission, *Licensing and Professional Registration Activities: 2021 Update* (Report 700, 2021) Appendix 1, Table 2. To obtain an AFS Licence, a person must complete an application consisting of Form FS01 and provide the required 'core proof documents'. See also Australian Securities and Investments Commission, *AFS Licensing Kit: Part 1—Applying for and Varying an AFS Licence* (Regulatory Guide 1, January 2021) [RG 1.6]–[RG 1.8], [RG 1.54]–[RG 1.65].

9 Australian Securities and Investments Commission, *Licensing and Professional Registration Activities: 2021 Update* (n 8) Appendix 1, Table 2. Australian Securities and Investments Commission, *AFS Licensing Kit: Part 1—Applying for and Varying an AFS Licence* (n 8) [RG 1.6]–[RG 1.8], [RG 1.54]–[RG 1.65].

10 Advice correspondence from Australian Securities and Investments Commission to Australian Law Reform Commission, 15 July 2021.

11 While credit is specifically excluded from the scope of Chapter 7, margin lending facilities are specifically included as financial products: *Corporations Act 2001* (Cth) s 964A(l).

radically since the *Securities Industry Act* [*1980*] was introduced that in some cases the licensing provisions now appear to be inadequate, irrelevant or unenforceable'.[12] More recent changes have seen a move by many AFS Licensees away from 'vertically integrated' business models, which attracted scrutiny during the Financial Services Royal Commission.[13]

8.13 The changing nature of the financial services industry is relevant in two main respects. First, the move away from vertical integration suggests that regulation needs to be sufficiently flexible to accommodate changing business models and industry participants. The proposals discussed in **Chapter 10** may facilitate this by providing a basis on which more industry-specific regulation can be tailored and consolidated within the overarching legislative framework. Secondly, reduced vertical integration may have particular implications for financial advice and financial advisers in terms of how they are regulated and the obligations to which they should be subject. Issues relating to financial advice are discussed further in **Chapter 11**.

Policy settings

8.14 Part 7.6 of the *Corporations Act* does not specify particular objectives of the AFSL regime. The Wallis Inquiry appeared to proceed from the premise that licensing was the appropriate form of regulation for financial services, and the main question was what form a licensing regime should take. Regulatory theory suggests that the main purposes of the AFSL regime are to ensure that only capable and competent service providers enter the market, and to promote compliance with conduct norms.[14]

8.15 Licensing also acts as a regulatory 'hook' or 'switch'.[15] While revocation of a licence may be the ultimate sanction, holding an AFS Licence enlivens a range of obligations (which are briefly discussed below). Failure to fulfil these obligations often constitutes contravention of a civil penalty provision or a criminal offence in its own right.

12 National Companies and Securities Commission, *A Review of the Licensing Provisions of the Securities Industry Act and Codes* (1985) [3.29].

13 'Vertical integration' is a business model adopted by many AFS Licensees under which a single entity controls financial advice, platforms, and funds management. See, eg Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019) 124–27.

14 See Cindy Davies, Samuel Walpole and Gail Pearson, 'Australia's Licensing Regimes for Financial Services, Credit, and Superannuation: Three Tracks toward the Twin Peaks' (2021) 38(5) *Company and Securities Law Journal* 332, 333–334.

15 Ibid 335.

Example: The importance of licensing as a 'hook' for obligations

Prior to December 2020, insurance claims handling and settling services were excluded from the definition of 'financial service' in the *Corporations Act*, and therefore the AFSL regime.[16] In recommending that the exclusion for claims handling and settling services be repealed,[17] the Financial Services Royal Commission emphasised the importance of the obligation in s 912A(1) of the *Corporations Act* applicable to AFS Licensees, noting that:

> There can be no basis in principle or in practice to say that obliging an insurer to handle claims efficiently, honestly and fairly is to impose on the individual insurer, or the industry more generally, a burden it should not bear.[18]

8.16 ASIC's regulatory guidance is consistent with the general objects of Chapter 7 of the *Corporations Act* (contained in s 760A) when it states that the regulatory goals of the AFSL regime are 'at the broadest level … to promote consumer confidence in using financial services and the provision of efficient, honest and fair financial services by all licensees and their representatives'.[19] Judicially, it has been recognised that the AFSL regime 'excludes unqualified and untrained persons from the industry; and it enforces compliance with ethical standards'.[20]

8.17 As the AFSL regime was introduced to replace a number of more specific industry-based licensing regimes, it was anticipated that a single licensing regime with uniform standards would reduce compliance costs and lessen the administrative burden regarding conduct and disclosure.[21] This was expected to be of particular benefit for those offering multiple types of financial services.[22] Other expected benefits were increased competition due to the ease (simplified procedure) of offering a broader range of products and services.

8.18 Feedback from consultees has suggested that these expected benefits may not have been fully realised as a result of the complexity of the legislative framework

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16 *Corporations Regulations 2001* (Cth) reg 7.1.33. They are now specifically included within the definition of 'financial service' by s 766A(1)(eb) of the *Corporations Act*.

17 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 13) rec 4.8.

18 Ibid 308.

19 Australian Securities and Investments Commission, *AFS Licensing: Meeting the General Obligations* (Regulatory Guide 104, April 2020) [RG 104.15].

20 *Cainsmore Holdings Pty Ltd v Bearsden Holdings Pty Ltd* [2007] FCA 1822 [32], citing AJ Black, 'Licensing of Financial Services Providers' in *Butterworths Australian Corporations Law: Principles and Practice*, Vol 2 at [7.7.0005]; *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) (No 2)* [2015] FCA 527 [28], citing AJ Black, 'Licensing of Financial Services Providers' in *Butterworths Australian Corporations Law: Principles and Practice*, Vol 2 at [7.7.0005].

21 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.48].

22 Ibid.

generally. Many industry participants have emphasised the cost and regulatory burden that the current legislative framework imposes. In the context of financial advice, the Financial Services Council has suggested that compliance is 'a core function of advice businesses and a key driver of cost' and that, in their view:

> Regulatory complexity also adds to the uncertainty and compliance risk informing future business decision-making that ultimately see services end or curtailed as compliance trumps service delivery.[23]

8.19 Consumers also continue to experience confusion arising from the licensee and representative structure in cases where the interests of an AFS Licensee and their representatives are not necessarily aligned with those of their clients.[24] A report by ASIC examining consumers' experiences with timeshare schemes, for example, found that participants in the research 'did not consider the [timeshare scheme] operators to be financial advisers'.[25] This suggests that the consumers neither sought nor understood that they were receiving advice from a person who represented an AFS Licensee. The report noted that:

> No participants could recall receiving financial advice about whether the purchase was suitable for them based on their overall objectives, financial situation and needs. Few participants recalled receiving an SOA.[26]

8.20 Multiple instances of misconduct on the part of AFS Licensees and their authorised representatives have occurred since the AFSL regime was implemented, as documented throughout the Financial Services Royal Commission and earlier inquiries.[27] The Royal Commission, for example, identified misconduct by a range AFS Licensees, including large institutions that had committed multiple breaches of licensing obligations.[28] The Financial Services Royal Commission did not suggest that complexity caused misconduct, rather that the root cause of much misconduct was 'greed; greed by licensees, and greed by advisers'.[29] However, the issue

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23 Financial Services Council, *Affordable and Accessible Advice: FSC Green Paper on Financial Advice* (2021) 6.

24 See, eg, Australian Securities and Investments Commission, *Financial Advice: Review of How Large Institutions Oversee Their Advisers* (Report 515, March 2017). See also Australian Securities and Investments Commission, *Financial Advice: Vertically Integrated Institutions and Conflicts of Interest* (Report 562, January 2018).

25 Australian Securities and Investments Commission, *Timeshare: Consumers Experiences* (Report 642, December 2019) [76]. Timeshare schemes fall within the financial services regulatory and licensing regime because they are managed investment schemes and therefore timeshare interests are financial products: see *Corporations Act 2001* (Cth) ss 9 ('managed investment scheme'), 764A(1)(b).

26 Australian Securities and Investments Commission (n 25) [76].

27 David Murray et al, *Financial System Inquiry* (Final Report, 2014); Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 13); Black and Hanrahan (n 7) [11.2].

28 See, eg, Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 2, 2019) and discussion of obligations under s 912A(1)(a), (aa) and (ca) at 410–15. Nonetheless, the Commission recommended that the law should be simplified so that its intent is met (see, in particular, Recommendations 7.3 and 7.4).

29 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation

remains as to whether the 'piecemeal' approach of the existing law and the resulting complexity mask the fundamental norms of conduct and the outcomes that the law intends to achieve.

AFS Licensee obligations

8.21 The *Corporations Act* imposes a large number of obligations on AFS Licensees that contribute to complexity, and may give rise to compliance difficulties. The obligations fall into three broad categories. The first is 'conduct of business obligations' which relate to how a licensee provides its services.[30] These include the general obligations contained in s 912A, such as the obligation to act 'efficiently, honestly and fairly' in s 912A(1), and other rules regarding conflicts of interest. These obligations apply to AFS Licensees alongside the generally applicable prohibitions on misconduct in relation to financial services, such as the prohibitions contained in Part 7.10 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. The statutory AFS Licensee obligations also apply in addition to general law obligations, such as any fiduciary duty. Conduct obligations are discussed in detail in **Chapter 13**.

8.22 A second category of obligations is directed towards the nature of an AFS Licensee's business, as opposed to the services they provide. For example, Part 7.8 of the *Corporations Act* contains what are described as 'other conduct requirements for financial services licensees',[31] which includes obligations relating to dealing with client money and property contained in Divs 2 and 3, and obligations relating to financial records, statements, and audits in Div 6.

8.23 A third category requires AFS Licensees to comply with obligations that aid ASIC in performing its supervisory functions in relation to licensees. For example, pursuant to s 912C of the *Corporations Act*, ASIC may direct that an AFS Licensee give ASIC a written statement about its financial services, and pursuant to s 912E an AFS Licensee must give ASIC such reasonable assistance as requested by ASIC to perform its functions. Failure to comply with a direction or request under these provisions is an offence.

8.24 Further consideration will be given to the question of complexity of obligations and compliance in Interim Report C, which will focus on how the provisions of Chapter 7 of the *Corporations Act* could be restructured or reframed.

Breach reporting obligations

8.25 A further example of the third category of obligations is s 912D of the *Corporations Act* (since 1 October 2021, s 912DAA) which contains what is commonly referred to as an AFS Licensee's breach reporting obligation. This complex obligation has been described as 'a cornerstone of Australia's financial services

and Financial Services Industry (n 13) 138.

30 Black and Hanrahan (n 7) [10.17].

31 See *Corporations Act 2001* (Cth) s 760B (Outline of Chapter).

regulatory structure'.[32] In the financial year 2020–2021, ASIC received 2,435 breach reports in relation to AFS Licensees and managed investment schemes.[33]

8.26 Prior to 1 October 2021, s 912D(1B) required an AFS Licensee to notify ASIC if the licensee had breached (or was likely to breach) certain obligations, and that breach was (or would be) 'significant' having regard to certain matters listed in s 912D(1)(b). Section 912D was repealed with effect from 1 October 2021 and replaced by new ss 912D, 912DAA and 912DAB.[34] These amendments effect substantial changes intended to 'clarify and strengthen' the breach reporting regime.[35] The changes include:

- introducing the defined concept of a 'core obligation' to capture the range of obligations in relation to which a breach, or potential breach, must be reported;[36]
- introducing the defined concept of a 'reportable situation', to capture the range of situations in which an AFS Licensee must provide a report to ASIC. These situations are expanded beyond breaches or potential breaches to include some situations in which an AFS Licensee conducts an investigation into potential breaches;[37]
- amending the matters to which regard must be had in determining if breach of an obligation is 'significant', including by deeming some breaches to be significant;[38] and
- imposing an obligation on AFS Licensees to notify ASIC if they have reasonable grounds to believe that a 'reportable situation' has arisen regarding another AFS Licensee involving an individual financial adviser who provides 'personal advice' (a complex defined term discussed in **Chapter 11**) in relation to 'relevant financial products' (discussed below).[39]

8.27 Failure by an AFS Licensee to report its own breaches constitutes an offence and a breach of a civil penalty provision, and failure to comply with the obligation to report a potential breach by another licensee (s 912DAB) is subject to a civil penalty.[40]

8.28 Putting aside potential difficulties in determining whether some breaches may be 'significant', complexity is introduced to the breach reporting regime by the fact that regulations can be used to modify the defined concepts of:

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32 Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Cth) [11.3].
33 Australian Securities and Investments Commission, *Annual Report 2020–2021* (2021) 211.
34 *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) sch 11.
35 Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Cth) [15.180].
36 *Corporations Act 2001* (Cth) s 912D(3).
37 Ibid ss 912D(1)–(2), 912DAA.
38 Ibid s 912D(4).
39 Ibid s 912DAB.
40 Ibid ss 912DAA, 912DAB.

- 'reportable situation', by prescribing circumstances to be a reportable situation';[41]
- 'core obligation', by prescribing obligations contained in a subset of legislation captured by the defined term 'financial services law' (as used in s 912A(1)(c) and defined in s 761A) to be 'core obligations';[42] and
- 'significant', by both prescribing circumstances that are deemed to be 'significant' and by supplementing the matters that must be taken into account by an AFS Licensee to determine if a breach is 'significant'.[43]

8.29 ASIC Regulatory Guide 78, which provides guidance on the breach reporting obligations, is itself currently 66 pages long.[44] This further illustrates the potential complexity inherent in the breach reporting obligations.

8.30 **Chapter 10** discusses the potential role of 'rules' in the context of a principled legislative hierarchy. The obligations contained in Part 7.8 Div 6 may, for example, be obligations that could appropriately be removed from the *Corporations Act* and contained in rules.

The extensive use of exclusions and exemptions

8.31 The extensive use of exclusions and exemptions from the AFSL regime, spread across the legislative hierarchy, is a significant driver of complexity. The need for exclusions and exemptions from the AFSL regime is a product of the breadth of the regime, the policy settings emanating from the Wallis Inquiry, and the implementation of those policies in legislation that is dependent on the use of defined terms. As noted below, **Chapter 10** demonstrates how a reformed legislative architecture could be used to simplify this inherent complexity.

8.32 As discussed in **Chapter 7**, the definition of 'financial product', which links with the definition of 'financial service', is underpinned by a policy that the regime in Chapter 7 of the *Corporations Act* should regulate all functionally equivalent financial products in a like manner. The range of regulated products and services therefore spans a wide range of financial industries.

8.33 The goal of uniform regulation of functionally equivalent products and related services is facilitated by a single licensing regime covering 'financial sales, advice and dealing'.[45] Acknowledging the expansiveness and potential for over-inclusion, the regime is also intended to be flexible. The manner of achieving that flexibility, however, is a cause of significant complexity, particularly as a result of the extensive use of exemptions from the AFSL regime.

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41 Ibid s 912D(2)(c).
42 *Corporations Regulations 2001* (Cth) reg 7.6.02A.
43 *Corporations Act 2001* (Cth) ss 912D(4)(e), (5)(d).
44 Australian Securities and Investments Commission, *Breach Reporting by AFS Licensees and Credit Licensees* (Regulatory Guide 78, September 2021).
45 Stan Wallis et al, *Financial System Inquiry* (Final Report, 1997) 273 (Recommendation 13).

8.34 Two further factors drive the need for exclusions and exemptions from the AFSL regime. The first is the legislative design which attaches certain core obligations, such as the obligations in s 912A, to the holding of a licence (discussed in greater detail in **Chapter 13**). This has produced situations where some services and their providers are exempt from the AFSL regime as a whole, while others are exempt from the obligation to hold an AFS Licence but nonetheless subject to exemption conditions that impose 'licensee-like' obligations and create alternative regulatory regimes. A second and related factor is the (perceived or actual) regulatory burden that licensing imposes, which has led to the use of powers to grant exemptions and make notional amendments to create what are effectively alternative regulatory regimes that operate alongside the *Corporations Act*. These are discussed in more detail below.

Example: Exemptions from the requirement to hold an AFS Licence

To implement Recommendation 4.8 of the Financial Services Royal Commission, the term 'claims handling and settling service' was defined by s 766G of the *Corporations Act* and included within the definition of 'financial service' by s 766A(1)(eb). The new definition in s 766G 'captures a broad range of activities', although it was not intended that all of the persons who engage in those activities should hold an AFS Licence.[46] New exemptions were therefore created in ss 911A(2)(ek), (el), (em) and (en) of the *Corporations Act*. Section 911A(2)(ek), for example, effectively limits the obligation to hold a licence to six categories of persons listed there and excludes all others who might provide 'claims handling and settling services'.

The manner and form of exclusions and exemptions

8.35 The obligation to hold an AFS Licence in s 911A(1) of the *Corporations Act* is subject to a long list of exemptions set out in s 911A(2). The growth of s 911A(2) over time reflects an increasing number of exemptions. At over 2,300 words, s 911A is the fifth longest section in the *Corporations Act*. This is in contrast to s 911A in March 2002, which was 1,176 words long and the 22nd longest section.[47] Section 911A is the third-longest section of the *Corporations Act* if ss 9 and 761A, which are dictionary provisions, are excluded.

8.36 Upon commencement, s 911A(2) was three pages long, comprising 15 paragraphs and 926 words. As at 30 June 2021, s 911A(2) was four pages long, comprising 27 paragraphs and 1,969 words. The exemptions contained in s 911A(2) cover a wide range of services and industry participants. These are summarised

46 Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Cth) [7.14]–[7.16].

47 Word counts are calculated by excluding structural elements such as subsection and paragraph numbering and lettering. See **Chapter 3** and **Appendix D** for discussion of methodology.

briefly at **Appendix C.8**. Pursuant to s 911A(2)(k), reg 7.6.01(1) of the *Corporations Regulations* prescribes an extensive list of services, across 42 paragraphs, for which a person is exempt from the obligation to hold an AFS Licence. These are also summarised briefly at **Appendix C.9**.

8.37 Section 911A is also notionally amended by three regulations, which notionally insert a total of 26 subsections comprising 2,161 words, almost doubling the size of s 911A.[48] Regulation 7.6.02AG notionally inserts six subsections after s 911A(2). These notional subsections, in turn, necessitate reg 7.6.05AH, which notionally amends s 911B(1)(e) to substitute a reference to s 911A(2) in that paragraph with reference to s 911A(2) *and* the notional subsections (2A) to (2F).

8.38 The policy intent that principals rather than their representatives or agents be licensed is given effect through an exemption in s 911A(2)(a) from the general s 911A(1) requirement.[49]

Examples: Exemptions from the obligation to hold an AFS Licence across the legislative hierarchy

In the *Corporations Act*:

- section 911A(2)(g), which exempts bodies regulated by APRA but only in relation to services for which APRA has 'regulatory or supervisory responsibilities' that are provided to 'wholesale clients' (as that term is defined); and
- section 911A(2)(j), which exempts a person who provides services in their capacity as trustee of a self-managed superannuation fund.

In the *Corporations Regulations*:

- reg 7.6.01(hc), which excludes 'a dealing in a financial product that consists only of an employer-sponsor arranging for the issue of a superannuation product to an employee'; and
- reg 7.6.01(ea), which excludes services provided by a representative or a related body corporate of a financial services licensee that consist only of:
  - (A) informing a person (***person 2***) that a financial services licensee, or a representative of the financial services licensee, is able to provide a particular financial service, or a class of financial services; and
  - (B) giving person 2 information about how person 2 may contact the financial services licensee or representative

48 *Corporations Regulations 2001* (Cth) regs 7.6.01AB, 7.6.02AG, 7.6.02AGA.

49 The exemption in s 911A(2)(a) is subject to s 911B, which contains a range of conditions that must be satisfied for a representative that provides financial services to be exempt from the obligation to hold an AFS Licence. Section 911B is a civil penalty provision.

8.39 Exemptions and exclusions from the obligation in s 911A to hold an AFS Licence are created in a variety of ways and under a range of powers:[50]

- Exclusions from the definitions of financial product and financial service: a particular financial product or service may be excluded from the definitions of 'financial product' or 'financial service'.[51] This has the effect of exempting providers of these products and services from s 911A(1), as well as other provisions of Chapter 7.
- Regulations under s 926B(1)(a): may prescribe 'exemptions' for a person or class of persons from s 911A(1).
- Regulations under s 926B(1)(b): may prescribe 'exemptions' for a financial product or a class of financial products from s 911A(1).
- Regulations under s 926B(1)(c): may notionally amend the *Corporations Act* to insert new notional provisions that include 'exemptions' from s 911A(1), including for classes of persons or financial products.
- ASIC legislative instruments under s 926A(1)(a): may provide for 'exemptions' for a person or class of persons from s 911A(1), and may impose conditions on the exemption.[52]
- ASIC legislative instruments under s 926A(1)(b): may provide for 'exemptions' for a financial product or class of financial products from s 911A(1), and may impose conditions on the exemption.[53]
- ASIC legislative instruments under s 926A(1)(c): may notionally amend the *Corporations Act* to insert new notional provisions that include 'exemptions' from s 911A(1), including for classes of persons or financial products.
- Regulations under s 911A(2)(k): may prescribe an 'exemption' from s 911A(1) for the provision of a particular service or services provided in particular circumstances.
- Individual relief instruments under s 911A(2)(l): may prescribe an 'exemption' from s 911A(1) for a particular financial service.

8.40 Some exemptions from the obligation to hold an AFS Licence may apply based on the characteristics of the person (or class of persons), or to particular persons (or class of persons) but only for certain financial services.

8.41 The range of powers described above, exercisable through a variety of instruments, mean that it can be difficult to identify all the relevant exemptions and exclusions. These exemptions sit alongside, and potentially notionally amend, the exemptions already contained in s 911A(2).

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50 The words 'exemption' and 'exempt' have been placed in quotation marks in the paragraphs below to indicate that those are the terms used in the provisions. As outlined in **Table 2.1** in **Chapter 2**, in this Interim Report the term 'exemption' is only used when referring to an exemption from an obligation. Otherwise the term 'exclusion' is used when referring to products or services excluded from the scope of a provision's application.

51 For further discussion see **Chapter 7**.

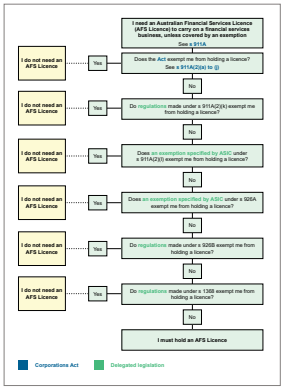
52 *Corporations Act 2001* (Cth) s 926A(3).

53 Ibid.

8.42 The current structure of exemptions is itself, therefore, a driver of complexity. In order to definitively know the law, a reader must confirm whether or not an exemption applies in one or more respects across numerous provisions. As discussed in **Chapter 7**, this will not be apparent on the face of the legislation and means a reader must consult the *Corporations Regulations* as well as ASIC legislative instruments.[54] It is also difficult to discern any consistent or guiding reason for locating particular exemptions in the *Corporations Act*, *Corporations Regulations*, or another legislative instrument.

8.43 The diagram at **Appendix C.10** illustrates how the current spread of inclusions and exclusions across different levels of the legislative hierarchy creates numerous 'exit ramps' from the AFSL regime, and the complex 'journey' a reader must follow to conclusively determine the application of the obligation in s 911A(1).

Appendix C.10



Spent provision

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

8.44 Regulation 7.6.02AGA of the *Corporations Regulations* is spent and should be repealed. Regulation 7.6.02AGA notionally inserts 20 subsections of s 911A. Regulation 7.6.02AGA is directed at applying a transitional regime for providers of financial services in relation to carbon credit units, which commenced on 1 May 2012 and ceased operation on 31 December 2012.[55] Regulation 7.6.02AGA and its notional amendments have now been superseded by the obligation to hold an AFS Licence.[56]

8.45 As an example of complexity and possible confusion, the notional amendments given effect by reg 7.6.02AGA include a notional subsection (5B), notwithstanding that a subsection numbered (5B) also exists in the text of the *Corporations Act*. The

54 In addition to the above powers, an exemption power that may be exercised in relation to Chapter 6D (Fundraising) or Chapter 7 is contained in s 1368 (pt 9.12). There are no regulations that exempt from Part 7.6 currently in force under s 1368.

55 *Corporations Regulations 2001* (Cth) reg 7.6.02AGA, inserting notional ss 911A(5B), (5U).

56 Notional s 911A(5C) of the *Corporations Act*, as inserted by reg 7.6.02AGA, creates a civil penalty provision and notional s 911A(5D) creates an offence. These provisions could only have been breached prior to 31 December 2012. As a result, they no longer have application and their repeal would not prevent proceedings being commenced for a breach that occurred when they were in force prior to 31 December 2012 (noting that, in any event, s 1317K of the *Corporations Act* places a six year time limit on civil penalty proceedings).

ALRC recommends that reg 7.6.02AGA be repealed. Repealing the regulation would remove over 1,400 words from the *Corporations Regulations*.

ASIC instruments

8.46 There are 69 ASIC legislative instruments made under Part 7.6 of the *Corporations Act*, comprising approximately 23% of the 295 ASIC legislative instruments in force as at 30 June 2021.[57] These 69 instruments are 703 pages in length and contain 165,672 words. The provisions authorising those instruments are set out in **Table 8.1** below.

Table 8.1: Number of in force ASIC legislative instruments made under Part 7.6

Authorising section	Number of in force instruments
911A(2)	4
926A(2)	61
911A(2) & 926A(2)	4

8.47 The ALRC has identified that 71% of the instruments made under Part 7.6 are made for the primary purpose of granting relief from the AFSL regime. **Table 8.2** sets out the number of current instruments performing each purpose.

Table 8.2: Primary purpose of in force ASIC legislative instruments related to Part 7.6

Primary purpose of instrument	Total	With conditions imposed
Grant of relief	49	20
Imposition of obligations	9	0
Procedural	7	0
Other variation of obligations	4	0

57 See Australian Law Reform Commission, 'ASIC-Made Legislative Instruments (Qualitative) – 30 June 2021' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/legislative-data>. This database is not limited to legislative instruments made under the *Corporations Act*. However, it excludes ASIC legislative instruments that are 'rules' (eg, the Market Integrity Rules, Derivative Transaction Rules, and Financial Benchmark Rules).

8.48 In addition, from 2001–2020, ASIC made an estimated 1,297 individual relief instruments under s 911A(2), and an additional 395 individual relief instruments under s 926A(2).[58]

8.49 ASIC does not maintain an easily accessible and comprehensive list of persons or entities who are exempted from the AFSL regime, whether entirely or from specific conditions and obligations of the regime. This is partly because there is no requirement on financial product and services providers to notify ASIC of an intention to rely on exemptions.[59]

8.50 Accordingly, a potentially indeterminate number of financial product and services providers are able to offer products and services without an AFS Licence in reliance on an exemption. A challenge for consumers engaging with unlicensed providers is understanding the nature of the exemption for the provider and the conditions attached to such an exemption. This may have implications for the remedies available to the consumer and the efficacy of any enforcement action that may be taken by ASIC.

Alternative regulatory regimes

8.51 Both regulations and ASIC legislative instruments can create alternative regulatory regimes that operate in parallel to the *Corporations Act*. Several examples of alternative regulatory regimes exist in the context of the AFSL regime, as outlined below.

Foreign financial services providers

8.52 Delegated legislation has been used to create an alternative regulatory regime in relation to Foreign Financial Services Providers ('FFSPs') regulated by specified overseas regulatory authorities. FFSPs fall within s 910A by virtue of the definitions of 'financial services business', 'carry on', and 'in this jurisdiction',[60] as well as the broad jurisdictional reach of s 911D. FFSPs are therefore required to hold an AFS Licence in order to provide financial services in Australia unless an exemption is available.

8.53 Conditional exemptions were created for FFSPs in 2003 and 2004 by delegated legislation, provided the FFSP was regulated by a jurisdiction with comparable financial services regulation to that of Australia.[61] Two categories of

58 For a comprehensive summary of the estimated number of individual relief instruments made under relief-making powers in the *Corporations Act*, see **Table 3.4** in **Chapter 3**.

59 In comparison, where specific relief is sought under ss 911A(2)(l) or 926A, the person must notify ASIC of its intention to rely on the exemption. See also Australian Securities and Investments Commission, *Licensing: Discretionary Powers* (Regulatory Guide 167, June 2019).

60 These definitions are discussed below at [8.93]–[8.99].

61 See Australian Securities and Investments Commission, *Foreign Financial Services Providers: Further Consultation* (Consultation Paper 315, July 2019) 7–8.

exemptions were provided: 'sufficient equivalence relief';[62] and 'limited connection relief'.[63]

8.54 Concerns regarding supervision and enforcement, as well as misuse of the relief, led ASIC to review the FFSP exemptions, beginning in 2016.[64] In the course of ASIC's review, one stakeholder noted that

> the need for permanent exemptions is a demonstration of shortcomings with the structure of the law not with the objectives of the exemption … [t]he origins of the problem lie in the ad hoc solutions to transition problems encountered with the introduction and implementation of the financial services reforms and the licensing of financial service providers in Australia in 2004.[65]

8.55 The review culminated in the introduction of new legislative instruments in 2020 to replace the relief provided under the two categories of exemptions, and in the creation of an alternative AFSL regime ('foreign AFS licensing regime') and the concept of 'funds management financial services'.[66]

8.56 While addressing regulatory concerns surrounding the exemptions, the new legislative instruments created yet another alternative regime that substitutes for Part 7.6 the *Corporations Act*, with further layers of complexity added to the application process. This included requiring FFSPs to navigate the application process of the AFSL regime to identify new bases for relying on the exemption (or 'exit ramps') contained within the regime. Additionally, this new regime remains located in legislative instruments with the attendant navigability issues.

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62 See *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*, which repealed and continued for two years the licensing relief contained in: *ASIC Class Order — UK Regulated Financial Service Providers* (CO 03/1099); *ASIC Class Order — US SEC Regulated Financial Services Providers* (CO 03/1100); *ASIC Class Order — US Federal Reserve and OCC Regulated Financial Services Providers* (CO 03/1101); *ASIC Class Order — Singapore MAS Regulated Financial Service Providers* (CO 03/1102); *ASIC Class Order — Hong Kong SFC Regulated Financial Service Providers* (CO 03/1103); *ASIC Class Order — US CFTC Regulated Financial Services Providers* (CO 04/829); *ASIC Class Order — Germany BaFin Regulated Financial Service Providers* (CO 04/1313). See also *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109*.

63 See *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182*, which extended the relief under *ASIC Class Order — Licensing Relief for Financial Services Providers with Limited Connection to Australia dealing with Wholesale Clients* (CO 03/824).

64 See for example, Australian Securities and Investments Commission, *Licensing Relief for Foreign Financial Services Providers with a Limited Connection to Australia* (Consultation Paper 268, 2016); Australian Securities and Investments Commission, *Foreign Financial Services Providers* (Consultation Paper 301, 2018) [33]–[34]; Australian Securities and Investments Commission (n 61). See also Australian Securities and Investments Commission, Explanatory Statement, *ASIC Corporations (Foreign Financial Services Providers – Foreign AFS Licensees) Instrument 2020/198* [2]–[8].

65 Australian Financial Markets Association, Submission to Australian Securities and Investments Commission, *Foreign Financial Services Providers: Further Consultation* (Consultation Paper 315, July 2019) (23 August 2019) 7.

66 *ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198*; *ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199*; *ASIC Corporations (Amendment) Instrument 2020/200*.

8.57 In May 2021, the Government announced that it would consult on options to 'restore previously well-established regulatory relief for FFSPs'.[67] Since that announcement, ASIC has extended the transitional relief for FFSPs to 2023 and paused its assessment of licence applications by FFSPs.[68]

Litigation funding

8.58 Following the Federal Court's decision in *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* in 2009,[69] litigation funding arrangements were regarded as generally falling within the definition of 'managed investment scheme' in s 9 of the *Corporations Act*. This also meant that they fell within the Chapter 7 regulatory regime by virtue of the definitions of 'financial product' and 'financial service'. Subsequently, amendments to the *Corporations Regulations* in 2011 excluded litigation funding arrangements from the definition of 'managed investment scheme' and provided for specific exemptions from the s 911A(1) obligation to hold an AFS Licence.[70] In 2020, the *Corporations Regulations* were amended so as to remove the exemption from the obligation to hold an AFS Licence so far as it applied to providers of third party class action litigation funding, but to retain an exemption for providers of other types of litigation funding in amended regs 7.6.01(x)–(y).[71]

8.59 Regulation 7.6.01AB of the *Corporations Regulations* applies to persons exempted by regs 7.6.01(x) and (y). Regulation 7.6.01AB notionally inserts s 911A(5C) into the *Corporations Act*, which provides that regulations may require a person exempt from the requirement to hold an AFS Licence by regs 7.6.01(x) or (y) 'to have adequate practices, and follow certain procedures, for managing conflicts of interest' in relation to the funding arrangement.[72] Pursuant to the notionally inserted s 911A(5C), regs 7.6.01AB(2)–(3) impose an obligation that, if breached, constitutes an offence. That requirement is similar to the obligation in s 912A(1)(aa) of the *Corporations Act* which requires AFS Licensees to

> have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative.[73]

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67 Commonwealth of Australia, *Budget Measures (Budget Paper No. 2) 2021–2022* (11 May 2021) 190.

68 Australian Securities and Investments Commission, 'ASIC extends transitional relief for foreign financial services providers following Federal Budget' (Media Release 21-131MR, 11 June 2021); *ASIC Corporations (Amendment) Instrument 2021/510*.

69 *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.

70 *Corporations Regulations 2001* (Cth) regs 5C.11.01(1), 7.6.01(x)–(y).

71 *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth). The types of litigation funding arrangements that are excluded are identified and defined as 'insolvency litigation funding schemes' and 'litigation funding arrangements' in, respectively, regs 5C.11.01(3) and (4) of the *Corporations Regulations*.

72 *Corporations Regulations 2001* (Cth) reg 7.6.01AB(1).

73 See further **Chapter 13**, and **Proposal A21** in relation to s 912A(1)(aa).

8.60 Thus it can be seen that while providers of some types of litigation funding are required to hold an AFS Licence under s 911A(1), others are exempt from that obligation but nonetheless subject to one of the obligations normally attracted by holding an AFS Licence. Regardless of whether there are sound policy reasons for regulating providers of different types of litigation funding arrangements differently, the manner of doing so, as outlined above, produces complex legislation.

ASIC Corporations (Avia Syndicate) Instrument 2015/825

8.61 *ASIC Corporations (Avia Syndicate) Instrument 2015/825* exempts several related entities (namely, operators and promoters of fractional aircraft owning syndicates that are time-sharing schemes) from the obligation to hold an AFS Licence in s 911A(1).[74] According to the Explanatory Statement for the instrument:

> ASIC considered that the proposed activities are on the periphery of financial services regulation … Disclosure, and in particular PDS disclosure with prominent warnings, was considered sufficient to provide a basic consumer protection mechanism without imposing disproportionately burdensome additional regulation in the form of scheme registration and licensing.[75]

8.62 The exemptions contained in the instrument are made conditional on one of those entities 'taking reasonable steps to become and remain' a member of AFCA.[76] The requirement to be a member of AFCA is one of the general obligations contained in s 912A(1)(g) that is applicable only to an AFS Licensee that provides services to retail clients.[77] The instrument therefore sets up an alternative regulatory regime that requires adherence to some aspects of the generally applicable law in the *Corporations Act* (such as financial product disclosure in Part 7.9), but not the AFSL regime in Part 7.6, except for one of the obligations that is otherwise only attracted by holding an AFS Licence.

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74 *ASIC Corporations (Avia Syndicate) Instrument 2015/825* is relatively unique because, as its Explanatory Statement notes, the instrument 'is in substance an individual instrument of relief'. Individual relief is generally, though not exclusively, granted by way of notifiable instruments, which are not subject to Parliamentary disallowance and do not automatically sunset 10 years after commencement, as distinct from legislative instruments.

75 Australian Securities and Investments Commission, Explanatory Statement, *ASIC Corporations (Avia Syndicate) Instrument 2015/825* [2].

76 *ASIC Corporations (Avia Syndicate) Instrument 2015/825*.

77 Section 1017G of the *Corporations Act* also applies an obligation to be a member of AFCA to certain AFS Licensees and non-AFS Licensees who are product issuers and 'regulated persons' (within the meaning of s 1020AH).

Consolidating and simplifying exclusions and exemptions

8.63 The extensive use of exclusions and exemptions in the *Corporations Act*, *Corporations Regulations*, and ASIC legislative instruments currently appears to be necessary, at least in part, to meet the policy that the AFSL regime be applied flexibly. The current manner of implementing that policy creates considerable legislative complexity. That complexity could be significantly reduced by using application provisions and situating exclusions and exemptions in delegated legislation.

8.64 Drawing on the problem analysis contained in this chapter, **Chapter 10** demonstrates how a reformed legislative architecture could be used to achieve simplification.

8.65 While the extensive use of exclusions and exemptions supports the flexible application of the AFSL regime, it is an open question whether there is a consistent and coherent policy, other than flexibility, behind the exemptions. This is particularly the case for conditional exemptions that create alternative regulatory regimes. In some cases, conditional exemptions are used to relieve parts of the regulated population from the core licensing obligations, including the obligation to hold an AFS Licence itself, but at the same time apply some of the obligations associated with holding a licence.

8.66 Consolidating and simplifying the current raft of exclusions and exemptions presents an opportunity to assess their consistency and coherence, including from a policy perspective. Together with the proposals discussed in **Chapter 13**, rationalising the present range of exclusions and exemptions may allow for further clarity in the policy settings and the fundamental norms underpinning the key conduct obligations placed on AFS Licensees as well as the AFSL regime more generally.

Consolidating the AFSL and credit licensing regimes

8.67 Incorporating 'credit' within a single definition of 'financial product' would provide the opportunity to rationalise and consolidate the currently separate AFSL and Australian credit licensing regimes. These definitions are discussed in **Chapter 7** and below.

8.68 The exclusion of credit from Chapter 7 of the *Corporations Act*, as discussed in **Background Paper FSL4,** appears to be largely a product of history rather than principle. What appears to have been the main reason for excluding credit, namely that Commonwealth regulation of credit alongside state-based regime for consumer credit 'would create complexity and opportunities for regulatory arbitrage',[78] no longer applies, as consumer credit has now been exclusively regulated by the Commonwealth since 2010.

78 Department of the Treasury (Cth), *Financial Services Reform Bill: Commentary on the Draft Provisions* (2000) [1.26].

8.69 At the time the *NCCP Act* was enacted and the credit licensing regime established, active consideration was given to incorporating credit within the AFSL regime. Ultimately, it was decided that only margin lending products and services would be regulated by Chapter 7 of the *Corporations Act*, with the balance of consumer credit regulated by the *NCCP Act*.

8.70 In a submission to the Senate Economics Legislation Committee's Inquiry into the National Consumer Credit Protection Bill 2009 (Cth), law firm MinterEllison commented that:

> we are not convinced that there is sufficient justification to establish a separate licensing regime under a separate statute. Given the nature of the proposed credit licensing regime, there does not seem any reason not to regulate credit through the Australian financial services licence (AFSL) regime in Chapter 7 of the *Corporations Act 2001* (FSR).[79]

8.71 It made particular observations about the Australian credit licensing regime proposed under the Bill:

> It is our understanding that the original reason for establishing a separate licensing regime under a separate Act was to enable the adoption of a licensing regime which is simpler than the AFSL regime under Chapter 7 of the Corporations Act. In fact, however, the Credit Bill mirrors almost entirely the Australian financial services licensing regime. … If the Government had proposed a very different licensing regime, the rationale for a separate statute would be clear.[80]

8.72 In response, Treasury submitted that:

> Whether or not credit should simply be included as a financial product within the Corporations Act, and the existing system for holders of an Australian financial services licence (AFSL) was considered. It was acknowledged that having credit come under the AFSL would mean that existing legal concepts and standards of conduct would apply. However, the different characteristics of credit products would mean that there would be a consequent need to modify elements of the Corporations Act, diluting this effect and potentially increasing confusion for industry and consumers, where products under the same licence were treated differently.[81]

8.73 Under the current separate licensing regimes, however, it is possible for confusion to arise from the fact that similar services may be provided by the same entity and to the same consumer, but under different Acts and licences. This may be the case for consumers dealing with authorised deposit-taking institutions, such as

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79 MinterEllison, Submission No 10 to Senate Economics Legislation Committee, *National Consumer Credit Protection Bill 2009 and Related Bills (Cth)* (17 July 2009) 1.

80 Ibid 2.

81 Department of the Treasury (Cth), Submission No 56 to Senate Economics Legislation Committee, *National Consumer Credit Protection Bill 2009 and Related Bills (Cth)* (August 2009) 13.

banks, that may issue products and give advice (requiring an AFS Licence) and also provide personal and housing loans (requiring a credit licence).[82]

8.74 The *NCCP Act* does contain a number of provisions bespoke to consumer credit, such as the responsible lending laws and pre-contractual disclosure obligations. However, the overall structural similarity between the AFSL regime and Australian credit licensing regime continues to be noted.[83] At the same time, other obligations that arise under the *NCCP Act*, such as the best interests obligations of mortgage brokers, appear similar to those of financial advisers under the AFSL regime but may be quite different in their actual content.[84]

8.75 As discussed above, the use of a principled legislative hierarchy in either the *Corporations Act*, *NCCP Act*, or a consolidated Act would permit the current complexity created by the extensive use of exclusions and exemptions to be considerably simplified and unavoidable complexity to be managed. That same approach could be used to manage any necessary differences in scope or application of different obligations. The significant discretion granted to ASIC in crafting licence conditions would also accommodate any need for variations in conditions.

8.76 As discussed in **Background Paper FSL4**, it is not entirely certain that under the present constitutional framework the Commonwealth's powers would be sufficient to enact a separate piece of legislation with respect to matters traversing all of the *Corporations Act*, *ASIC Act*, and *NCCP Act*. This would ultimately be a matter for the Commonwealth to consider. The opportunity to revisit the current state referrals presents one possible solution to facilitate consolidation.

8.77 It is relevant, also, to consider the practical consequences of consolidating licensing regimes. As discussed in **Chapter 3**, analysis of ASIC data suggests that at least 372 entities hold both an AFS Licence and a credit licence. The ALRC has also identified 5,825 persons who are both credit representatives and authorised representatives. While there is only a relatively small number of dual AFS Licence and credit licence holders, there is a significant number of representatives that are authorised under both an AFS Licence and an Australian credit licence. This data does not tell the complete story for corporate groups that may operate under a single brand and business model but in which different entities hold difference licences.

8.78 There would also be implications for ASIC, including transition costs, if licensing regimes were merged. Given ASIC already administers both licensing regimes, these may not be considerable and efficiencies may be gained in administering a single regime.

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82 This issue may have been partially overcome from a consumer's perspective as a result of the former Financial Ombudsman Service, the Credit and Investments Ombudsman, and Superannuation Complaints Tribunal being integrated within one approved external dispute resolution body, AFCA.

83 See Davies, Walpole and Pearson (n 14).

84 Samuel Walpole, M Scott Donald and Rosemary Teele Langford, 'Regulating for Loyalty in the Financial Services Industry' (2021) 38(5) *Company and Securities Law Journal* 355, 366–70.

8.79 Simplification could also be achieved by removing the duplication between ASIC's overlapping investigation and enforcement powers currently in Part 3 of the *ASIC Act* and Part 6 of the *NCCP Act*. Presently, where ASIC conducts an investigation concerning suspected contraventions of both the *NCCP Act* and the *Corporations Act* or *ASIC Act*, which is possible given the overlapping obligations and prohibitions, the separate legislative regimes mean that ASIC must typically commence two formal investigations: one under s 13 of the *ASIC Act* and a second under s 247 of the *NCCP Act*. Nearly identical, and duplicative, investigative powers are then available under each Act.

8.80 In addition, the different location of investigation powers in the *ASIC Act* and *NCCP Act* affects ASIC's enforcement options. Section 464 of the *Corporations Act* gives ASIC standing to apply to a court for orders winding up a company if ASIC has investigated, or is investigating, the company pursuant to its powers in the *ASIC Act*. No equivalent standing is granted to ASIC by the *Corporations Act* in respect of an investigation commenced under the *NCCP Act*. It seems anomalous that while ASIC may commence an investigation into a corporate AFS Licensee under the *ASIC Act* and have the option to seek orders winding the company up, the same option is not available in respect of a corporate Credit Licensee subject to investigation under the *NCCP Act*.

8.81 Consolidation may rectify this anomaly, as well as streamlining the use of investigative powers more generally.

8.82 That said, several international jurisdictions also utilise separate licensing regimes as part of the regulation of their financial systems. For example, the Monetary Authority of Singapore as a 'super regulator' regulates the entirety of the financial services industry and as a result, oversees all licensing matters, including separate licensing regimes.[85] South Africa also maintains a separate credit licensing regime from that for financial services, although under the supervision of different regulators.[86]

8.83 New Zealand also has a separate regime for credit.[87] If a person is a provider of consumer credit, and not already licensed or authorised by the Financial Markets Authority or the Reserve Bank of New Zealand, they must be certified by the Commerce Commission.[88]

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85 See *Monetary Authority of Singapore Act* (Singapore, cap 186, 1999 rev ed) (which includes 'financial institution'); *Banking Act* (Singapore, cap 19, 2008 rev ed) (which includes 'credit facilities'); *Finance Companies Act* (Singapore, cap 108, 2011 rev ed); *Financial Advisers Act* (Singapore, cap 110, 2007 rev ed).

86 See *National Credit Act 2005* (South Africa); *Financial Advisory and Intermediary Services Act 2002* (South Africa).The credit licensing regime is supervised by the National Credit Regulator. Financial licensing regimes are supervised by the Financial Sector Conduct Authority established under the *Financial Sector Regulation Act 2017* (South Africa).

87 The Financial Markets Authority administers the *Financial Markets Conduct Act 2013* (NZ). The Commerce Commission is responsible for enforcement of the *Credit Contracts and Consumer Finance Act 2003* (NZ) (see ss 6–7 definitions of 'credit' and 'credit contracts').

88 Under Part 5A of the *Credit Contracts and Consumer Finance Act 2003* (NZ).

8.84 Hong Kong has an industry-based financial services regulatory regime with no 'super regulator'. In terms of credit licensing, the licensing of money lenders and regulation of money-lending transactions that sit outside the banking system are separately governed from financial services licensing, or authorisation, of the specified 'regulated activities'.[89]

8.85 Further consideration will be given to the potential for consolidating the AFSL and Australian credit licensing regimes in Interim Report C, which will focus on how the provisions of Chapter 7 of the *Corporations Act* could be restructured or reframed.

The potential to consolidate other licensing regimes in Chapter 7

8.86 As discussed in **Chapter 7**, operating a financial market or operating a clearing and settlement facility are included within the definition of 'financial service' for the purposes of the *ASIC Act* but excluded from the *Corporations Act* definition.[90]

8.87 That distinction is partly attributable to what are currently separate licensing regimes for each of operating a financial market, operating a clearing and settlement facility, and providing financial services, as regulated in Parts 7.2, 7.3, and 7.6 of Chapter 7 respectively.[91] Financial markets and clearing and settlement facility licensing differs from the AFSL regime in many respects, including that the licences are granted by the Minister as opposed to AFS Licences that are granted by ASIC.

8.88 The possibility of creating a single definition of 'financial service' would facilitate closer analysis to determine whether simplification could be achieved by consolidating these licensing regimes. Equally, enacting a single definition of 'financial service' that included both operating a financial market and a clearing and settlement facility would not necessitate that the licensing regimes be merged; rather, as discussed in **Chapter 7**, application provisions could be used to ensure that only the necessary regimes (and other provisions) applied.

8.89 Further consideration may be given to the potential for consolidation and simplification of these licensing regimes in Interim Report C.

Key definitions and concepts

8.90 Like the rest of the *Corporations Act*, Part 7.6 relies heavily on defined terms and tagged concepts, which create further complexity. Discussed below are

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89 See *Money Lenders Ordinance* (Hong Kong) cap 163. 'Regulated activities' are prescribed by Schedule 5 of the *Securities and Futures Ordinance* (Hong Kong) cap 571 and are regulated by the Securities and Futures Commission.

90 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAB(1)(f); *Corporations Act 2001* (Cth) s 765A(1)(l)(i).

91 Chapter 7 of the *Corporations Act* also contains a fourth licensing regime in Part 7.5B relating to 'financial benchmarks'. Section 908BA requires any person who administers a 'significant financial benchmark' (defined in s 908AC to include any 'financial benchmark' declared by a legislative instrument under s 908AC(2)) to hold a licence. Administering a financial benchmark is not included within the definition of 'financial service' in either the *ASIC Act* or the *Corporations Act*.

examples of the use of definitions in Part 7.6 that demonstrate key issues in relation to navigability, labelling, and notional amendments.

8.91 Section 910A of the *Corporations Act* contains a list of 22 defined terms that apply only for the purposes of Part 7.6. It does not, however, contain a complete list of terms defined in the Part or signposts to other defined terms. Two further terms are defined elsewhere in Part 7.6,[92] including s 910B which provides two relational definitions for the term 'control' that differ from the otherwise Act-wide definition of that term in s 50AA.

8.92 The *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (Cth), which received Royal Assent on 28 October 2021, substantially amends Part 7.6 of the *Corporations Act*. Most of these amendments commence on 1 January 2022. The amendments include repealing four definitions from s 910A and inserting 13 new definitions.[93]

Defined terms used in the s 911A(1) obligation to hold an AFS Licence

8.93 To fully understand s 911A a reader must consult at least four definitions across provisions in five different locations: s 761A, s 911D, s 761C, Part 1.2 Div 3 (likely after being referred there by s 761C or s 9), and Part 7.1 Div 4. The expression 'carries on a financial services business in this jurisdiction' in s 911A relies on three defined terms: 'financial services business'; 'carry on'; and 'in this jurisdiction'.

8.94 'Financial services business' is defined by s 761A to mean 'a business of providing financial services'. Section 9 provides that 'financial services business, when used in a provision outside of Chapter 7, has the same meaning as it has in Chapter 7'. Outside of Chapter 7, the term 'financial services business' is only used in three sections, one of which (s 13) defines the term 'associate' for the purposes of Chapter 7 and is therefore only relevant to that Chapter.

8.95 Section 761C of the *Corporations Act* is titled 'Meaning of *carry on* a financial services business', and provides:

> In working out whether someone carries on a financial services business, Division 3 of Part 1.2 needs to be taken into account. However, paragraph 21(3)(e) does not apply for the purposes of this Chapter.

The Act-wide dictionary in s 9 of the *Corporations Act* similarly provides that the expression 'carry on' has a meaning affected by Part 1.2 Div 3.

8.96 Part 1.2 Div 3 contains four sections that both give substance to and qualify the expression 'carrying on a business'. These include s 18, which provides that a business may be carried on otherwise than for profit, and s 21, which outlines when a business will be carried on in Australia and provides for exceptions in s 21(3). Section 21(3)(e) provides, in summary, that a person does not carry on business in

92 *Corporations Act 2001* (Cth) ss 910B, 910C.

93 Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021 (Cth) sch 1 items 16, 18–20, 22–25.

Australia merely because they solicit or procure 'an order that becomes a binding contract only if the order is accepted outside Australia'. Section 761C therefore performs two roles: first, it acts as a signpost to Part 1.2 Div 3, and secondly, it overrides s 21(3)(e) for the purposes of Chapter 7.

8.97 Combined with the definition of 'in this jurisdiction' in s 911D, the exclusion of s 21(3)(e) has significant implications for the scope of the AFSL regime. Section 911D requires a person to consult the definition of 'this jurisdiction' in s 9, which describes the geographical area in which the *Corporations Act* applies. Section 911D also has the effect of deeming a financial service 'to be carried on in this jurisdiction' if a person 'engages in conduct that is intended to induce people in this jurisdiction to use the financial services the person provides or is likely to have that effect'. This provision is intended to make it clear that 'service providers who target Australians from overseas … will be taken to carry on a financial services business in this jurisdiction' and therefore are required to hold an AFS Licence.[94]

8.98 As acknowledged by ASIC in Regulatory Guide 121, the provisions relating to carrying on a business are not exhaustive, so the common law test of 'carrying on a business' needs to be applied subject to Part 1.2 Div 3 and s 911D.[95] The Revised Explanatory Memorandum to the FSR Bill notes that the common law meaning of 'carrying on a business' includes 'elements of system, repetition and continuity', thereby making it unlikely that 'one-off transactions relating to the provision of financial services and financial products' would be caught by the AFSL regime.[96] Notwithstanding this statement, Regulatory Guide 121 nonetheless warns potential service providers that 'system, repetition and continuity are not essential; a one-off transaction, if substantial, could also be seen by the courts as carrying on a business in Australia'.[97]

8.99 The measures discussed in **Chapter 6**, if implemented, would improve the navigability of the definitions contained in s 911A by more clearly signposting, in a single dictionary, where the definitions can be found. Given the importance of s 911A to the AFSL regime, the inclusion of cross-reference notes identifying important defined terms and their locations could also assist a reader to navigate the provision.

Relevant financial products

8.100 Section s 910A of the *Corporations Act* defines '***relevant financial products***', for the purposes of Part 7.6, to mean financial products other than:

(a) basic banking products; or

(b) general insurance products; or

(c) consumer credit insurance; or

94 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [11.5].
95 Australian Securities and Investments Commission, *Doing Financial Services Business in Australia* (Regulatory Guide 121, July 2013) [RG 121.46].
96 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [11.5].
97 Australian Securities and Investments Commission (n 95) [RG 121.48].

(d) a combination of any of those products.

8.101 In addition to being a non-intuitive label,[98] the term 'relevant financial products' is complex because it is defined negatively — to paraphrase, it means 'all financial products except those listed'. This means that, where it is used, it effectively operates as an exclusion, limiting the scope of a provision to only a subset of financial products. The term is used (in the singular and plural) 29 times in 18 sections in Part 7.6. The term is also used in three other definitions in s 910A.[99]

8.102 On some occasions, the scope of the term is further qualified. For example, s 921C(5) provides that s 921C does not apply

> in relation to a person who is to provide personal advice to retail clients in relation to relevant financial products if the only relevant financial product in relation to which the person is to provide personal advice to a retail client is a time-sharing scheme.

8.103 The definition of 'relevant financial products' presents a challenge to navigability — to understand the term requires an understanding of the following defined terms nested within it:

- 'financial product', defined in Part 7.1 Div 3;
- 'basic banking product', which though signposted in s 910A (the dictionary provision for Part 7.6) is defined by s 961F, and in turn relies other defined terms;
- 'general insurance product', which is signposted in s 761A (the dictionary provision for Chapter 7) as 'a financial product described in paragraph 764A(1)(d)', s 764A being the provision that lists products specifically included within the definition of 'financial product'; and
- 'consumer credit insurance', defined by s 910A to have the meaning given by s 11 of the *Insurance Contracts Act 1984* (Cth).

8.104 Further, while the term 'relevant financial products' (plural) is defined in s 910A for the purposes of Part 7.6, the term 'relevant financial product' (singular) is defined differently in s 1016A, which appears in Part 7.9 relating to financial product disclosure. Although the latter term is defined only for the purposes of s 1016A, it still has the potential to create confusion with the plural 'relevant financial products'.

8.105 'Relevant financial products' is used in provisions that predominantly relate to a subset of financial advice. Its greatest significance is as part of the defined term 'relevant provider', which in summary means an individual who is authorised to give 'personal advice' (a defined term discussed in **Chapter 11**) to 'retail clients' (a defined term discussed in **Chapter 12**) in relation to 'relevant financial products'.[100] The term 'relevant provider' is, in turn, used in several provisions of Part 7.6 that place obligations on 'relevant providers' or AFS Licensees in respect of 'relevant

98 See **Chapter 6** for discussion of using intuitive labels for defined terms.
99 'Body corporate licensee', 'limited-service time-sharing adviser', and 'relevant provider'.
100 *Corporations Act 2001* (Cth) s 910A.

providers'. These are Div 8A (Professional standards for relevant providers), Div 8B (Compliance schemes), and Div 9 Subdivs B and C (relating to notice requirements and the Register of Relevant Providers).

8.106 Used in conjunction with the defined term 'relevant provider', 'relevant financial products' sets the scope of a number of provisions in Part 7.6. As discussed in **Chapter 6** and **Chapter 7**, using defined terms to determine scope creates complexity and impedes navigability. Readability and navigability could be improved by repealing the definition and giving effect to its intention in an application provision in the provisions that use it. An example of how this approach could be implemented is discussed in **Chapter 10**.[101]

Responsible manager

8.107 The term 'responsible manager' is a concept created by ASIC in regulatory guidance that is neither defined nor used in the *Corporations Act* or *Corporations Regulations*. ASIC Regulatory Guide 105 sets out ASIC's minimum expectations with respect to what ASIC describes as the 'organisational competence obligation' in s 912A(1)(e) of the *Corporations Act*.[102] Regulatory Guide 105 states:

> We assess your compliance with this obligation by looking at the knowledge and skills of the people who manage your financial services business. We refer to these people as your 'responsible managers'.[103]

8.108 The Regulatory Guide contains extensive discussion of the concept 'responsible manager', but does not otherwise set out to define it.

8.109 Notwithstanding the lack of an explicit statutory foundation for the term 'responsible manager', it is significant for an AFS Licensee in two main respects. First, as noted above, it is central to how ASIC assesses a licensee's compliance with s 912A(1)(e), which requires an AFS Licensee to 'maintain the competence to provide those financial services' and is a civil penalty provision.[104] Secondly, an organisation must nominate their responsible manager/s when applying for a licence.[105] Once granted an AFS Licence, the licensee must notify ASIC of any change in its responsible managers within 10 days. The obligation to notify ASIC is effectively created by ASIC through the operation of s 922A of the *Corporations Act* and reg 7.6.05(1)(g), which give ASIC discretion to record in its register 'any information that ASIC believes should be recorded there', and reg 7.6.04(1)(b),

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101 See [10.123] in **Chapter 10**.

102 By **Proposal A21** discussed in Chapter 13, the ALRC has proposed that the *Corporations Act* be amended to remove s 912A(1)(e). As discussed at [13.105], this would have implications for the way ASIC grants an AFS Licence (see s 913B) and how ASIC enforces compliance with AFS Licence obligations (see, eg, s 915C), as well as consequential effects on the regulatory guidance discussed here.

103 Australian Securities and Investments Commission, *AFS Licensing: Organisational Competence* (Regulatory Guide 105, April 2020) [RG 105.2].

104 *Corporations Act 2001* (Cth) s 912A(5A).

105 Australian Securities and Investments Commission (n 103); Australian Securities and Investments Commission, *AFS Licensing Kit: Part 1—Applying for and Varying an AFS Licence* (n 8).

which imposes a condition on all AFS Licensees to notify ASIC of any changes to matters recorded in ASIC's register.

8.110 As a defined concept, the expression 'responsible manager' has some intuitive value because it conveys that the person takes responsibility for the operational management of a business.[106] On the other hand, there is some possibility that the concept could be confused with other, similar defined terms in the *Corporations Act*, such as:

- 'senior manager', a term defined by s 9 and one that is used in s 913BA (Fit and proper person test) in Part 7.6; and
- 'responsible officer', a term defined by s 9 but which is not used in Part 7.6.

Linked to a refusal or failure to give effect to a determination made by AFCA

8.111 The term 'linked to a refusal or failure to give effect to a determination made by AFCA' is defined by s 910C and used in only two provisions: as one of the matters to which ASIC must have regard when applying the fit and proper person test to determine an AFS Licence application in s 913BB(2)(e) and as one of the grounds on which ASIC may make a banning order against a person under s 920A(1)(j).

8.112 This is another example of a definition that, contrary to the principles discussed in **Chapter 4**, is not used to elucidate meaning. Rather, it sets out the circumstances in which a person will be taken to have been 'linked to a refusal or failure to give effect to a determination made by AFCA'. The definition is itself quite lengthy, comprising two subsections and eight paragraphs. The main purpose of the definition therefore appears to be simply saving the need to repeat the substance of the definition itself in the two provisions that use it.

8.113 As discussed in **Chapter 6**, the labels used for defined terms should be as intuitive as possible, but if an expression conveys an ordinary meaning then readers may overlook the fact that the expression may be defined. The label 'linked to a refusal or failure to give effect to a determination made by AFCA' illustrates this problem because that expression could carry its ordinary meaning. Furthermore, readers would not ordinarily expect such a long expression (comprising 15 words) and which contains four distinct concepts ('linked', 'refusal to give effect', 'failure to give effect' and 'a determination made by AFCA') to be defined as a composite expression.

8.114 Given the defined term is only used twice, navigability could be improved without substantially adding to the length of the *Corporations Act* by repealing the definition and instead incorporating it as an additional subsection in each of ss 912BB and 920A.

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106 See, eg Australian Securities and Investments Commission (n 103) [RG 105.20], which expands on who may be nominated as a 'responsible manager'.

Defined terms and ASIC legislative instruments

8.115 ASIC legislative instruments often utilise defined terms when making exemptions or declarations pursuant to s 926A(2) (exemptions and notional amendments made by ASIC) in relation to the requirements of the AFSL regime in Part 7.6. In particular, the definitions of 'financial product' and 'financial service', and thus the scope of the AFSL regime, may be altered (either directly or indirectly) by such notional amendments. Of the 69 instruments made under Part 7.6, the ALRC has identified six legislative instruments that notionally amend existing definitions and 15 that notionally insert new definitions.[107]

Example: Notional amendment of existing definitions

ASIC Class Order — Relief for 31 Day Notice Term Deposits (CO 14/1262) provides relief for certain term deposits from AFS Licence requirements and other obligations by way of notional amendments to the definitions of:

- 'basic deposit product' in s 761A by omitting paragraphs (c) and (d) and substituting the timeframes specified in the class order; and
- 'basic banking product' in s 910A by omitting the entire definition and substituting the specified definition in the class order (and reference to s 961F(e) and resulting reg 7.7A.07).

8.116 The above example demonstrates how notionally amended definitions are used to carve-out a particular product, such as a particular type of term deposit (known as a '31 Day Notice Term Deposit'), and provide regulatory relief from the requirements of Part 7.6 and other obligations under the *Corporations Act*.

107 Included in these are three legislative instruments that both amend existing definitions and insert

Example: Notional insertion of new definitions

ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968 provides a tailored regulatory regime for managed discretionary account ('MDA') providers and includes a 'Definitions' section with 16 definitions that are not used elsewhere in the *Corporations Act*.[108] According to the instrument's Explanatory Statement, these definitions are used to 'inform the content' of the legislative instrument.[109] For example:

- 'MDA provider', 'external MDA custodian', and 'market participant' are used to 'switch on' various exemptions from obligations (subject to conditions) under the *Corporations Act*.[110]
- 'MDA services' and 'external MDA custodian' are used when notionally inserting ss 912AE–912AFE (General obligations), as well as s 912AG (Interpretation), which contains further definitions, including cross-references to definitions inserted by other ASIC class orders.[111]

8.117 The notional insertion of definitions, as well as notional provisions that contain further notional definitions, contributes to the complexity associated with navigating the AFSL regime.

8.118 Under the approach discussed in **Chapter 10** regarding 'rules', common terms could be given a single definition instead of having to create a dictionary for each legislative instrument.

Defined terms used in licence conditions

8.119 Pursuant to ss 914A (The conditions on the licence) and 914B (ASIC may request information etc. in relation to an application for conditions to be varied), AFS Licensees are required to comply with the conditions of an AFS Licence. Such conditions include:

- those outlined in reg 7.6.04 of the *Corporations Regulations*;
- select standard conditions imposed when the licence is granted, as set out in ASIC Pro Forma 209; and
- any other tailored conditions imposed by ASIC under s 914A.

8.120 Regulation 7.6.04 is itself 1,697 words long and defines six terms for the purposes of the regulation. Pro Forma 209 was first issued in June 2002 and has

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new ones.

108 This excludes the definition of 'Act' which means the *Corporations Act 2001* (Cth).

109 Australian Securities and Investments Commission, Explanatory Statement, *ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968*.

110 *ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968* pt 2.

111 See, eg, the definition of 'annual investor statement' in notional s 912AG(4), which is defined by reference to subsections notionally inserted by ASIC Class Order [CO 13/763] and [CO 13/762].

been subsequently re-issued 17 times. Typically, a subset of the conditions contained in Pro Forma 209 will be applied at the time an AFS Licence is granted. The nature and drafting of conditions and authorisations contained in AFS Licences are largely matters within the discretion of ASIC, subject to limitations aimed at preventing unnecessary regulatory overlap between ASIC and APRA.[112]

8.121 A definitions section in Pro Forma 209 lists 56 defined terms, comprising approximately 7,800 words.[113] The definitions section contains terms that do not appear to be defined in the *Corporations Act* or *Corporations Regulations* such as 'financial asset', 'foreign exchange contract', 'managed investment warrant', 'miscellaneous financial investment product', and 'miscellaneous financial risk product'. Defined terms also include several non-intuitive terms such as 'eligible custodian', 'eligible provider', and 'eligible undertaking' that do not appear to be defined in the *Corporations Act*.

8.122 Other defined terms in Pro Forma 209 contain slightly different definitions to terms used in the *Corporations Act*. For example 'consumer credit insurance' is defined in s 910A by reference to s 11 of the *Insurance Contracts Act 1984* (Cth) whereas in Pro Forma 209 it is defined as 'a "consumer credit insurance product" as defined in regulation 7.1.15 of the Corporations Regulations'. The defined term 'derivative' also differs from the *Corporations Act* definition so as to include reference to defined terms that are unique to Pro Forma 209 such as 'managed investment warrant' and 'foreign exchange contracts'.

8.123 Closer analysis of the current use of legislative hierarchy gives rise to questions about obligations that are appropriately contained in AFS Licence conditions, and the interaction between licence conditions and other parts of the legislative hierarchy. These issues will be considered in more detail in Interim Report B.

Regulatory guidance issued by ASIC

8.124 ASIC has issued extensive guidance in relation to the AFSL regime. At a high level, this regulatory guidance assists the regulated population to determine whether they need an AFS Licence, the process of applying for a licence, and the obligations associated with holding a licence.

8.125 As at March 2021, out of the total 208 regulatory guides issued and not withdrawn by ASIC, 109 contain the term 'AFS Licence'. In particular, there are 19 regulatory guides and 3 information sheets directly relevant to the application

112 See *Corporations Act 2001* (Cth) s 914A(4); Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [11.17]. Additionally, where an AFS Licensee is an authorised deposit-taking institution (see *Banking Act 1959* (Cth)), and a proposed condition would significantly impact the institution's ability to carry on its banking business, the powers that ASIC would otherwise have 'to impose, vary or revoke' such a condition are instead powers of the Minister: s 914A(5).

113 This word count includes parenthetical notes that explain when certain definitions are included in a licence.

process for an AFS Licence and the obligations of an AFS Licensee. An 'AFS Licensing Kit', which is designed to assist those applying for an AFS Licence, spans three regulatory guides and is 178 pages long.

8.126 The need for regulatory guidance, and the volume of it, is both a symptom and cause of complexity surrounding the financial services regulatory regime. The use and design of regulatory guidance will be discussed in greater detail in the Interim Report B.

9. Disclosure

Contents

Introduction

9.1 This chapter considers the application and content of disclosure requirements as governed by key definitions, standards, and concepts in the *Corporations Act*.

9.2 Key elements of the disclosure framework for Chapter 7 of the *Corporations Act* include FSGs, SoAs, general advice warnings, and PDSs.[1] 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),[2] the *SIS Act*,[3] and the *NCCP Act*.[4]

9.3 Determining when particular disclosure obligations apply, and to whom, requires reference to various definitions, including, for example, the definitions of 'financial product' (and types thereof) and 'financial service', as well as Part-specific

1 Additional disclosure obligations in Chapter 7 include those relating to: Cash Settlement Fact Sheets (Part 7.7 Div 3A), ongoing fee disclosure statements (Part 7.7A Div 3), CGS depository interest information sheets (Part 7.9 Div 5C), and short sales covered by securities lending arrangement of certain listed products (Part 7.9 Div 5B).

2 See *Insurance Contracts Act 1984* (Cth) pt IV div 4 in relation to Key Facts Sheets for consumer insurance contracts.

3 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) s 29QB.

4 See *National Consumer Credit Protection Act 2009* (Cth) ss 113, 126–7, 136, 149, 158, 160 (credit guides); 114, 137 (quotes); 121, 144 (credit proposal disclosure document); 120, 132, 143, 155 (written assessment).

definitions such as 'responsible person' and 'regulated person' (Part 7.9). 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'.

9.4 Disclosure accounts for a significant volume of the *Corporations Act*, *Corporations Regulations*, ASIC legislative instruments, and individual relief instruments. Finding and understanding applicable disclosure requirements requires financial services providers to refer to multiple sources and, in many cases, to 'read in' notional amendments to provisions of the Act. 'Alternative regulatory regimes' are created by notional amendments and the imposition of conditions on exemptions, as discussed in **Chapter 7** of this Interim Report.

9.5 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.[5]

9.6 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.

9.7 The proposals in this chapter 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; and
- coupling the obligation to give financial product disclosure with an outcomes-based standard that reflects the underlying policy objective, in order to provide greater flexibility in the application and design of disclosure requirements.

9.8 This chapter also invites 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.

9.9 **Chapter 10** of this Interim Report includes further discussion of how the regulatory framework for disclosure could be simplified through the development

5 See below at [9.11]–[9.20] for discussion of the policy objectives of disclosure requirements.

of a more coherent approach to the legislative hierarchy — an issue that will be considered in greater detail as part of Interim Report B.

9.10 Proposals for reform in this chapter target product disclosure requirements in the *Corporations Act* as a source of particular complexity in the regulatory framework for corporations and financial services. However, the ALRC also invites comments on the potential implications or application of the proposed reforms in relation to other disclosure obligations.

Policy settings

9.11 The overarching policy objective of financial product and services disclosure obligations is to provide retail clients with the information necessary to make an informed choice about those products or services.[6]

9.12 This broad objective is reflected in the objects provision for Chapter 7 of the *Corporations Act*, which cites promoting 'confident and informed decision making by consumers of financial products and services' as a component of the chapter's main object.[7]

9.13 A similar objective underpins disclosure requirements in respect of shares and other securities. However, as Professor Hanrahan notes, while 'it is sometimes assumed that corporate disclosure is intended only to serve the information needs of existing and prospective investors, this is not the case'.[8] Black and Hanrahan note that:

> the different rationales for requiring disclosure … [include] to inform the choices of individual investors, to even the playing field between corporate insiders and outsiders, and to provide sufficient information to the market as a whole to achieve allocative efficiency.[9]

9.14 The Wallis Inquiry suggested that disclosure regulation is 'at the core of any scheme to protect consumers as it allows them to exercise informed choice'.[10] However, in 'recent years, it has been widely recognised that disclosure is a necessary, but not sufficient, tool for consumer protection'.[11]

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6 For discussion of the concept of a 'retail client', see **Chapter 12**.

7 *Corporations Act 2001* (Cth) s 760A.

8 Pamela Hanrahan, 'Core Issues in the Regulation of Misleading Silence in Corporate Law' in Elise Bant and Jeannie Marie Paterson (eds), *Misleading Silence* (Hart Publishing, 2020) 307, 307.

9 Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis Butterworths, 10th ed, 2021) [4.3].

10 Stan Wallis et al, *Financial System Inquiry* (Final Report, 1997) 261.

11 Phoebe Tapley and Andrew Godwin, 'Disclosure (Dis)Content: Regulating Disclosure in Prospectuses and Product Disclosure Statements' (2021) 38(5) *Company & Securities Law Journal* 315, 315. See, eg, Australian Securities and Investments Commission and Dutch Authority for the Financial Markets, *Disclosure: Why It Shouldn't Be the Default* (Joint Report, 2019).

9.15 A fundamental assumption underpinning the development of disclosure requirements was that correcting the information imbalance between suppliers and purchasers of financial products and services would empower consumers to make decisions in their best interests. CLERP Proposals Paper No 6 suggested, for example, that disclosure requirements 'promote the more efficient allocation of resources by assisting investors to choose investment products which will achieve their investment strategies and goals'.[12]

9.16 However, empirical evidence 'cautions against over-reliance on disclosure to protect consumer interests because, for a range of reasons, studies show that disclosure of relevant information does not necessarily translate to good decision-making by consumers'.[13] Additional measures, such as the design and distribution obligations (Part 7.8A of the *Corporations Act*), have accordingly been introduced to complement disclosure obligations.[14] In the context of the regulation of financial product advice, there has been a shift from reliance on disclosure to manage the impact of conflicted remuneration on the quality of advice towards the prohibition of such remuneration in many instances.[15]

9.17 Additional policy aims of disclosure requirements under the *Corporations Act* include:

- ensuring an appropriate balance between comprehensiveness and comprehensibility of disclosure;
- enabling comparability of products and services; and
- facilitating cost-effective disclosure.

9.18 The Final Report of the Wallis Inquiry emphasised that the 'aim of regulation should be effective disclosure, not merely the production of information'.[16] The Report noted the potential counterproductive effect of disclosing 'excessive or

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12 Department of the Treasury (Cth), *Financial Markets and Investment Products: Promoting Competition, Financial Innovation and Investment* (Corporate Law Economic Reform Program Proposals for Reform: Paper No 6, 1997) 105.

13 Tapley and Godwin (n 11) 315. See Australian Securities and Investments Commission and Dutch Authority for the Financial Markets (n 11) for discussion of key limitations on the utility of disclosure in enhancing consumer decision making in relation to financial products and services. For general discussion of the limitations of mandated disclosure in aiding decision making, see Omri Ben-Shahar and Carl E Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press, 2014) 307.

14 See Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (Cth) [1.2]–[1.5]; David Murray et al, *Financial System Inquiry* (Final Report, 2014) 198–205. For analysis of the relationship between design and distribution obligation requirements and their relationship with concerns about the effectiveness of disclosure obligations, see Jeannie Marie Paterson, 'From Disclosure to Design: The Australian Regulatory Response to Mis-Selling to Consumer Investors by Financial Services Providers' in Sandra Booysen (ed), *Financial Advice and Investor Protection: Comparative Law and Practice* (Elgar, forthcoming).

15 See further **Chapter 11**. There are notable exclusions from this prohibition, such as in relation to general insurance and life insurance products: *Corporations Act 2001* (Cth) ss 963B–963D.

16 Wallis et al (n 10) 261.

complex information', which 'may confuse consumers and discourage them from using disclosure documents'.[17] Accordingly, disclosure requirements aim to

> balance the need for the purchaser to have sufficient information to make an informed decision and compare products against the concern that they may be provided with more information than they can comprehend.[18]

9.19 Another key objective of the financial product and services disclosure requirements introduced by the *FSR Act* was the harmonisation of the disparate disclosure requirements previously applicable to different products and providers.[19] The introduction of PDS and FSG requirements responded to the Wallis Inquiry's call for 'consistent and comparable' disclosure requirements.[20]

9.20 The perceived advantages of consistent disclosure requirements were twofold. First, it was expected that consistency of disclosure requirements would assist consumers to compare products and services.[21] Secondly, it was suggested that streamlined disclosure requirements would reduce compliance costs for financial service providers who were previously subject to differing requirements for the range of products and services on offer.[22] However, as discussed below, over time the consistency of disclosure requirements has been eroded by the introduction of tailored requirements for specific products, persons, and circumstances through various means, resulting in a complex patchwork of regulatory requirements.[23]

9.21 Black and Hanrahan observe that:

> While FSR emphasised a consistent approach to financial product disclosure, the regime has evolved highly specific disclosure requirements for the products covered by it. The disclosure requirements in Pt 7.9 are complex, and highly specific in their application. They vary significantly depending on the type of financial product on offer.[24]

Scope of disclosure obligations

9.22 The scope of the various financial product and services disclosure regimes established by the *Corporations Act* is determined by three key factors outlined below: the persons involved; the product or service being offered; and, the circumstances in which the product or service is offered. Accordingly, determining whether disclosure is required in a given situation, and how it must be given, necessitates consideration of a number of key questions, as illustrated in **Figure 9.1**.

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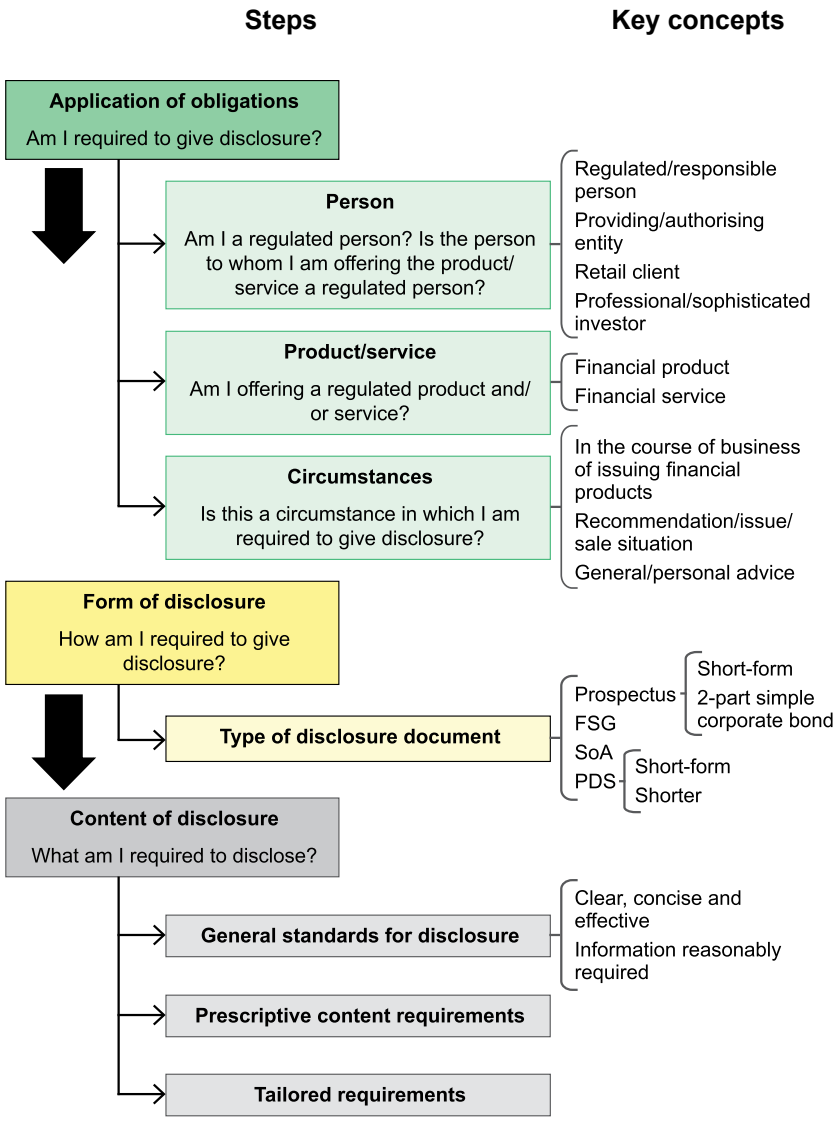
17 Ibid.
18 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [14.71].
19 See ibid [2.29]–[2.33], [2.39], [2.46].
20 Wallis et al (n 10) 264, Recommendation 8.
21 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.30], [2.36]; Wallis et al (n 10) 262, 264.
22 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.31], [2.35].
23 See [9.50]–[9.62], [9.105]–[9.116].
24 Black and Hanrahan (n 9) [5.5].

9.23 A significant number of defined terms and tagged concepts are used in provisions that determine the scope and content of disclosure regimes. Notably, apart from Parts 1.2 and 7.1 (which set out Act- and Chapter-wide definitions respectively), Part 7.9 contains the greatest number of definitions (63).[25] Key concepts that inform the application and content of disclosure obligations in relation to financial products and services are highlighted in **Figure 9.1**, and discussed further below.

Figure 9.1: Steps for determining scope and content of disclosure obligations



25 See further **Figure 3.11** in **Chapter 3**, which illustrates the location of definitions within Chapter 7 of the *Corporations Act*. For an explanation of the parameters of this data, refer to **Appendix D**.

Person

Retail client

9.24 In line with various consumer protection provisions in Chapter 7 of the *Corporations Act*, the financial services disclosure requirements in Part 7.7 and financial product disclosure requirements in Part 7.9 only apply if the service or product is provided to a person as a 'retail client'.[26]

9.25 By contrast, the prospectus regime in Part 6D.2, which deals with the offer and sale of securities, is not explicitly directed to 'retail clients'. However, there are exclusions from the obligation to provide disclosure in circumstances that resemble exclusions from the definition of retail client, such as the exclusions in respect of 'sophisticated investors' and 'professional investors'.[27]

Providing entity, regulated person, responsible person

Proposal A7 Sections 1011B and 1013A(3) of the *Corporations Act 2001* (Cth) should be amended to replace 'responsible person' with 'preparer'.

9.26 The types of persons who are subject to disclosure obligations under the *Corporations Act*, and the labels used to refer to such persons, vary across the different regimes.

9.27 The Part 7.7 regime relating to financial services disclosure only applies to 'financial services licensees' and their 'authorised representatives'.[28] The term 'providing entity' is used in Part 7.7 as a 'tag', or shorthand, to refer to those persons.[29] Providing entities must provide disclosure — in the form of an FSG, SoA, Cash Settlement Fact Sheet, or general advice warning as applicable — in accordance with Part 7.7. The term 'client' is similarly used as shorthand for the concept 'retail client'.[30]

9.28 By comparison, the PDS regime in Part 7.9 applies to 'regulated persons' who issue, recommend or sell a financial product to a retail client.[31] This extends to a broader range of persons than Part 7.7. 'Regulated person' is defined in the definitions section for Part 7.9 Div 2, and includes:

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26 See *Corporations Act 2001* (Cth) ss 941A(1), 941B(1), 944A, 948B, 949A(1), 1012A–1012C. The definition of retail client is set out in s 761G, and is affected by s 761GA and Part 7.1 Div 2 of the *Corporations Regulations*. By virtue of s 761G(4), persons who are not retail clients are treated as 'wholesale' clients. See **Chapter 12** for discussion of the concepts of 'retail client' and 'wholesale client'.

27 Ibid s 708(8), (11).

28 See ibid ss 941A, 941B, 944A, 948B, 949A. For discussion of these concepts see **Chapter 8**.

29 Ibid.

30 Ibid.

31 Ibid ss 1012A–1012C.

- financial services licensees;
- authorised representatives of financial services licensees;
- in most circumstances, issuers;
- in some circumstances, sellers of financial products;
- persons who are required to hold an AFS Licence; and
- persons who are not required to hold an AFS Licence because they are a trustee of a self-managed superannuation fund, or are subject to an exemption under the regulations or from ASIC.[32]

9.29 The term (or label) 'regulated person' is used and defined differently elsewhere in the Act, including within Part 7.9. For example, in Part 7.9 Div 5C, the term 'regulated person' is defined in relation to a 'CGS depository interest'.[33] Within Part 7.9 Div 2, 'regulated person' is given an additional meaning in relation to the 'regulated acquisition of a financial product'.[34] In Part 7.8A, 'regulated person' includes a reference to the definition of regulated person for Part 7.9 Div 2, but is also 'modified so that the references to financial products include references to securities'.[35] As discussed in **Chapter 5**, it is generally preferable to adhere to the principle that a term should have only one defined meaning for the purposes of an Act.

9.30 The use of 'regulated person' in these different provisions serves to limit the application of relevant obligations. An alternative means to achieve this purpose without the use of a defined term such as 'regulated person', which necessarily differs in scope for different provisions, may be to make use of an 'application provision' that sets out the persons to whom the relevant part or division applies. This approach is discussed further in **Chapter 8** and **Chapter 10**, and may be given further consideration as part of Interim Reports B and C as a means of facilitating any proposed restructuring.

9.31 Part 7.9 also utilises the concept of a 'responsible person'. A definition of the term 'responsible person' is contained in the definitions section for Part 7.9 Div 2.[36] This definition is a signpost to a different section, s 1013A(3), which defines 'responsible person' as the 'person by whom, or on whose behalf, a Product Disclosure Statement for a financial product is required to be prepared'.

9.32 The distinction between the terms 'responsible person' and 'regulated person' within Part 7.9 Div 2 is not readily apparent on the face of these terms, particularly in light of the similarity between the terms. As discussed in **Chapter 6**, defined terms should correspond intuitively with the substance of the definition. **Proposal A7** would replace the label for 'responsible person', as defined in ss 1011B and 1013A(3) for the purposes of Part 7.9 Div 2, with 'preparer'. The term 'preparer' would better reflect

32 Ibid s 1011B.
33 Ibid s 1020AH.
34 Ibid s 1012IA.
35 Ibid s 994A.
36 Ibid s 1011B.

the role of the 'responsible person' as the 'person by whom, or on whose behalf, a Product Disclosure Statement for a financial product is required to be prepared'. The proposed label is also consistent with terminology currently used in the headings to certain provisions in Part 7.9.[37]

9.33 Unlike Part 7.7 and Part 7.9, the prospectus regime in Part 6D.2 does not use a label to capture the persons who are subject to disclosure obligations under the Part. The prospectus requirements instead generally refer to a 'person making the offer'.[38]

9.34 However, there are specified types of persons who may be liable for loss or damage resulting from material deficiencies in disclosure documents prepared for the purposes of Chapter 6D.[39] Persons that may be responsible for misstatements, or omissions, in a disclosure document include:

- the person making the offer;
- each director of the body making the offer if the offer is made by a body;
- an underwriter to an offer.[40]

9.35 Section 730 also requires those persons to inform the person making the offer if they become aware of any deficiencies in the disclosure document.[41]

Product or service

Service

9.36 The requirement under Part 7.7 to provide an FSG applies in circumstances where a providing entity provides a 'financial service' to a retail client.[42] However, similar to the exclusion of certain financial products from the PDS requirements, there are exemptions from the obligation to provide an FSG where the financial service provided is of a particular type, such as the operation of a registered scheme or notified foreign passport fund.[43]

9.37 The requirements to provide an SoA or a general advice warning are additionally engaged when the financial service provided is 'financial product advice'. The type of disclosure required depends on whether the advice is personal advice or general advice.[44]

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37 See ibid ss 1021D–10121F, 1021J.
38 Ibid ss 707, 708, 710, 712.
39 Ibid s 729(1).
40 Ibid.
41 Ibid s 730.
42 Ibid ss 941A(1), 941B(1). For discussion of the concept of 'financial service', see **Chapter 7**.
43 Ibid ss 941C(3), (3A).
44 Ibid ss 944A, 949A. For discussion of the general and personal advice distinction, see **Chapter 11**.

Product

9.38 In comments that remain pertinent today, CLERP Proposals Paper No 6 noted in 1997 that there is

> a wide diversity of products available in the finance industry spanning the full spectrum of risk/return preferences of consumers. Product diversity poses unique challenges for disclosure regulation, in particular, how to ensure that prospective investors have sufficient information to make informed and meaningful comparisons between products, without imposing undue compliance costs or overly prescriptive and inflexible regulation on the issuers and the market.[45]

9.39 The standard PDS regime in the *Corporations Act* was designed to apply consistently to a broad range of investment options, with the aim of assisting consumers to assess and compare different investment options.

9.40 A regulated person must give a person a PDS for a 'financial product',[46] as defined in s 761A and Part 7.9 Div 2 to which s 761A refers.[47] The revised Explanatory Memorandum to the FSR Bill explains that the problem with existing regulation of financial product disclosure was that 'functionally similar products [were] governed by disparate Acts and non-legislative instruments'.[48] The proposed solution was to 'apply consistent disclosure requirements to all "financial products", although with flexibility in the legislation to allow for significant differences between products'.[49]

9.41 Various types of 'financial products' are, however, excluded from the application of the standard disclosure requirements in Part 7.9, or subject to adapted requirements, by provisions within the Act, as well as the *Corporations Regulations* and ASIC legislative instruments.[50]

9.42 One significant carve-out from 'financial product' for the purposes of Part 7.9 is 'securities'.[51] A PDS does not need to be provided with the issue of securities. This is because disclosure for securities is instead regulated by the prospectus regime in Part 6D.2. For the purposes of the prospectus regime in Part 6D.2, 'securities' is defined in s 700(1). This definition incorporates the definition of security in s 761A of Chapter 7 with some carve-outs.[52]

9.43 As discussed further in **Chapter 7** of this Interim Report, the definition of 'security' in s 761A for the purposes of Chapter 7 differs from how it is defined elsewhere in the *Corporations Act.* For the purposes of Chapter 7, a security includes shares and debentures in a body, but not interests in managed investment

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45 Department of the Treasury (Cth) (n 12) 107.
46 *Corporations Act 2001* (Cth) ss 1012A(3), 1012B(3), 1012C(3).
47 See further **Chapter 7** of this Interim Report.
48 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.29].
49 Ibid [2.29]–[2.38].
50 See discussion below at [9.50]–[9.62], [9.105]–[9.116].
51 *Corporations Act 2001* (Cth) s 1010A.
52 See ibid s 700(1).

schemes.[53] As a result, interests in managed investment schemes are *not* excluded by s 1010A from the PDS requirements under Part 7.9.

9.44 Prior to the *FSR Act*, interests in a managed investment scheme were covered by the prospectus regime rather than the PDS regime. Hanrahan has argued that interests in managed investment schemes would be more appropriately regulated under the prospectus regime, and that doing so would streamline Part 7.9, which 'contains many provisions that are relevant only to listed products and that replicate aspects of the Chapter 6D disclosure regime'.[54] Offers of certain financial products, such as stapled securities, may be subject to disclosure requirements under both Chapter 6D and Part 7.9.

Circumstances

9.45 The circumstances in which a PDS is required are set out in ss 1012A–1012C: personal advice recommending a particular financial product (s 1012A); situations related to the issue of financial products (s 1012B); and offers related to the sale of financial products (s 1012C). The regime is then disengaged or adapted in circumstances described in ss 1012D, 1012DA, 1012DAA, 1012E, 1012F, 1012G and 1014E, ASIC legislative instruments, and the *Corporations Regulations*.[55]

9.46 Sections 1012A–1012C use tagged concepts to describe the situations in which a PDS must be provided to a person. The tags assigned to the situations are: 'recommendation situation'; 'issue situation'; and 'sale situation'. Each situation defines, for the purposes of Part 7.9 Div 2, 'relevant conduct' and the 'client' to whom the situation relates. The tags 'relevant conduct' and 'client' are then used in a general way throughout Div 2 (in particular, in the exception sections in Subdiv B). Given that the tagged concepts 'relevant conduct' and 'client' play a key role in scoping the applicability of exceptions to the Part 7.9 disclosure regime, it may be suitable for the concepts to be signposted in the definitions section for Div 2 (s 1011B). In particular, a definition of 'client' could be included in s 1011B which explains that all of the situations relate to a person who is either provided with financial product advice, or, issued, or sold a financial product *as a retail client*.

9.47 In addition, each of the situations is described by reference to concepts defined elsewhere in Chapter 7 of the *Corporations Act*. The definitions section for Div 2 (s 1011B) includes signposts to the definitions of 'offer' and 'sale', which take on unique meanings in Part 7.9. However, there are a number of other relevant terms such as 'acquire', 'issue', and 'provide' that are defined in s 761E for the purposes of Chapter 7 more broadly. The implementation of recommendations

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53 See ibid s 761A. Cf Part 7.11, where a security also includes a managed investment product and a foreign passport fund product.

54 Pamela Hanrahan, *Legal Framework for the Provision of Financial Advice and Sale of Financial Products to Australian Households* (Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Background Paper No 7, 2018) 89 n 355. See also Black and Hanrahan (n 9) [5.7]–[5.8].

55 See, eg, *Corporations Regulations 2001* (Cth) regs 7.9.07D–7.9.07FC.

in **Chapter 6**, such as the creation of a single glossary of defined terms and the development of drafting guidance to draw attention to the use of defined terms would accordingly assist with understanding the concepts of 'recommendation situation', 'issue situation', and 'sale situation'.

9.48 A number of situations in which a PDS is not required are set out in s 1012D. Among these, a PDS is not required when a client:

- has already received an up-to-date PDS;
- has access to up-to-date information; or
- already holds a financial product of the same kind.

9.49 These exemptions lessen the requirements for duplicative or onerous disclosure in certain circumstances, including where it is reasonable to believe that a client has received, or has, and knows that they have, access to all the information that the PDS would contain and any other information that is required to be disclosed.[56] A similar list of exemptions from the Part 7.7 regime is set out in s 941C. In line with **Proposal A10**, these exemptions should be included in a consolidated legislative instrument rather than the primary law. Further, given that many of the exemptions are directed at reducing duplicative or unnecessary disclosure, consideration should be given to whether the exemptions themselves should be consolidated to reduce the complexity created by specific exemptions.

Opportunities for simplification

Exemptions and exclusions

9.50 Much like Chapter 7 of the *Corporations Act* more broadly, exemptions and notional amendments are frequently used to vary the scope of disclosure obligations in an *ad hoc* manner.

9.51 There are numerous legislative instruments and regulations that grant relief from or notionally amend disclosure requirements in the *Corporations Act*.

9.52 As at 30 June 2021, there were 295 in force ASIC instruments on the Federal Register of Legislation.[57] The total number of unique instruments in respect of disclosure or other obligations under Chapter 6D, Part 7.7, or Part 7.9 was 113. This means that disclosure-related instruments accounted for close to 40% of ASIC legislative instruments.[58] **Table 9.1** sets out the number of legislative instruments

56 *Corporations Act 2001* (Cth) ss 1012D(1), (2), (2A), (2B), (3).

57 See Australian Law Reform Commission, 'ASIC-Made Legislative Instruments (Qualitative) – 30 June 2021' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/legislative-data>. This dataset is not limited to legislative instruments made under the *Corporations Act*. However, it excludes ASIC legislative instruments that are 'rules' (eg, the Market Integrity Rules, Derivative Transaction Rules, and Financial Benchmark Rules).

58 Part 7.9 and Chapter 6D include provisions relating to matters other than disclosure, such as cooling-off periods (Part 7.9 Div 5) and securities hawking (s 736). Some instruments may therefore not relate directly to disclosure obligations.

made under sections in Chapter 6D, Part 7.7, and Part 7.9 that authorise ASIC to exempt a person from or notionally amend relevant provisions.

Table 9.1: Number of in force ASIC legislative instruments made under disclosure-related provisions

Chapter/ Part	Section	Relevant disclosure document	Number of LIs made under section*
Chapter 6D	741(1)	Prospectus or CSF offer document	48
Part 7.7	942B(7A)	FSG (AFS Licensee)	1
Part 7.7	942C(7A)	FSG (authorised representative)	1
Part 7.7	951B(1)	FSG, SoA, general advice warning, or Cash Settlement Fact Sheet	23
Part 7.9	1020F(1)	PDS	84

*Note: Some legislative instruments were made under more than one section of the Act.

9.53 The ALRC has identified granting relief as the primary purpose of the majority (81%) of disclosure-related ASIC legislative instruments.[59] For example, *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* excludes interests in a conditional cost litigation scheme from the financial product disclosure regime.[60] Disclosure-related instruments account for 53% of the 173 ASIC legislative instruments for which the ALRC identified granting relief as the primary purpose of the instrument.

9.54 **Table 9.2** depicts the 'primary purpose' of ASIC legislative instruments made under Chapter 6D, Part 7.7, or Part 7.9, as categorised by the ALRC.

59 As a number of instruments cite multiple provisions as a source of authority, some of these instruments may grant relief in respect of non-disclosure related provisions and only make consequential amendments to disclosure provisions.

60 See also *ASIC Corporations (Mortgage Investment Schemes) Instrument 2017/857*; *ASIC Corporations (Non-Traditional Rights Issues) Instrument 2016/84*.

Table 9.2: Purpose of disclosure-related in force ASIC legislative instruments

Primary purpose of LIs	Total number
Grant of relief	92
Imposition of obligations	4
Procedural	7
Other variation of obligations	10

9.55 The ALRC also sought to identify ASIC legislative instruments that impose requirements on persons who rely on relief granted by the instrument.[61] Over half of the 48 legislative instruments that the ALRC identified as imposing requirements on persons who rely on relief granted by the instrument are disclosure-related instruments. As discussed further below, these types of instruments sometimes impose alternative disclosure requirements as a condition of reliance on relief from disclosure obligations under the Act.

9.56 In addition to ASIC legislative instruments, there are a number of regulations that grant relief in the form of exemptions from disclosure requirements.[62]

9.57 The ALRC also completed computational analysis of all ASIC Gazettes dating from 3 July 2001 (ASIC 1/01) to 22 December 2020 (ASIC 52/2020) to understand the nature and volume of individual relief instruments. During this period, there were over 1,400 Gazettes.[63] The number of individual relief instruments made under s 741(1) (relating to Chapter 6D disclosure) was the second highest of any section of the *Corporations Act*.[64]

9.58 Within Chapter 7, the highest number of individual relief instruments has been made under s 1020F(1) (an estimate of 2,404), which relates to Part 7.9 financial product disclosure. In comparison, there were an estimated 269 individual relief instruments made under s 951B(1) in relation to Part 7.7 (financial services disclosure).

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61 For this purpose, the ALRC distinguished between conditions that must be met prior to reliance on relief, and conditions imposed subsequent to reliance on relief. The data captured relates to the latter category of conditions. See further Australian Law Reform Commission (n 57).

62 See, eg, *Corporations Regulations 2001* (Cth) regs 7.9.07D–7.9.07FC.

63 As ASIC Gazettes are published as images, the ALRC used optical character recognition (OCR) technology to convert images to machine-readable text. However, this was imperfect, and the number of instruments authorised by each section is therefore likely an undercount. For a comprehensive summary of the estimated number of individual relief instruments made under relief-making powers in the Act, see Table 3.4 in Chapter 3.

64 The largest number of instruments were made under s 601QA(1), which relates to the regulation of managed investment schemes under Chapter 5C.

9.59 The use of regulations and legislative instruments to manage the scope of the application of the disclosure regime and prescribe further detail where necessary was expressly contemplated by the drafters of the FSR Bill.

9.60 In the context of the FSG regime, the revised Explanatory Memorandum to the FSR Bill noted that:

> A flexible regulation-making power is included to both disapply disclosure of certain information in specified circumstances and also to prescribe in more detail the information required under one of the above headings in particular or general situations.[65]

9.61 Similarly, in relation to the product disclosure provisions, the revised Explanatory Memorandum to the FSR Bill states that, 'the product disclosure provisions are drafted at a level of general principle that is intended to be capable of flexible application'.[66]

9.62 However, the volume and dispersal of exemptions and notional amendments across various sources present significant challenges for the navigability of the disclosure regimes. The number of conditional exemptions suggests that the regimes currently in force are not working effectively for a range of products and circumstances.[67]

9.63 **Chapter 10** of this Interim Report outlines how the navigability and transparency of exemptions and exclusions across Chapter 7 of the *Corporations Act* could be improved by consolidating exclusions and exemptions within delegated legislation. **Chapter 10** also explores how the need for conditional exemptions may be reduced by reforms to better accommodate tailored disclosure requirements for different products and circumstances.

Restructuring of Part 7.9 for greater coherence in scope

9.64 The financial product disclosure provisions in Part 7.9 currently sit alongside obligations relating to advertising,[68] cooling off periods,[69] unsolicited offers to purchase financial products off-market,[70] disclosure in relation to short sales covered by securities lending arrangements of listed section 1020B products,[71] and other miscellaneous requirements, such as the requirement for confirmation of certain transactions involving a financial product.[72]

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65 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [12.17].
66 Ibid [14.179].
67 For example, see *ASIC Corporations (Share and Interest Sale Facilities) Instrument 2018/99*; *ASIC Corporations (Non-Cash Payment Facilities) Instrument 2016/211*; *ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82*; *Corporations Regulations 2001* (Cth) regs 7.9.09A–7.9.09C, sch 10A pt 19.
68 *Corporations Act 2001* (Cth) pt 7.9 div 4.
69 Ibid pt 7.9 div 5.
70 Ibid pt 7.9 div 5A.
71 Ibid pt 7.9 div 5B.
72 Ibid s 1017F.

9.65 Certain products are excluded from the application of the standard disclosure requirements under Part 7.9, but remain subject to other obligations within Part 7.9. This has led to a situation where Part 7.9 applies to varying extents to different types of financial products because certain products are 'carved-out' of Part 7.9 generally, but are 'carved-in' for discrete aspects of Part 7.9, such as s 1017F (confirming transactions) and Div 5A (unsolicited offers to purchase financial products off-market). Division 1 of Part 7.9 provides, for example, that Part 7.9 does not apply to four types of financial products, apart from certain provisions. The application of Part 7.9 to these excluded products is outlined in **Table 9.3**.

Table 9.3: Application of Part 7.9 to products excluded by ss 1010A–1010BA

	Securities (s 1010A(1))	**Debentures, stocks, bonds issued by government (s 1010A(2))**	**Contribution plans (s 1010BA)**	**Products not issued in course of business (s 1010B)**
Div 2 (PDSs)				
Div 3 (Other disclosure obligations for issuer)	[1017F]	[1017F]	[1017F]	
Div 4 (Advertising)				
Div 5 (Cooling-off)				
Div 5A (Unsolicited off-market offers to purchase)				
Div 5B (Short sales)				
Div 5C (CGS depository interests)				
Div 6 (Miscellaneous)				
Div 7 (Enforcement)	[Will only apply for Div 5A]	[Will only apply for Div 5A]	[Will only apply for Div 5A]	

inapplicable applicable in part applicable in full

9.66 The existence of limited exceptions to Part-wide exclusions for particular financial products adds to the complexity of Part 7.9. Greater consistency would be achieved if the provisions that require these kinds of 'carve-ins' were relocated to a different Part to facilitate consistency in the scope of Part 7.9. Restructuring Part 7.9

would also serve to achieve greater thematic coherence within the Part, assisting with navigability and transparency.[73]

9.67 It is arguable that the more 'thematically-distinct' provisions set out above would be better placed outside of Part 7.9 (potentially in Part 7.8 or a newly created part).[74] For example, s 1017F, which relates to confirming transactions relating to financial products, appears to be sufficiently different in character to the other product disclosure obligations in Part 7.9 to justify its relocation to an alternative part of the *Corporations Act*.

9.68 A similar case can be made with respect to Part 7.9 Divs 5A and 5B. Division 5A deals with the making of unsolicited off-market offers to *purchase* financial products (and particularly the terms of the offer rather than disclosure in relation to the financial product). Division 5B deals with disclosure in relation to short selling of specified products. Division 5B is thematically aligned with s 1020B and could arguably be appropriately distanced from the product disclosure obligations in Part 7.9, in addition to ss 1020A and 1020BAA, which are also not disclosure obligations. Division 5 on cooling-off periods may also be better placed outside of the disclosure obligations in Part 7.9.

9.69 Notably, there are limited structural interconnections between Divs 5, 5A and 5B, ss 1020A–1020B, and other provisions in Part 7.9. This means that the former provisions could be relatively easily relocated to a different part. In particular, these divisions do not engage any of the enforcement provisions in Div 7 or the stop orders power in s 1020E.

9.70 Some of these non-disclosure provisions make use of definitions, or concepts, set out in ss 1012A, 1012B, and 1012C.[75] To limit the need to cross-refer to provisions in Part 7.9, provisions that are relocated could instead replicate or incorporate the relevant definitions or concepts.

9.71 Furthermore, if Div 5A were removed from Part 7.9, there would be no need for different definitions of 'disclosure document or statement' for the purposes of Subdivs A and B of Div 7 (on offences and civil liability respectively). It would, however, be necessary to replicate some of the enforcement provisions in Part 7.9 as they apply to Div 5A.

9.72 Options for restructuring Part 7.9 will be explored further as part of Interim Reports B and C. The ALRC welcomes stakeholder views on the approach outlined above, or on alternatives that may better serve the aims of navigability and coherence.

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73 See also discussion in **Chapter 10**.

74 Relevant provisions are outlined at [9.64].

75 See, eg, *Corporations Act 2001* (Cth) s 1020A(2), which refers to 'making a recommendation, as described in subsection 1012A(3), that is received in the jurisdiction … making an offer, as described in subsection 1012B(3) or 1012C(3), that is received in this jurisdiction … '.

Regulation of the content of disclosure

9.73 Disclosure obligations across the *Corporations Act* make use of standards to set the perimeters of the extent of information to be disclosed and to regulate the comprehensibility of disclosure documents. Key standards, as discussed below, include:

- 'information that a person would reasonably require' to make a decision; and
- 'clear, concise and effective'.

9.74 These standards are supplemented by a range of prescriptive requirements that require the inclusion of specified information and statements in disclosure documents, and prescribe aspects of formatting, such as the title of documents. Other regulated aspects of disclosure include how and when disclosure documents are to be provided, how documents may be updated, and when disclosure documents must be lodged with ASIC.

9.75 Generally applicable requirements are adapted in a number of respects for particular products, services, persons, or circumstances by provisions of the Act, as well as by the *Corporations Regulations* and ASIC legislative instruments.

9.76 Existing standards of disclosure aim to balance the comprehensiveness and comprehensibility of disclosure by tying the level of information required to that which would be reasonably required to make a decision, and setting a standard for the presentation of disclosure documents that calls for clarity and conciseness.[76] The range of prescriptive requirements, in turn, aim to promote consistent disclosure of key information and enhance consumer comparison of products and services by ensuring a level of standardisation across disclosure documents.[77]

9.77 However, as previously noted, there appears to be general consensus that the existing disclosure requirements have limitations, do not facilitate consumer understanding, and are a source of significant compliance costs. Finding and understanding applicable disclosure requirements present significant challenges. As Black and Hanrahan observe, it 'should not pass without comment that legislation and regulatory rules intended to produce the clear, concise and effective communication of information utterly fail to demonstrate it'.[78]

9.78 During consultations for this Inquiry, disclosure was raised by a number of consultees as an area of the law that would benefit from rationalisation, particularly in light of the introduction of design and distribution obligations. For regulators, it appears that disclosure obligations are rarely the focus of litigated proceedings.[79]

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76 See, eg, Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [14.71].

77 See, eg, ibid [14.72]. For further discussion of these policy objectives see [9.17]–[9.20] above.

78 Black and Hanrahan (n 9) [5.48].

79 In its analysis of case data from the High Court, the Federal Court, and the NSW Supreme Court, Court of Appeal, Court of Criminal Appeal and District Court, the ALRC found no cases from 2000 to July 2021 that considered ss 1021D–1021F (the offence provisions in relation to a defective disclosure document under Part 7.9). There were five cases relating to ss 952D, 952E and 952G

9.79 Observations from commentators and from consultations for this Inquiry to date, as well as the ALRC's empirical analysis, suggest that disclosure provisions likely contain significant unnecessary complexity. The analysis below outlines key features of the existing framework for the regulation of the content of disclosure, and highlights drivers of complexity within this framework. Discussion of potential reforms follows.

Standards for disclosure

'Information that a person would reasonably require'

9.80 A number of disclosure obligations refer to 'information that a person would reasonably require' as the general standard to be met when disclosing specified types of information. The extent of information that must be disclosed in accordance with specified requirements is that which a person would reasonably require for the purpose of: making a decision as a retail client to acquire a financial product or service; deciding whether to act on personal advice; or making an informed assessment of particular matters. **Table 9.4** outlines how this standard is expressed for the purposes of key disclosure obligations.[80]

Table 9.4: 'Information reasonably required' disclosure standards in the Corporations Act

Expression of standard	Relevant provisions	Relevant disclosure obligation(s)
all the information that holders of bid class securities and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the bid	s 638(1)	Target's statement (Part 6.5 Div 3)
all the information that investors and their professional advisers would reasonably require to make an informed assessment of the matters set out in the table below	s 710(1)	Prospectus (Part 6D.2)

(defective disclosure offence provisions under Part 7.7), while the number of cases in relation to s 728 (relating to misstatements in, or omissions from, prospectuses) was 23. There was also a limited number of cases (51) that concerned s 1041E, which creates a general offence for Chapter 7 in relation to 'false or misleading statements', and s 1308 (15 cases), which creates a general offence in relation to 'false or misleading documents'. See **Chapter 3** and **Appendix D** for further discussion of this dataset and the ALRC's methodology.

80 See also, eg, *Corporations Act 2001* (Cth) s 299A(1), in relation to requirements for annual directors' reports for listed entities.

Expression of standard	Relevant provisions	Relevant disclosure obligation(s)
the level of detail/information about a matter that is required is such as a person would reasonably require for the purpose of making a decision whether to acquire financial services from the providing entity/to act on the advice, as a retail client	s 942B(3) s 942C(3) s 947B(3) s 947C(3)	FSGs (Part 7.7 Div 2) SoAs (Part 7.7 Div 3)
such of the following information as a person would reasonably require for the purpose of making a decision as a retail client, whether to acquire the financial product	s 1013D	PDS (Part 7.9 Div 2)

9.81 This standard is intended to be adaptive and flexible.[81] As noted by Senior Member McCabe in relation to s 1013D, 'the application of the standard will produce different disclosure outcomes in individual cases'.[82]

9.82 A variant of the standard above requires disclosure of 'information that might reasonably be expected to have a material influence/effect', as reflected in **Table 9.5** below.[83]

Table 9.5: 'Material influence/effect' disclosure standards in the Corporations Act

Expression of standard	Relevant provisions	Relevant disclosure obligation(s)
information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED [enhanced disclosure] securities of the entity	s 674(2)(c)(ii) s 675(2)(c)(ii)	Continuous disclosure (Chapter 6CA)

81 See, eg, Department of the Treasury (Cth), *Fundraising: Capital Raising Initiatives to Build Enterprise and Employment* (Corporate Law Economic Reform Program Proposals for Reform: Paper No 2, 1997) 13; Department of the Treasury (Cth) (n 12) 108.

82 *Re Wright Patton Shakespeare Capital Ltd v Australian Investment and Securities Commission* (2007) 99 ALD 335 [15].

83 See also, eg, *Corporations Act 2001* (Cth) s 412(1)(a)(ii) in relation to explanatory statements for proposed compromises or arrangements under Part 5.1.

Expression of standard	Relevant provisions	Relevant disclosure obligation(s)
any other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product	s 1013E	PDS (Part 7.9 Div 2)

9.83 In relation to the preparation of a PDS, this second standard notably constitutes the substance of the disclosure obligation in s 1013E and not merely the standard for disclosure of specified types of information. Namely, there is an obligation to disclose any other information that meets the standard in s 1013E, in addition to disclosure of such of a specified list of information that meets the 'information that a person would reasonably require' standard expressed above.[84] A target's statement is similarly subject to an open-ended obligation to include 'all the information that a person would reasonably require', which operates as a standard to define the substance of the disclosure obligation and not merely the standard for disclosure of specified types of information.[85]

9.84 In relation to both financial product and securities disclosure and target's statements, relevant standards for disclosure interact with general qualifications on the extent of information to be disclosed. Information that would otherwise meet the standards above need only be disclosed to the extent to which:

- it is reasonable for a person to expect to find the information in the disclosure document;[86] and
- the information is known by relevant persons involved in the preparation of the disclosure documents.[87]

9.85 Some disclosure obligations do not adopt a standard for the extent of information to be disclosed. The content requirements for Cash Settlement Fact Sheets, ongoing fee disclosure statements, and bidder's statements, for example, simply contain a list of information and statements that must be included in the disclosure document without specifying a standard for the level of detail or the extent of information to be included in relation to listed items.[88]

84 See *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* (2011) 85 ACSR 354 [119] for discussion of the 'complimentary' relationship between ss 1013D(1) and 1013E.
85 See *Corporations Act 2001* (Cth) s 638(1).
86 Ibid ss 638(1A)(a), 710(1)(a),1013F.
87 Ibid ss 638(1A)(b), 710(1)(b), 1013C(2). See Tapley and Godwin (n 11) 322–3 for further discussion of these qualifications in relation to prospectuses and PDSs.
88 See *Corporations Act 2001* (Cth) ss 636, 948F, 962H.

'Clear, concise and effective'

9.86 The 'clear, concise and effective' standard requires information in a disclosure document to be worded and presented in a clear, concise and effective manner.[89] This standard is a common feature of a number of disclosure obligations across the Act, including those relating to:

- prospectuses (Part 6D.2);[90]
- crowd-sourced funding offer documents (Part 6D.3A);[91]
- FSGs (Part 7.7 Div 2);[92]
- SoAs (Part 7.7 Div 3);[93]
- Cash Settlement Fact Sheets (Part 7.7 Div 3);[94]
- PDSs (Part 7.9 Div 2);[95] and
- offer documents for unsolicited offers to purchase financial products off-market (Part 7.9 Div 5A).[96]

9.87 The standard was first introduced into the *Corporations Act* by the *FSR Act* in relation to PDSs, FSGs, and SoAs. It was later adopted as part of the continuous disclosure obligations and prospectus requirements in 2004.[97] The Explanatory Memorandum accompanying those amendments notes that the introduction of the requirement was 'intended to avoid disclosure documents that are unclear, vague or ambiguous',[98] in the context of disclosure documents that had 'grown increasingly complex'.[99]

9.88 There is limited case law considering the application of the 'clear, concise and effective' standard.[100] However, ASIC has issued regulatory guidance in relation to the standard for prospectuses, PDSs, FSGs, and SoAs.[101] In relation to

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89 For further discussion of the legislative history of this standard with respect to financial product disclosure see Tapley and Godwin (n 11) 318–20.

90 *Corporations Act 2001* (Cth) s 715A.

91 Ibid s 738K.

92 Ibid ss 942B(6A), 942C(6A).

93 Ibid ss 947B(6), 947C(6).

94 Ibid s 948F(5).

95 Ibid s 1013C(3).

96 Ibid ss 1019I(4), 1019J(4). See also s 249L(3) in relation to notices of meetings of members of companies.

97 *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).

98 Explanatory Memorandum, Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth) [4.185].

99 Ibid [4.190].

100 See, eg, *Re Wright Patton Shakespeare Capital Ltd v Australian Investment and Securities Commission* [2008] AATA 1068. For discussion of this case, see Andrew Godwin and Paul Rogerson, 'Clear, Concise and Effective: The Evolution of Product Disclosure Documents' in Shelley Griffiths, Sheelagh McCracken and Ann Wardrop (eds), *Exploring Tensions in Finance Law: Trans-Tasman Insights* (Thomson Reuters, 2014) 26–7.

101 Australian Securities and Investments Commission, *Prospectuses: Effective Disclosure for Retail Investors* (Regulatory Guide 228, August 2019) [RG 228.19]–[RG 228.40]; Australian Securities and Investments Commission, *Disclosure: Product Disclosure Statements (and Other Disclosure*

prospectuses, ASIC indicates when it will generally regard a prospectus as 'clear, concise and effective',[102] and provides detailed guidance in relation to how to meet the standard.[103] ASIC also suggests that the 'clear, concise and effective' standard should be 'read as a compound phrase so that each word qualifies the other'.[104] The guidance in relation to PDSs forms part of ASIC's 'good disclosure principles', and is generally expressed at a less granular level than the guidance in relation to prospectuses.[105]

9.89 ASIC may make a 'stop order' where a disclosure document or statement required by Part 6D.2 or Part 7.9 fails to meet the 'clear, concise and effective' standard.[106] However, a failure to comply with the standard does not result in a disclosure document being 'defective' for the purposes of offence and civil liability provisions.[107] Accordingly, the consequences of a failure to comply with this standard are less significant than omission of material required pursuant to the 'information reasonably required' standard and other specific disclosure requirements, as discussed further below.[108] This may further incentivise product issuers and service providers to err on the side of 'over-disclosure' to foreclose potential liability for omissions, rather than prioritising clarity and conciseness.

Prescriptive content requirements

9.90 Disclosure is further regulated through varying levels of prescription in relation to the types of information and statements that must be disclosed, and the formatting of disclosure documents.

9.91 Some disclosure obligations adopt what might be described as a 'checklist approach' by exhaustively prescribing the statements and types of information that must be disclosed.[109]

9.92 The prescribed information and statements in relation to SoAs and FSGs include statements in relation to the name and contact details of the providing

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Obligations) (Regulatory Guide 168, October 2011) [RG 168.71]–[RG 168.104]; Australian Securities and Investments Commission, *Licensing: Financial Product Advisers—Conduct and Disclosure* (Regulatory Guide 175, June 2021) [RG 175.120]–[RG 175.21], [RG 175.135], [RG 175.213]–[RG 175.217].

102 Australian Securities and Investments Commission, *Prospectuses: Effective Disclosure for Retail Investors* (n 101) [RG 228.24].

103 Ibid [RG 228.25]–[RG 228.40].

104 Ibid [RG 228.22].

105 Tapley and Godwin (n 11) 320.

106 See *Corporations Act 2001* (Cth) ss 739(1)(a), 1020E(1)(a)(ia).

107 See definition of 'defective' in ibid ss 952B, 953A, 1021B, 1022A. However, liability may arise in respect of a disclosure document that falls short of the 'clear, concise and effective' standard where this failure is such that the document is 'misleading': see Godwin and Rogerson (n 100) 30–3.

108 See [9.139].

109 See, eg, *Corporations Act 2001* (Cth) ss 636, 948F, 962H.

entity,[110] and information about remuneration,[111] and any association or relationships 'that might reasonably be expected to be capable of influencing the providing entity' in the provision of the service or advice.[112] Other key disclosures include information about the kinds of financial services the providing entity is authorised to provide (for FSGs),[113] and a statement setting out the advice, and information about the basis on which the advice is or was given (for SoAs).[114]

9.93 In relation to prospectuses, a choice was made to eschew a prescriptive, 'checklist' approach in favour of a test for disclosure that places greater onus on the issuer of the securities to assess what must be disclosed.[115] Pursuant to this approach, if the prospectus relates to an 'offer to issue (or transfer) shares, debentures or interests in a managed investment scheme', the information that must be disclosed is that which would reasonably be required to make an informed assessment of:

- the rights and liabilities attaching to the securities offered; and
- the assets and liabilities, financial position and performance, profits and losses and prospects of the body that is to issue (or issued) the shares, debentures or interests.[116]

9.94 In addition to this general test, which incorporates the 'information that a person would reasonably require' standard as discussed above, the prospectus regime sets out a general list of specific disclosures.[117] Required disclosures include the terms and conditions of the offer, information about the interests of and benefits given to certain people, and statements in relation to expiry periods, lodgement of the prospectus and the admittance of the securities to quotation on a financial market.

9.95 The PDS regime adopts a 'directed disclosure' approach,[118] which incorporates a more extensive list of specific disclosures on the basis that:

> in order to provide sufficient comparability between similar investment products, it is likely that issuers and promoters of certain financial products will require a higher level of guidance that that which is provided by a general disclosure requirement based on the prospectus provisions.[119]

9.96 Subject to the 'information that a person would reasonably require' standard and the qualifications discussed above, s 1013D requires disclosure of, inter alia, information about:

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110 Ibid ss 942B(2)(a), 942C(2)(a), 947B(2)(c), 947C(2)(c).
111 Ibid ss 942B(2)(e), 942C(2)(f), 947B(2)(d), 947C(2)(e).
112 Ibid ss 942B(2)(f), 942C(2)(g), 947B(2)(e)(ii), 947C(2)(f)(ii).
113 Ibid ss 942B(2)(c), 942C(2)(d).
114 Ibid ss 947B(2)(a)–(b), 947C(2)(a)–(b).
115 Department of the Treasury (Cth) (n 81) 13–14.
116 *Corporations Act 2001* (Cth) s 710(1). Different matters are prescribed for a prospectus in relation to an 'offer to grant (or transfer) a legal or equitable interest in securities or grant (or transfer) an option over securities'.
117 Ibid s 711.
118 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [4.35].
119 Department of the Treasury (Cth) (n 12) 108.

- any significant risks associated with holding the product;[120]
- any significant taxation implications; and
- the extent to which labour standards or environmental, social or ethical considerations are taken into account in relation to any investment component of the product.[121]

9.97 The lists of required information and statements for prospectuses and PDSs, as well as other disclosure documents, include disclosure of any other statements or information required by the regulations.[122]

9.98 Other aspects of disclosure regulation include:

- prescription of the title of disclosure documents, and permissible abbreviations thereof;[123] and
- provision for the use of supplementary and/or replacement disclosure documents to update or correct existing disclosure documents.[124]

9.99 The level of prescription and extent of particularisation in the regulation of disclosure is illustrated by the relative volume of disclosure regulation. The ALRC's data analysis indicates that disclosure represents the topic that takes up the largest amount of legislative space within the *Corporations Act*.

9.100 There are 32 sections within Part 6D.2, 60 sections within Part 7.7, and 126 sections within Part 7.9; this makes the latter Part the largest within the *Corporations Act.*[125] Part 7.9 also has the largest number of words (45,347), subsections (515), and paragraphs (1,452) of any Part in the Act.

9.101 Parts 7.7 and 6D.2 are also very large in comparison to other Parts of the *Corporations Act*. Part 7.7 has 17,164 words (making it the 10th largest Part), 216 subsections, and 477 paragraphs. Part 6D.2 contains 15,500 words, 200 subsections, and 428 paragraphs. The relative length of Part 7.9 compared to Part 6D.2 is consistent with the view at the time of the FSR Bill that greater prescription was warranted in relation to the requirements for a PDS than for a prospectus, as discussed above.

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120 For discussion of the meaning of 'significant risk' in s 1013D, see *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* (2011) 96 ACSR 307 [130]–[132], [160]; *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* (2011) 85 ACSR 354 [98]–[100].

121 For further detail in relation to the information that must be disclosed in this regard, see *Corporations Regulations 2001* (Cth) reg 7.9.14C; Australian Securities and Investments Commission, *Section 1013DA Disclosure Guidelines* (Regulatory Guide 65, November 2011).

122 See *Corporations Act 2001* (Cth) ss 711(8), 942B(2)(k), 942C(2)(m), 947B(2)(g), 947C(2)(h), 948F(1)(f), 1013D(1)(k). For regulations made for these paragraphs, see *Corporations Regulations 2001* (Cth) regs 7.7.03, 7.7.03A, 7.7.04, 7.7.05A, 7.7.06, 7.7.06A, 7.7.06B, 7.7.07, 7.7.09AA, 7.7.09BA, 7.7.11, 7.7.11A, 7.7.12, 7.9.14D.

123 See, eg *Corporations Act 2001* (Cth) ss 942A, 943B, 947A, 948E, 1013E, 1014B.

124 See ibid ss 643–7, 719A–720, 943A–943F, 1014A–1014L in relation to target statements and bidder's statements, prospectuses, FSGs, and PDSs.

125 For further discussion of the relative length of provisions of the *Corporations Act*, see **Chapter 3**.

9.102 Similarly, the quantity of regulations made under disclosure-related Parts of the *Corporations Act* is significant in comparison to the total regulations made under the Act. In particular, Part 7.9 of the *Corporations Regulations* contains the greatest number of words (42,620), the second largest number of regulations (227), and the greatest number of paragraphs (1,298) in comparison to regulations made under other Parts of the Act. Part 7.7 and Part 6D.2 account for a smaller portion of the *Corporations Regulations.*[126]

9.103 The disclosure requirements set out in the *Corporations Act* and *Corporations Regulations* are supplemented by extensive guidance from ASIC that addresses general principles for disclosure,[127] as well as specific guidance for disclosure in relation to particular products.[128]

9.104 As discussed above, disclosure-related instruments additionally account for a significant proportion of ASIC legislative instruments, with s 1020F in Part 7.9 representing the most frequently cited source of authority for ASIC legislative instruments.[129]

Tailored disclosure requirements

9.105 The general disclosure requirements outlined above are adapted for the purposes of particular persons, circumstances, or products by other provisions in the *Corporations Act*, as well as by the *Corporations Regulations* and ASIC legislative instruments. This is particularly the case in relation to financial product and securities disclosure.[130]

9.106 Certain provisions in the *Corporations Act* prescribe additional disclosures, or amend or grant relief from particular requirements. This function is also fulfilled by ASIC legislative instruments and regulations that notionally amend, or grant relief

126 There are 14,812 words in Part 7.7 of the *Corporations Regulations,* 59 regulations, and 373 paragraphs. In Part 6D.2 of the *Corporations Regulations,* the total number of words is 2,283, there are 6 regulations, and 95 paragraphs.

127 Australian Securities and Investments Commission, *Disclosure: Product Disclosure Statements (and Other Disclosure Obligations)* (n 101); Australian Securities and Investments Commission, *Offering Securities Under a Disclosure Document* (Regulatory Guide 254, August 2020); Australian Securities and Investments Commission, *Prospectuses: Effective Disclosure for Retail Investors* (n 101).

128 See, eg, Australian Securities and Investments Commission, *Mortgage Schemes: Improving Disclosure for Retail Investors* (Regulatory Guide 45, May 2012); Australian Securities and Investments Commission, *Hedge Funds: Improving Disclosure* (Regulatory Guide 240, October 2013); Australian Securities and Investments Commission, *Unlisted Property Schemes: Improving Disclosure for Retail Investors* (Regulatory Guide 46, March 2012); Australian Securities and Investments Commission, *Infrastructure Entities: Improving Disclosure for Retail Investors* (Regulatory Guide 231, January 2012); Australian Securities and Investments Commission, *Agribusiness Managed Investment Schemes: Improving Disclosure for Retail Investors* (Regulatory Guide 232, January 2012).

129 See Australian Law Reform Commission (n 57).

130 For further discussion of ways in which the general disclosure requirements for prospectuses and PDSs are adapted by provisions of the *Corporations Act*, the *Corporations Regulations*, and ASIC legislative instruments see Tapley and Godwin (n 11) 324–30.

from, relevant provisions in the Act. The ALRC identified 57 disclosure-related ASIC legislative instruments that notionally amend the Act.[131]

9.107 Notional amendments typically have application in relation to particular products, persons, or circumstances. However, in some instances aspects of the general requirements are notionally amended for the regulated population as a whole.[132]

9.108 Tailored disclosure requirements are also imposed as a condition of relief in some ASIC legislative instruments. As discussed in **Chapter 7** of this Interim Report, the effect of conditional exemptions or notional amendments in some cases is to create 'alternative regulatory regimes' for particular products, persons, or circumstances that operate in parallel with the standard disclosure requirements reflected in the *Corporations Act*.

9.109 **Table 9.6** highlights some examples of ways in which the general disclosure requirements for PDSs and prospectuses have been adapted. Colour coding demonstrates the spread of these adapted requirements across the *Corporations Act*, *Corporations Regulations*, and ASIC legislative instruments.

131 See Australian Law Reform Commission (n 57). 'Disclosure-related instruments' refers to ASIC legislative instruments made under sections in Chapter 6D, Part 7.7, or Part 7.9: see further [9.50]–[9.63].

132 See, eg, *ASIC Corporations (Updated Product Disclosure Statements) Instrument 2016/1055* which provides generally applicable relief from the obligation to update a PDS per s 1012J if certain reasonable steps are taken.

Table 9.6: Examples of adapted disclosure requirements

Nature of adaptation	Subject of adapted requirements	Source of adapted requirements
Prescription of additional disclosures	Foreign passport fund products, managed investment products that are enhanced disclosure ('ED') securities, and foreign passport fund products that are ED securities	ss 1013GA, 1013I, 1013IA
	Managed investment products in certain circumstances	*ASIC Corporations (Managed Investment Product Consideration) Instrument 2015/847*
	Protected policies issued by a general insurer or protected accounts issued by an authorised deposit-taking institution	reg 7.9.14D
Amendment of or relief from particular requirements	Continuously quoted securities	ss 713, 101FA
	Offers of debentures by a body in the course of business	*ASIC Corporations (Debenture Prospectuses) Instrument 2016/75*
	General insurance products	reg 7.9.15D
	Short-form prospectus (any product)	s 712
	Short-form PDS (any product)	reg 7.9.61AA, Sch 10BA
	2-part simple corporate bonds prospectuses	ss 713A–713E
	'Shorter PDS' for superannuation products, simple managed investment scheme products, and margin loan facilities	regs 7.9.11–7.9.11Z, schs 10A, 10C–10E
Imposition of alternative disclosure requirements as condition of relief	Employee incentive schemes	*ASIC Class Orders 14/1000 & 14/1001*
	Securities issued on conversion of convertible notes	*ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82*
	Share and interest sale facilities	*ASIC Corporations (Share and Interest Sale Facilities) Instrument 2018/99*

Corporations Act *Corporations Regulations* *ASIC legislative instruments*

9.110 In some instances, adapted disclosure requirements represent an attempt to mitigate the perceived limitations of those requirements in achieving the key policy objectives of disclosure, either generally or in relation to specific products. For example, the introduction of the 'Shorter PDS' requirements for superannuation products, simple managed investment scheme products, and margin loans in 2010 responded to concerns that

> the effectiveness of disclosure has been compromised by a tendency for suppliers of financial products to provide excessive information, generally over and above what the reasonable consumer would need to make a product purchasing decision.[133]

9.111 The objective of the introduction of the 'Shorter PDS' was to

> improve consumer protection by developing disclosure documents that are more effective in providing consumers with the information they need to make an informed investment decision by making PDSs simpler, more readable and standardised, while reducing business compliance costs.[134]

9.112 The Shorter PDS requirements substantially displace the standard content requirements for a PDS, including the general standards for disclosure outlined above. A PDS for these products must include prescribed statements and information, set out under prescribed section numbers and headings. A maximum page length and minimum font size are also prescribed.[135] Empirical research suggests, however, that the highly prescriptive requirements for Shorter PDSs have not been conducive to improved consumer understanding, as initially contemplated.[136]

9.113 The application of the new requirements to superannuation, simple managed investment scheme, and margin lending products did not reflect the identification of the standard PDS requirements as being particularly inappropriate for those products. The Shorter PDS reforms instead reflected a choice to prioritise reforms for those products, as part of a staged process, based on 'their widespread use in Australia and/or the level of risk generally associated with the product'.[137]

9.114 In other instances, the tailoring of disclosure requirements reflects the inappropriateness or inapplicability of the general requirements to particular products and the circumstances captured by the scope of the disclosure requirements. For example, in relation to simple corporate bonds, it was found that the standard prospectus requirements constituted a regulatory barrier to the issuance of corporate bonds to retail clients.[138] The introduction of 2-part simple corporate bonds prospectuses in 2014 was intended to introduce a 'less burdensome approach to

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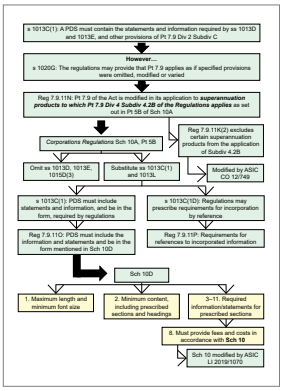
133 Regulation Impact Statement, *Corporations Amendment Regulations 2010 (No. 5)* (Cth) [8].
134 Ibid [38].
135 *Corporations Regulations 2001* (Cth) schs 10C–10E.
136 See Andrew Godwin and Ian Ramsay, 'Short-Form Disclosure Documents—An Empirical Survey of Six Jurisdictions' (2016) 11(2) *Capital Markets Law Journal* 296.
137 Regulation Impact Statement, *Corporations Amendment Regulations 2010 (No. 5)* (Cth) [19].
138 Explanatory Memorandum, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014 (Cth) [2.18]–[2.19].

disclosure for simple corporate bonds [which] takes into account the information and the entity and its financial position already available via existing continuous disclosure requirements'.[139]

9.115 An inevitable consequence of the extent of tailored disclosure requirements across the *Corporations Act*, the *Corporations Regulations*, and ASIC legislative instruments is that finding and understanding the law governing disclosure in particular circumstances is a challenging exercise. This difficulty is further exacerbated by the need to understand how the numerous notional amendments by regulations and ASIC legislative instruments interact with the provisions of the *Corporations Act*. In relation to Shorter PDSs, for example, the reader must have regard to notional amendments that omit or substitute provisions of Part 7.9,[140] as well as regulations that exclude particular provisions.[141]

Appendix C.11



9.116 **Appendix C.11** illustrates the complexity of how the Shorter PDS requirements for superannuation products are achieved in the current regulatory framework.

9.117 **Chapter 10** of this Interim Report outlines a model for how tailored requirements for particular products, persons, and circumstances could be consolidated within delegated legislation to improve the transparency and navigability of the regulatory framework.

Opportunities for simplification

9.118 Existing disclosure requirements in Chapter 7 and other provisions of the *Corporations Act* rely on key standards and varying levels of prescription as the means of achieving the overarching policy objective of informed consumer decision making, and related secondary aims, including balancing comprehensiveness and comprehensibility, facilitating comparability, and improving cost effectiveness. However, there are clear limitations on the achievement of these aims under the current framework.

9.119 In the securities and product disclosure context, tailored disclosure requirements such as those associated with Shorter PDSs and 2-part simple corporate bonds prospectuses were introduced in response to the recognition that application of the standard disclosure requirements by industry has led to the production of complex, lengthy disclosure documents that are of limited utility to consumers and are a source of significant compliance costs for industry.[142]

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139 Ibid [2.31].
140 *Corporations Regulations 2001* (Cth) sch 10A pts 5A–5C.
141 Ibid regs 7.9.11M, 7.9.11U.
142 See Regulation Impact Statement, Corporations Amendment Regulations 2010 (No. 5) (Cth) [11]–[15]; Explanatory Memorandum, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014 (Cth) [2.19].

9.120 There has been increasing erosion of the 'consistent and comparable disclosure requirements' recommended by the Wallis Inquiry, with standard disclosure requirements adapted in various respects by a patchwork of *Corporations Act* provisions, regulations, and ASIC legislative instruments.

9.121 The Regulatory Impact Statement for the Shorter PDS reforms noted there is 'some evidence to suggest that the current framework does not allow for comparability across products because of heterogeneity in the way information and content is presented in PDSs'.[143] However, some studies have cast doubt on the assumption that standardisation of disclosure documents facilitates comparison of similar products and services.[144]

9.122 The existing regulatory framework additionally presents significant challenges for those seeking to find and understand the law, as a result of the sheer volume of regulation and complexity in the interaction of standards, prescriptive requirements, and tailored requirements across various sources.

An outcomes-based standard for disclosure

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.

9.123 The ALRC proposes that the obligation to provide financial product disclosure be reframed to incorporate an alternative standard for disclosure that places greater emphasis on outcomes. Implementation of this approach would be consistent with an outcomes-based approach to regulation, as discussed in **Chapter 2** of this Interim Report.

9.124 Appropriate development and implementation of the proposed approach would require significant investment of time and resources on behalf of government and industry, and at one level would represent a shift in existing policy settings. However, in view of the widely recognised shortcomings, and notable complexity, of the existing regulatory framework, which arguably does not coherently implement the underlying policy objectives of disclosure regulation, consideration of more fundamental reform appears warranted.

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143 Regulation Impact Statement, *Corporations Amendment Regulations 2010 (No. 5)* (Cth) [9].

144 See, eg, Godwin and Rogerson (n 100) 22 fn 69: comparability 'can be a double-edged sword if it increases the risk that all products will end up looking the same to retail investors', citing Jenny Chen and Susan Watson, 'Investor Psychology Matters: Is a Prescribed Product Disclosure Statement a Supplement for Healthy Investment Decisions?' (2011) 17(4) *New Zealand Business Law Quarterly* 412; Lachlan Burn, 'KISS, but Tell All: Short-Form Disclosure for Retail Investors' (2010) 5(2) *Capital Markets Law Journal* 141.

9.125 The approach contemplated in **Proposal A8** could serve to:

- clarify, and encourage meaningful compliance with, the substance and intent of product disclosure obligations;
- provide greater flexibility to product providers to adopt more innovative approaches to disclosure; and
- reduce the necessity of myriad exemptions from, and notional amendments to, general disclosure requirements, while retaining the facility to impose tailored requirements and prescribe detail where necessary and appropriate.

9.126 Consistent with the Final Report of the Financial Services Royal Commission, coupling the obligation to provide financial product disclosure with an outcomes-based standard would assist 'to draw explicit connections in the legislation between the particular rules that are made and the fundamental norms to which those rules give effect'.[145] Reframing the obligation in this way would assist to appropriately distinguish between the intended outcome of disclosure and necessary detail relevant to the achievement of this outcome (both generally, and in particular circumstances).

9.127 The relevant standard should be developed through a consultative process. However, by way of illustration, implementation of **Proposal A8** might involve, for example, reframing the obligation as a requirement to take reasonable steps designed to ensure that a reasonable consumer, and their financial adviser where appropriate, would understand the key risks, costs, and benefits of the product at the time of investment.

9.128 Relevant considerations in determining what is required to meet the revised standard could be non-exhaustively specified. This could include matters such as the complexity of the product, the risk profile of the product, the Target Market Determination for the product (where applicable under the design and distribution obligations), and the extent to which the product is well-understood by those in the target market. Although the application of the obligation would necessarily be context-specific, examples in delegated legislation could be used to illustrate the types of steps that may be reasonably required in respect of different circumstances. For example, the types of steps required in relation to a novel or complex product might include consumer testing of a proposed disclosure approach and adaptation of that approach in response to findings from testing.[146]

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145 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019) 17.

146 For discussion of the potential interplay between product design and 'performance-based consumer comprehension standards', see Lauren E Willis, 'Performance-Based Consumer Law' (2015) 82 *University of Chicago Law Review* 1309. Professor Willis notes that such standards 'leave firms free to decide whether consumers value a complex attribute highly enough to cover the extra educational costs that the firm will incur, or whether simplifying the product is the better course': 1340. See also Paterson (n 14) on how disclosure may supplement design and distribution obligations in the Australian context.

9.129 In New Zealand, the *FMC Act* (NZ) clarifies the intended outcome of disclosure through a provision that sets out the 'purpose' of a PDS.[147] **Proposal A8** would more directly tie the disclosure obligation to the intended outcome. This approach would facilitate greater flexibility in the regulatory framework for product providers to adopt more innovative approaches to disclosure, including interactive e-disclosure options.[148] A requirement to publish an outline of the reasonable steps being taken by providers could be introduced to facilitate scrutiny by interested parties, including the regulator and consumer rights groups.

9.130 An outcomes-based standard may also aid in the objective of increasing the cost efficiency of disclosure by enabling providers to tailor the steps taken to meet the obligation on the basis of, for example, the relative complexity and risk of the product, and the types of persons to whom the product will be marketed.

9.131 Noting the failure of disclosure rules to engender consumer understanding in the US context, Professor Willis has argued that '[c]onsumer-comprehension standards that firms could meet by whatever means they see fit are an intuitive move from disclosure mandates'.[149] Willis outlines a range of ways in which a 'performance-based consumer comprehension standard' could be implemented and monitored. Willis nonetheless notes that such a standard would not supplant prescriptive disclosure rules, which may serve a valuable 'standardizing function that facilitates consumer comprehension' in relevant instances.[150]

9.132 A general disclosure obligation framed in accordance with **Proposal A8** should similarly be appropriately supplemented by more detailed requirements where there may be a need for prescription, such as in relation to standardised disclosures of fees and costs, as well as specific disclosures required for particular products. **Chapter 10** of this Interim Report outlines a model for how these types of requirements could be consolidated within delegated legislation to improve transparency and navigability, and reduce the need for conditional exemptions from disclosure requirements. This approach will be explored further as part of Interim Report B.

Accounting for tailored disclosure requirements for financial products and securities

9.133 As outlined above, different disclosure requirements currently apply to securities (which are subject to the prospectus regime in Part 6D.2) and other financial products (which are subject to the PDS requirements in Part 7.9).

9.134 The disclosure requirements for securities and financial products share a number of commonalities, reflecting the use of the prospectus requirements as a foundation for the development of the PDS requirements. There are nonetheless

147 *Financial Markets Conduct Act 2013* (NZ) s 49.

148 For a discussion about digital disclosure and the use of technology for disclosure see Andrew Godwin, 'Brave New World: Digital Disclosure of Financial Products and Services' (2016) 11(3) *Capital Markets Law Journal* 442.

149 Willis (n 146) 1311.

150 Ibid 1315.

a range of variations in the requirements. Some variations may be appropriately explained by distinctions between the role of prospectuses, which serve to inform the market as well as individual investors, versus the role of PDSs, which are primarily targeted to consumers.[151] However, the rationale for other distinctions is not readily apparent. For example:

> The prospectus test notably contemplates the role of professional advisers in investment decisions by retail clients by including a reference to 'professional advisers' in s 710(1). Reference to information that might be required by a professional adviser to a retail client was consciously omitted from the general test for a PDS, but there was little explanation offered for this omission.[152]

9.135 As discussed above, implementation of **Proposal A8** could facilitate tailoring of product-specific disclosure requirements underlying the general standard for disclosure within consolidated delegated legislation. On this basis, consideration could be given to the consolidation and rationalisation of the legislative framework for financial product disclosure and securities disclosure to reduce unnecessary duplication and inconsistencies in disclosure requirements. Maintenance of appropriately distinct requirements of the prospectus and PDS regimes could be facilitated by the legislative hierarchy model outlined in **Chapter 10**. Pursuant to this approach, tailored requirements could be furnished by securities-specific disclosure rules that provide for specific content requirements, in addition to procedural matters such as lodgement of documents with ASIC, as currently contained in Part 6D.2 Div 5 of the *Corporations Act*.[153]

9.136 If **Proposal A8** is pursued, a key question would be whether an outcomes-based standard of disclosure could be appropriately framed to accommodate nuances between the purposes of disclosure obligations in respect of securities and other financial products, as discussed above. However, consideration could still be given to rationalisation of aspects of the legislative frameworks for prospectuses and PDSs through implementation of the legislative hierarchy outlined in **Chapter 10** in the absence of implementation of **Proposal A8**.

9.137 The regulatory framework in New Zealand provides an illustration of the imposition of consistent disclosure obligations in relation to securities and other financial products, with tailored requirements furnished by delegated legislation. Part 3 of the *FMC Act* (NZ) makes provision for disclosure obligations in relation to 'financial products', including debt and equity securities.[154] Part 3 of the Act imposes general obligations in relation to the preparation, lodgement, and provision of a PDS, while the *Financial Markets Conduct Regulations 2014* (NZ) include tailored content and formatting requirements in relation to different types of financial products.[155]

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151 See, eg, Black and Hanrahan (n 9) [5.4].
152 Tapley and Godwin (n 11) 322.
153 See further [10.129]–[10.138].
154 See definition of 'financial product' in *Financial Markets Conduct Act 2013* (NZ) s 7.
155 *Financial Markets Conduct Regulations 2014* (NZ) regs 22–5, schs 2–7.

9.138 Consolidation of the disclosure requirements in relation to securities and financial products would also have the benefit of improving the coherence of the scope of Part 7.9 by removing the need for the current exemption in relation to securities (and the complexity generated by the need for 'carve-ins' for securities in relation to certain aspects of Part 7.9). The application provisions for the disclosure requirements in Part 7.9 would need to be amended to incorporate the circumstances in which disclosure is required pursuant to Part 6D.2.[156]

9.139 Consideration would also need to be given to the extent to which harmonisation of liability and penalties for non-compliance with disclosure requirements under Part 6D.2 and Part 7.9 may be desirable or feasible. Part 7.9 and Chapter 6D both contain provisions dealing with offences, civil penalties, and civil liability in relation to a failure to provide disclosure or the provision of deficient disclosure, and related misconduct.[157] Although the liability regimes are necessarily tailored to the particular disclosure frameworks to which they relate,[158] there are a number of parallels between the two liability regimes that may offer appropriate scope for rationalisation.[159]

9.140 The ALRC is interested in stakeholder views on whether rationalisation of aspects of the disclosure regimes in Parts 7.9 and 6D.2 as outlined above would be feasible and desirable. This will be explored further as part of the ALRC's consideration of potential reframing or restructuring of Chapter 7 of the *Corporations Act* in Interim Report C.

156 See *Corporations Act 2001* (Cth) ss 706–708A.

157 See ibid pt 6D.3, pt 7.9 div 7. For a detailed examination of the liability provisions in relation to defective disclosure, see Black and Hanrahan (n 9) ch 7.

158 For example, Part 7.9 distinguishes between the liability of the preparer of a disclosure document, and the liability of a provider of a disclosure document (where the provider differs from the preparer). This is consistent with the distinction between 'responsible persons' and 'regulated persons' in Part 7.9, which is absent from Part 6D.2, as outlined above: see [9.28]–[9.35].

159 For example, both regimes impose liability with respect to omissions from, or misleading or deceptive statements in, disclosure documents where the omission or misleading or deceptive statement would be 'materially adverse from the point of view of' an investor, or 'a reasonable person considering whether the proceed to acquire the financial product concerned': see ss 728(3), (4), 1021B(1), 1021D–1021F. See further **Chapter 13** for discussion of rationalisation of general misleading or deceptive conduct provisions.

10. Exclusions, Exemptions, and Notional Amendments

Contents

Introduction

10.1 This chapter outlines a proposed legislative architecture that aims to facilitate:

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

10.2 The proposals arise out of the ALRC's analysis of complexity in the use of definitions in Chapter 7 of the *Corporations Act*. Accordingly, it is proposed that the architecture initially be implemented in Chapter 7 of the *Corporations Act* and its associated delegated legislation. The proposed architecture may also be an appropriate way to simplify other areas of the *Corporations Act*.

10.3 Currently, the various powers to create exclusions, to grant exemptions, and to notionally amend Chapter 7 of the *Corporations Act* (including definitional provisions) provide for necessary flexibility and adaptability 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 authorised version of an Act or legislative instrument that has been notionally amended will not reflect those amendments, and accordingly will 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.

10.4 Together, exclusions, exemptions, and notional amendments compound the existing level of complexity in the legislative regime.

10.5 In summary, the proposed legislative architecture would replace all existing exclusion, exemption, and notional amendment powers with respect to Chapter 7 of the *Corporations Act* with a new sole power to make exclusions and exemptions in a single, consolidated legislative instrument. All powers to omit, modify, or vary provisions of Chapter 7 of the *Corporations 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 exclusion, exemption, and notional amendment powers;
- consolidate prescriptive detail currently spread across the *Corporations Act*, the *Corporations Regulations*, and ASIC legislative instruments;
- adapt to emerging business models, technologies, and practices; and
- support a navigable, transparent, and principled legislative architecture.

10.6 This chapter illustrates how the ALRC's proposed legislative architecture could, in particular:

- 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 AFSL 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.

10.7 Prototype legislation contained at **Appendix E** illustrates how the proposals discussed in this chapter could be implemented.

Options for implementation

10.8 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.

10.9 For example, disclosure provisions may be a suitable first candidate for reform. In that case, implementing the proposed architecture would initially require:

- identifying all exclusions and exemptions from the disclosure regime and consolidating them in a single legislative instrument;
- as far as possible, converting conditions on disclosure-related exemptions into rules, and re-locating any remaining conditions into the consolidated exemptions legislative instrument;
- identifying material contained in regulations and ASIC legislative instruments that should instead be contained in the Act or in disclosure rules;
- identifying material in the Act that should be contained in disclosure rules; and
- converting all notional amendments of disclosure provisions into parliamentary amendments to the Act, or into disclosure rules, as appropriate.[1]

10.10 The ALRC invites stakeholder views on whether the proposals in this chapter are the best way of achieving simplification, and how the proposals could best be implemented. Based on stakeholder feedback, Interim Reports B and C will explore in detail how any new legislative architecture could be designed and implemented.

10.11 Interim measures, with a focus on the presentation of legislation, may help manage the complexity of the existing legislative architecture, pending implementation of any new architecture.[2] These interim measures would, however, achieve significantly less simplification than implementation of the reforms to the legislative architecture proposed in this chapter.

Summary of the problem

10.12 The preceding three chapters illustrate that the extensive use of exclusions, exemptions, and notional amendments is symptomatic of two features of Chapter 7 of the *Corporations Act* — namely, its breadth of application and its highly prescriptive nature. Exclusions, exemptions, and notional amendments have been introduced for particular persons, products, services and circumstances, for which the prescriptive rules in the *Corporations Act* have been perceived as inappropriate. Exemptions are frequently subject to extensive conditions or tailored regulatory schemes for the

1 As discussed in **Chapter 7**, principles for identifying the appropriate level of the legislative hierarchy for particular aspects of the law and for the appropriate use of delegated legislation will be considered in Interim Report B.

2 See [10.139]–[10.148].

particular products and circumstances. It appears that the underlying purpose of exemptions, in this context, is not to relieve a person of obligations, but rather to impose alternative and additional obligations.

10.13 This Interim Report focuses on complexity related to legislative instruments which apply to classes of persons. In addition, thousands of individual relief instruments containing conditions and alternative obligations are made every year by ASIC. Minimising the necessity for individual relief is one goal of the proposed legislative architecture. A key precursor to achieving this is reducing the current prescriptiveness of the *Corporations Act*. Individual relief will be the focus of detailed consideration in subsequent interim reports.

10.14 Exclusions and exemptions are a driver of legislative complexity (see **Chapter 3**). Exemptions can also 'reduce accessibility to the law, leading to a lack of clarity about the full extent of a legislative framework'.[3] The Financial Services Royal Commission observed that exceptions and limitations 'encourage literal application' of a law, and this has the effect of making it 'more complicated' to discern the law's 'unifying and informing principles and purposes'.[4] Exemptions that are subject to conditions can 'become a de facto legislative scheme if the law does not keep pace with developments'.[5] Managing a 'regulatory environment through an exemptions process is an attractive option for regulators because of the flexibility, immediacy and control it can provide'.[6] This can lead to an accretion of exemptions over time.

10.15 Exclusions and exemptions should instead be minimised to the extent possible by addressing their causes. Exclusions and exemptions should not be eliminated entirely; they are sometimes appropriate to accommodate functionally similar products and services, and to respond to market developments in a timely way.

10.16 Notional amendments can also lead to complexity (see **Chapter 3** and **Background Paper FSL2**). Their non-textual, or 'notional', nature is the principal cause of their complexity. Notional amendments also present a rule of law issue because they entail the Executive overriding an Act of Parliament.[7]

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

4 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019) 44. See also *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1 [813], [948].

5 Angus (n 3) 153.

6 Ibid.

7 See, eg, Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker' (2011) 39(1) *Federal Law Review* 1, 19; Tess Van Geelen, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, 298–9.

The problem, and potential solutions, in context

10.17 The ALRC discusses issues relating to legislative hierarchy in this Interim Report because the definitions of key terms such as 'financial product' and 'financial service' (and related exclusions) are currently spread across the legislative hierarchy. Accordingly, Interim Report A, and this chapter in particular, foreshadows a more detailed discussion of legislative hierarchy to follow in Interim Report B.[8]

10.18 The focus of this chapter is on *how* regulatory boundaries might most appropriately be set, allowing for necessary flexibility. A related question is *where* — at which 'level' of the legislative hierarchy — exclusions and exemptions should be contained, and where the content of existing notional amendments should be located.

10.19 Other complex questions include:

- *When* should exclusions, exemptions, and tailored regulatory regimes be provided for, and *why*?
- *Who* should be responsible for granting exclusions and exemptions, and for establishing tailored regulatory regimes?

10.20 The questions of '*when*', '*why*' and '*who*' are not resolved in this Interim Report, and the question of '*where*' is only partially addressed. These issues will be addressed in more detail in Interim Report B.

10.21 **Appendix C.12** summarises the questions discussed above, in table form, so as to give an overview of the current law compared to the model proposed in this chapter.

Delegated legislative authority

10.22 The current exemption and notional amendment powers contained in the *Corporations Act* are examples of ways in which the Parliament may delegate legislative authority.[9]

8 The Terms of Reference relating to Interim Report B ask the ALRC to examine 'the coherence of the regulatory design and hierarchy of laws' in the corporations and financial services legislation.

9 These are sometimes also referred to as 'exemption and modification' powers, including by using the words 'exemption' and 'modification' in headings to the provisions (as the examples of ss 926A and 926B of the *Corporations Act* demonstrate).

Example: Exemption and notional amendment powers in the *Corporations Act*

926A Exemptions and modifications by ASIC

(1) …

(2) ASIC may:

(a) exempt a person or class of persons from all or specified provisions to which this section applies; or

(b) exempt a financial product or class of financial products from all or specified provisions to which this section applies; or

(c) declare that provisions to which this section applies apply in relation to a person or financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration. …

926B Exemptions and modifications by regulations

(1) The regulations may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or

(c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations. …

10.23 The exemption and notional amendment powers in the *Corporations Act* are used primarily to adapt regulatory boundaries and tailor the Act's content. They do this by granting exemptions (or 'relief') from obligations, or by expanding or modifying the operation of obligations.[10] The powers may also be used to fix errors in the Act, to streamline the Act's operation, or to provide procedural and administrative details.[11]

10.24 With few exceptions,[12] the powers in the *Corporations Act* do not explicitly set out any matters that must be considered in their exercise. In *Australian Securities and Investments Commission v DB Management Pty Ltd*, the High Court stated that

10 Van Geelen (n 7) 302.
11 Ibid.
12 See, eg, *Corporations Act 2001* (Cth) ss 655A, 673.

exemption and notional amendment powers confer a 'wide discretionary power'.[13] In addition:

> The Court noted, and did not disagree with, earlier judicial commentary on the terms of the [notional amendment] power which had emphasised 'the difficulty of pointing to any basis upon which their operation could be confined'.[14]

10.25 ASIC's process for granting relief is contained in Regulatory Guide 51, *Applications for Relief*, as well as other topic-specific Regulatory Guides.[15] Regulatory Guide 51 lists three types of applications for relief that may be made to ASIC:

> (a) standard applications — seeking relief in accordance with published ASIC policy and pro forma instruments … ;
>
> (b) minor and technical applications — involving the application of existing policy to new situations … ; and
>
> (c) new policy applications — requiring us [ASIC] to formulate substantive new policy …[16]

10.26 Regulatory Guide 51 states that ASIC has regard to the overarching objectives of 'consistency and definite principles' when granting relief.[17] In the case of 'new policy applications', the Guide states that ASIC will 'generally grant relief' where it considers that 'there is a net regulatory benefit' or 'the regulatory detriment is minimal and is clearly outweighed by the resulting commercial benefit'.[18] As Van Geelen notes, the Guide does not elaborate on the source or method for identifying or evaluating the relevant principles, benefits, and detriments, which suggests that 'ASIC retains considerable discretion in determining whether a particular change is "consistent" with the Guide and the delegating power'.[19]

10.27 Regulatory Guide 51 also states that:

> In general, we will not use our discretionary powers to effect law reform. That is, relief will not be given to reverse the usual and intended effect of the Corporations Act …[20]

10.28 This suggests 'ASIC intends that it will not use its powers to make rules which implement entirely new policies which have not already been dealt with in the Act or Regulations'.[21] According to Professor Bottomley, the 'problem, nevertheless, is that

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13 *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 [47].
14 Bottomley (n 7) 20.
15 See, eg, Australian Securities and Investments Commission, *Licensing: Discretionary Powers* (Regulatory Guide 167, June 2019); Australian Securities and Investments Commission, *Disclosure: Discretionary Powers* (Regulatory Guide 169, May 2005, amended 25 January 2007).
16 Australian Securities and Investments Commission, *Applications for Relief* (Regulatory Guide 51, July 2020) [RG 51.7].
17 Ibid [RG 51.12], [RG 51.59]–[RG 51.64].
18 Ibid [RG 51.65].
19 Van Geelen (n 7) 303.
20 Australian Securities and Investments Commission (n 16) [51.71].
21 Bottomley (n 7) 7.

no clear line can be drawn here', because any change to the way in which the law applies constitutes a reform of the law.[22]

10.29 Comments by the Treasurer illustrate that there may be debate about the line that separates 'regulatory relief' from what some may consider matters of 'policy' or 'law reform'. The Treasurer acknowledged that regulators 'need to independently decide on individual matters and cases', but emphasised that

> regulators do not carry out their mandates in a vacuum. … It is the Parliament who determines who and what should be regulated. It's the role of regulators to deliver on that intent, not to supplement, circumvent or frustrate it.[23]

10.30 This sentiment is also reflected in the Australian Government's 'Statement of Expectations' regarding ASIC, released in August 2021, which stated that the Government expects ASIC to

> consult with the Government and Treasury in exercising its policy-related functions, such as the use of its exemption and modification powers, other rule-making powers, and guidance.[24]

10.31 This statement can be contrasted with the predecessor 'Statement of Expectations' released in April 2018:

> Where ASIC has powers to make orders or rules, modify the law or make exemptions, it should use those powers to the greatest extent possible, consistent with its enabling legislation. Where the exercise of that power would have significant implications for the market or the regulated population, the Government expects ASIC to consult with stakeholders and provide appropriate time to implement the regulatory change.[25]

10.32 There may be differing views among stakeholders about whether a regulator such as ASIC should exercise a delegated power in respect of matters that might be considered 'policy'. The nature and scope of any power is relevant. A power to grant an exemption, for example, could be constrained so as to require robust justification by reference to the policy of the legislation and specified criteria. Delegated powers expressed in this way lend themselves to more nuanced analysis about to whom they should be granted than wide and discretionary powers, such as those contained in the *Corporations Act*.

10.33 Presently, some powers to make exemptions and notional amendments are granted to ASIC, and some are effectively granted to the Minister (and exercised through regulations made by the Governor-General-in-Council). These powers are

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22 Ibid.

23 The Hon Josh Frydenberg MP, 'The Role of Australia's Financial System in Supporting the COVID-19 Recovery' (Speech, AFR Banking and Wealth Summit, Melbourne, 18 November 2020).

24 Australian Government, *Statement of Expectations: Australian Securities and Investments Commission* (2021) [3.3].

25 Australian Government, *Statement of Expectations: Australian Securities and Investments Commission* (2018) [33].

often exercisable both by ASIC and the Minister in respect of the same subject matter, which has the potential to produce complexity, incoherence, and inconsistency. When deciding on appropriate methods of delegating legislative power, it is not necessary to make a binary choice between granting a power either to ASIC or to the Minister. The reality is much more complex. This is somewhat reflected in the Treasurer's comment that 'regulators do not carry out their mandates in a vacuum'.

10.34 The fact that an Act formally grants delegated legislative power to one authority obscures the reality that several different participants may play a role in its exercise. Prior to any exercise of a delegated legislative power, the Parliament plays a role in setting out the nature and scope of the power, including for example whether particular matters need to be considered when exercising the power. Industry participants may play a part by making applications for relief to ASIC or engaging with Treasury or the Minister. Stakeholders may also participate in any consultation on draft delegated legislation. Any newly created power could, potentially, be made subject to compulsory consultation beyond that required by s 17 of the *Legislation Act*.

10.35 There may also be methods of oversight or approval, in addition to the usual Parliamentary scrutiny and disallowance procedures, that involve various participants. Current examples, such as ministerial consent, are discussed further below. It is possible that other collective or representative bodies could play a role in the process of making, vetting, or approving a decision to create delegated legislation.

10.36 Finally, different institutions have different capacities to address important matters in a timely way. For example, industry stakeholders have told the ALRC that they value ASIC's ability to respond to market developments more quickly than would be possible through regulations or other legislative instrument made by a Minister.

Exclusions and class exemptions

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.

10.37 Proposals A9 and A10 are designed to:

- remove existing powers to notionally amend Chapter 7 of the *Corporations Act* by delegated legislation; and
- facilitate the consolidation of exclusions and exemptions from obligations in Chapter 7 of the *Corporations Act* in a single place.[26]

10.38 Implementing these proposals would reduce complexity by improving the navigability and visibility of exclusions and exemptions, and by eliminating notional amendments to the Act. The prototype *Corporations (Exclusions and Exemptions from Chapter 7) Implementation Order 2021*, contained in **Appendix E**, demonstrates how **Proposal A10** could be implemented.

10.39 Chapter 7 of the *Corporations Act* contains 39 provisions that enable exemptions or notional amendments to be made. Two others provisions located outside Chapter 7 may also apply to Chapter 7.[27] **Appendix C.13** contains a summary of these provisions. The provisions vary in their scope, including as to whether they enable exemptions from, or notional amendments to, only one section (seven provisions) or multiple sections (30 provisions). The provisions also vary as to whether they may affect a class or only individual persons, products, or services.

10.40 Outside Chapter 7 of the *Corporations Act*, there are 25 provisions that enable exemptions or notional amendments that may affect multiple provisions of the Act.[28] Numerous other provisions enable exemptions and notional amendments for the purposes of particular sections or obligations.[29] These provisions and the powers supporting them will be the subject of more detailed consideration in Interim Report B.

10.41 Currently, class exemptions and notional amendments can be included in regulations, ministerial legislative instruments, and ASIC-made legislative instruments. A person must navigate the hundreds of legislative instruments made under the *Corporations Act* to identify class exemptions and notional amendments relevant to their circumstances, or rely on extensive ASIC guidance to assist.

10.42 Both ASIC and the Minister have significant discretion to create alternative regulatory regimes that can affect thousands of businesses and consumers. The

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26 As contemplated, for example, by **Proposal A4(f)** discussed in the context of the defined terms 'financial product' and 'financial service'.

27 *Corporations Act 2001* (Cth) ss 1217B, 1362A, 1368. Although s 1362A is still in force, the power it contained expired on 24 September 2020.

28 See, eg, *Corporations Act 2001* (Cth) ss 111AS, 341, 601BS, 1217.

29 See, eg, ibid ss 155, 250PAA, 283AA, 601DG.

location of these alternative regimes in hundreds of legislative instruments and the *Corporations Regulations* makes the whole regulatory regime difficult to navigate. The framing of alternative regulatory regimes as exemptions or notional amendments also obscures the fact that these instruments substantively affect a person's rights and obligations as provided in the *Corporations Act*.

10.43 To improve navigability, the ALRC proposes that all exclusions and class exemptions be contained in a single 'layer' of the legislative hierarchy and in a single location. Given the policy goals of adaptability and flexibility in the corporations and financial services regime (and in the Terms of Reference for this Inquiry), the ALRC proposes that exclusions and exemptions be contained in a single consolidated legislative instrument. Notional amendments should be eliminated, and the use of conditional exemptions should be reduced to the greatest extent possible. **Question A11** below offers an alternative model for making prescriptive rules (where necessary) in place of conditional exemptions and notional amendments.

10.44 The ALRC has not specified who should be responsible for granting exclusions and class exemptions. This is for three main reasons:

- this issue will be considered in detail in Interim Report B;
- implementing the model outlined in **Question A11** may affect the nature of the exemptions and exclusions that are required, as well as reduce their number and significance; and
- because the ALRC seeks stakeholder feedback on the model outlined in **Question A11**.

A single source of exclusions and class exemptions

10.45 A single legislative instrument containing all exclusions and class exemptions from Chapter 7 of the *Corporations Act* should be internally organised to reflect the structure of the Act and the obligations in it. This is demonstrated by the prototype *Corporations (Exclusions and Exemptions) Implementation Order 2021* in **Appendix E**.

10.46 The frequency with which exclusions are made and amended makes them more amenable to delegated legislation, rather than an Act. If exclusions were located only in the *Corporations Act*, their volume would clutter the Act and significantly reduce the clarity of its provisions. The range of powers to create exclusions and exemptions currently contained in the Act recognises that delegated legislation has an important role to play in managing the boundaries of regulation.

10.47 This single instrument would be amended by other legislative instruments.[30] These amending instruments, like all legislative instruments, would be subject to Parliamentary scrutiny. At all times, therefore, there would be one thematically organised instrument containing all non-structural exclusions and exemptions from

30 The content of amending legislative instruments would be consolidated in the single exemptions and exclusions legislative instrument, and the amending instrument itself would be automatically repealed under s 48A of the *Legislation Act*.

provisions of Chapter 7.[31] Interim Report B may propose principles that help identify provisions of the *Corporations Act* that should not be subject to exclusions and exemptions in delegated legislation.

10.48 Locating exclusions and exemptions in delegated legislation would mean that the scope of each part of Chapter 7 would not be apparent on the face of the *Corporations Act*. However, this is already the case, and the proposed model would be a significant improvement on the current distribution of exclusions, inclusions, and exemptions across the legislative hierarchy. While it may be possible to consolidate all exclusions and exemptions in the Act itself (as opposed to delegated legislation), the Act would then become much longer and more difficult to read. Hundreds of pages of exclusions and exemptions, with applicable conditions, would obscure the general regulatory regimes in the Act. The regime would also become significantly less flexible by requiring Parliamentary intervention for amendments in areas where it is not currently required.

10.49 By removing the very large number of exclusions and exemptions from the *Corporations Act*, *Corporations Regulations*, and ASIC legislative instruments, the legislation should be easier to read, navigate, and understand. Navigability could be further improved through the use of readers' aids and technology by 'connecting' the Act with the relevant exclusions and exemptions in the consolidated legislative instrument. For example, notes or even hyperlinks could be inserted in the Act highlighting or linking the provisions in delegated legislation that contain exemptions relevant to a particular obligation in the Act.

10.50 Ultimately, exclusions and exemptions should not be simply re-located within the legislative hierarchy, but rather should be avoided where possible. The Financial Services Royal Commission recommended that as 'far as possible, exceptions, and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated'.[32] Likewise, exemptions by regulatory agencies, which are often visible only to highly engaged stakeholders

> can lead to a disconnect between the state of the law and its actual operation as there is no overall picture about the need for a law change. If numerous exemptions are continually being granted by regulatory agencies, there is an issue whether the law is fit for purpose.[33]

10.51 Consistent with these observations, the main focus of this chapter, therefore, is how the wide range of products, services, industry participants, and circumstances subject to regulation can best be accommodated by the legislative framework.

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31 In very limited cases, structural exemptions, such as the exemption for authorised representatives from the requirement to hold a financial services licence, would remain in the Act.

32 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 4) rec 7.3.

33 Angus (n 3) 153.

Conditional exemptions and notional amendments

10.52 Currently, notional amendment powers can be used to create exemptions and impose rules that achieve the same outcome as conditions on an exemption. For example, *ASIC Corporations (Short Selling) Instrument 2018/745* notionally inserts sub-s (4A) into s 1020B, which relates to short sales of certain products. This notional provision exempts exchange traded funds market makers from certain provisions of s 1020B in particular circumstances. Conditions in the notionally inserted s 1020B(4B) must be met before a person can rely on the exemption in s 1020B(4A). The exemption, and the conditions on it, are therefore set up through an exercise of a notional amendment power rather than an exemption power.

10.53 The same effect as an exemption can also be achieved by omitting the application of provisions to certain products or persons. For example, *ASIC Corporations (Design and Distribution Obligations—Exchange Traded Products) Instrument 2020/1090* notionally omits certain provisions of Part 7.8A as they apply to exchange traded products, including s 994D (the prohibition on engaging in retail product distribution conduct unless a target market determination has been made). This has the effect of exempting distributors of such products from this prohibition.

10.54 Different powers, each with different implications for the complexity and navigability of the legislation, can therefore be used to achieve similar outcomes — namely, managing regulatory boundaries and adapting regulation to particular products and circumstances.

10.55 Conditional exemptions make 'voluntary' alternative regulatory regimes, in the sense that a regulated entity can choose whether to comply with the *Corporations Act* or to rely on the conditional exemption and therefore be subject to the conditions.[34] Conditional exemptions therefore create regimes which operate in parallel with the Act for the persons subject to the exemption. In some circumstances, conditions on an exemption are expressed as 'conditions precedent'; that is, they must be satisfied before an exemption applies. In other cases, conditions are expressed as though they are 'conditions subsequent'; that is, they impose obligations on persons relying on the exemption (for example, giving notice to ASIC if a particular event occurs or providing certain disclosure to consumers).

10.56 Conditional exemptions may be regarded as necessary in circumstances where a complete exemption is thought inappropriate and a narrower exemption would not achieve the underlying purpose. However, conditional exemptions add to the complexity of legislation, and should be minimised where possible. Such exemptions are opaque, and obscure the reality that the exemption is not in fact an exemption in the ordinary sense but instead a 'hook' for imposing an alternative, tailored set of obligations and prohibitions.

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34 For further discussion of voluntary and compulsory alternative regulatory regimes, see [7.156] of this Interim Report.

10.57 For consumers, businesses, professionals, judges, and lawmakers, tracking these exemptions and understanding the practical effect of the conditions can be complex.

10.58 Conditional exemptions sometimes take away rights of consumers and businesses as against other businesses, while imposing conditions that are enforceable only by ASIC. Parallel versions of regulatory regimes therefore exist not only for the exempt businesses, but also for consumers and other businesses dealing with an exempt business.

10.59 The effect and purpose of many conditional exemptions could be achieved in other ways, notably by removing from the Act prescriptive detail that is frequently subject to conditional exemptions, and instead locating that detail in legislative instruments that can be directly (as opposed to 'notionally') amended more readily than the Act. Requirements could be tailored to particular circumstances in legislative instruments without the need for conditional exemptions from the legislation.

10.60 Notional amendments present challenges for the rule of law and separation of powers,[35] and add considerable complexity to the law. Notional amendments make it impossible to read the Act and take its text as authoritatively presenting the current state of the law. The 100 instruments containing such notional amendments can also be difficult to find, particularly for non-lawyers. Interpreting the application and meaning of such amendments involves a complex analysis of the primary law and all relevant notional amendments.

10.61 In several instances, exemptions and notional amendments can be made both by ASIC and through regulations in respect of the same subject matter.

Example 1: Notional amendments

ASIC Class Order 14/1262 notionally amends a provision of the *Corporations Act* that is also notionally amended by reg 7.9.07FA of the *Corporations Regulations*.[36] To understand the instrument and its effect, a reader must therefore read the original provision of the Act, alongside the subsection notionally inserted by the Regulations, and the additional six sub-sections notionally inserted by the ASIC Class Order.

10.62 The complexity of managing the stock of notional amendments is also a challenge for policymakers and regulators in making notional amendments.

35 See, eg, Bottomley (n 7) 19; Van Geelen (n 7) 298–9.
36 *ASIC Class Order — Relief for 31 Day Notice Term Deposits* (CO 14/1262) s 5.

Example 2: Notional amendments

Section 1016A of the *Corporations Act* does not contain a subsection numbered (2A). Three different instruments (the *Corporations Regulations*, an ASIC Class Order, and an ASIC Legislative Instrument) each purport to separately insert into the *Corporations Act* a different notional provision designated as 's 1016A(2A)'. It is not clear whether the makers of any of these instruments were aware that other instruments had already inserted a notional provision with the same number.[37]

10.63 Multiple versions of the same provision in the *Corporations Act* are an unavoidable consequence of notional amendments. Sections or subsections can be notionally omitted or varied for certain persons, creating different versions of the same provision even though the text of the Act is unchanged. This approach to legislating is deeply complex for businesses, consumers, regulators, and policymakers themselves.

10.64 Notional amendments can also be significant in their effect. As discussed in **Chapter 7** of this Interim Report, examples of significant alternative regulatory regimes in delegated legislation include those applying to managed discretionary account ('MDA') services and investor-directed portfolio securities ('IDPS').[38]

10.65 Alternative regulatory regimes are often created in response to stakeholder demands. For example, *ASIC Corporations (Design and Distribution Obligations—Exchange Traded Products) Instrument 2020/1090* was made following

> queries about how the [design and distribution] obligations would apply to ETP [exchange traded product] issuers, as well as intermediaries involved in distribution, such as brokers, authorised participants and trading agents appointed by the issuer.[39]

10.66 The instrument sought to 'achieve the legislative intent and to provide certainty to issuers and distributors of ETPs'.[40]

10.67 Likewise, in reviewing the IDPS class order in 2013, ASIC received submissions supporting ongoing regulation of IDPS platforms under class orders, although some 'respondents noted that, in the medium to longer term, class orders

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37 *Corporations Regulations 2001* (Cth) sch 10A pt 6; *ASIC Class Order — Exemption and declaration for the operation of mFund* (CO 13/1621) s 7; *ASIC Corporations (Application Form Requirements) Instrument 2017/241* s 9.

38 *ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968*; *ASIC Class Order — Investor Directed Portfolio Services Provided Through a Registered Managed Investment Scheme* (CO 13/762).

39 Australian Securities and Investments Commission, Explanatory Statement, *ASIC Corporations (Design and Distribution Obligations—Exchange Traded Products) Instrument 2020/1090*, [17].

40 Ibid [18].

should be replaced by legislation that recognises the unique characteristics of [IDPS] platforms'.[41]

Managing complexity through the use of rules

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?

10.68 This section discusses the potential role of rules to replace much of the prescriptive detail that would otherwise appear in the *Corporations Act*, in conditional exemptions, or in notional amendments. These rules may be an effective, and less complex, alternative to creating tailored regulatory regimes in the form of conditional exemptions and notional amendments. The prototype *Financial Services Rules (Financial Product Disclosure) 2021*, contained in **Appendix E**, demonstrates how rules relating to one theme (in this case, financial product disclosure) could be consolidated in one instrument.

10.69 Rule-making powers differ from exemption and notional amendment powers because they permit the creation of self-contained legislative instruments that do not notionally amend or provide exemptions from an Act. Chapter 7 of the *Corporations Act* currently contains five rule-making powers exercisable by ASIC.[42] Rules made under four of these powers are subject to ministerial consent. Existing rule-making powers differ in terms of their expression and scope.

Status of rules

10.70 Rules can be made by way of legislative instruments.[43] Consequently, rule-making powers delegate legislative power. As legislative instruments, rules can be amended by other legislative instruments.

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41 Australian Securities and Investments Commission, *Response to Submissions on CP 176 Review of ASIC Policy on Platforms: Update to RG 148* (Report No 351, June 2013) 5–6.

42 Market integrity rules (Part 7.2A, s 798G), derivative transaction rules (Part 7.5A, s 901A), derivative trade repository rules (Part 7.5A, s 903A), financial benchmark rules (Part 7.5B, 908CA), and client money reporting rules (Part 7.8, s 981J).

43 See, eg, the note beneath s 8(1) of the *Legislation Act*. Where rules affect a class of persons the *Legislation Act* requires that they be registered as a legislative instrument, unless an exemption applies to their making: *Legislation Act 2003* (Cth) s 8.

10.71 Rules could be consolidated into a small number of legislative instruments, each of which could contain rules in relation to a particular theme. For example, a dedicated legislative instrument could contain rules relating to disclosure, and a separate legislative instrument could contain rules relating to financial advice. A single rule-making power could be relied on to make rules in multiple thematic legislative instruments. The single power for ASIC to make market integrity rules, for example, has resulted in six thematic legislative instruments.[44] An alternative approach to publication could see all rules consolidated in one thematically structured legislative instrument (for example, 'the Financial Services Rules'). Regardless, rules should be published in a consistent structure. This would help to produce a coherent and navigable regulatory regime.

10.72 The nomenclature of 'rules' may be useful in communicating to the regulated population (and to those with whom they transact) that these legislative instruments contain *rules* that have the force of law and must be followed. Other expressions, such as 'conditional exemptions' and 'standards', do not necessarily have the same expressive force. The term 'rules' also helps to clearly distinguish these legislative instruments from non-binding guidance. The use of the term 'rules' is consistent with the label adopted by the Administrative Review Council (Cth), which used 'rules' in its seminal report to refer to 'delegated instruments that are legislative in character'. It further described the legislative function as 'involving the making of legally binding rules, usually of a wide or general application'.[45]

10.73 The Senate Standing Committee for the Scrutiny of Bills ('Bills Committee') has 'expressed specific concerns about the inclusion of significant matters in "rules" rather than "regulations"'.[46] Similarly, the Senate Standing Committee for the Scrutiny of Delegated Legislation ('Delegated Legislation Committee') has queried the use of rules, rather than regulations, for 'the prescribing of matters for Commonwealth legislation'.[47] The concerns of both committees appear to be based on the broad delegation of legislative power that rule-making powers may permit and the lack of involvement by OPC in drafting rules.

10.74 In 2014, then First Parliamentary Counsel, Peter Quiggin PSM, addressed each of those concerns, observing that the content of existing regulations did not relate to matters of any greater significance for the Commonwealth than other legislative instruments:

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44 *ASIC Market Integrity Rules (Securities Markets) 2017*; *ASIC Market Integrity Rules (Securities Markets – Capital) 2017*; *ASIC Market Integrity Rules (Futures Markets) 2017*; *ASIC Market Integrity Rules (Futures Markets – Capital) 2017*; *ASIC Market Integrity Rules (Capital) 2021*; *ASIC Market Integrity Rules (IMB Market) 2010*.

45 Administrative Review Council (Cth), *Rule Making by Commonwealth Agencies* (Report to the Attorney-General No 35, 1992) [1.2].

46 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (3 June 2019) 84.

47 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* (Monitor No 2 of 2014, 5 March 2014) 1. See also Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest 1 of 2018, 7 February 2018) 11–13.

> The reason that the drafting of these [regulations] is tied to OPC under the Legal Services Directions is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.[48]

10.75 Quiggin quoted the Administrative Review Council (Cth), which had suggested it was unrealistic for all significant delegated legislation to be drafted by OPC, and it was not 'necessarily desirable that drafting be centralised' as the 'preparation [of instruments] needs an extensive contribution from the agencies themselves'.[49] Quiggin also noted:

> Commonwealth Acts have provided for the making of instruments rather than regulations for many years. The use of a general rule-making power in place of a general regulation-making power is a development of this long-standing approach, and has been adopted by OPC for the reasons discussed below. In my view, over time this approach will enhance, and not diminish, the overall quality of legislative instruments (in particular, the quality of instruments that have the most significant impacts on the community).[50]

10.76 The Bills Committee has also expressed concern because rules do not require approval from the Federal Executive Council, unlike regulations.[51] The involvement of the Federal Executive Council is unique to regulations. No other legislative instruments, including those containing significant notional amendments and exemptions, require approval from the Federal Executive Council.

10.77 Quiggin noted that, in 2013, OPC had drafted only about 35% of all pages of registered legislative instruments, including all regulations.[52] Quiggin's observation that the content of regulations is not necessarily any more significant than that of other legislative instruments is notable in this regard: there does not seem to be any principled distinction between the content of regulations, ministerial instruments, and instruments made by agencies or delegates.

10.78 In addition, the extent to which involvement by the Federal Executive Council improves the quality or accountability of regulations as compared to other legislative instruments is unclear. In Australia, ministers are accountable to the Parliament, and ministerial decisions (including in relation to the approval of legislative instruments) can be subject to cabinet approval. Section 17 of the *Legislation Act* imposes some requirements regarding consultation prior to making any legislative instrument (including regulations), but s 19 provides that a failure to consult appropriately does not affect the validity of a legislative instrument. It is possible for the enabling legislation of a legislative instrument to impose additional and more specific obligations regarding consultation.

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48 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2015* (Report, 11 February 2015) 27.
49 Administrative Review Council (Cth) (n 45) 23.
50 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia (n 48) 26.
51 Ibid 22.
52 Ibid 28.

10.79 The ALRC does not propose introducing a 'general instrument-making power' of the kind about which the Scrutiny Committees have raised concerns. Current powers in the *Corporations Act* should not simply be converted into broad powers to make rules. Any powers in the *Corporations Act* to make rules on a particular subject matter should be appropriately circumscribed, just as current ASIC rules can be made only in relation to specific matters.[53]

The purpose of rules

10.80 Rules in thematic legislative instruments could provide a location in the legislative hierarchy for much of the prescriptive detail that is currently spread across legislative sources. This would include most of the content of what are currently alternative regulatory regimes. Reducing detail and particularisation in the *Corporations Act* would permit more principles-based drafting in the Act, as well as improving both readability and clarity. This kind of delegation could appropriately 'save pressure on parliamentary time', and enable the law to 'deal with rapidly changing or uncertain situations'.[54]

10.81 The approach discussed in this chapter is not intended to simply remove matters from the *Corporations Act* and place them at a different level in the hierarchy, but rather to ensure that matters appear at an appropriate level in the hierarchy. For example, arguably:

- exclusions and class exemptions should be consolidated in a single legislative instrument (**Proposal A10**);
- obligations that result in criminal or civil penalties, and key obligations that are generally applicable, (some of which currently appear in the *Corporations Regulations* or ASIC legislative instruments) should appear in the Act;[55]
- obligations that do not result in criminal or civil penalties, such as obligations that give substance or detail to more general obligations in the Act (and particularly those obligations that are currently subject to notional amendments or conditional exemptions), should be situated in legislative instruments; and
- some of what is currently guidance issued by ASIC should instead be expressed as binding rules in legislative instruments, and some of the prescriptive detail currently contained in the law should instead be expressed as guidance.

10.82 This brief summary foreshadows more detailed consideration in Interim Report B of the principles that should guide Parliament, ministers, and agencies in their lawmaking, and in maintaining an appropriate delegation of legislative authority.

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53 See, eg, *Corporations Act 2001* (Cth) ss 798G, 901A.

54 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 6. See also **Chapter 2** of this Interim Report regarding legislative hierarchy.

55 See Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, 2020).

Notional amendment powers unnecessary

10.83 Removing from the *Corporations Act* prescriptive detail that is frequently tailored, or in relation to which exemptions are frequently granted, would likely eliminate the need for any powers to notionally amend the Act. The number of exemptions from obligations contained in the Act would also be reduced. This is because rules in legislative instruments could more easily be adapted to particular products, persons, or circumstances than is possible for requirements contained in the Act. This would reduce the need for complete or conditional exemptions.

10.84 Obligations could be tailored by textually amending the relevant legislative instrument, for example:

- to limit the application of relevant provisions (effectively achieving the same outcome as exemptions currently achieve); or
- to adapt relevant provisions (effectively achieving the same outcome as notional amendments and conditional exemptions currently achieve).

10.85 This approach would:

- retain the benefits of flexibility and adaptability currently in the regime;
- do away with hundreds of legislative instruments that currently contain alternative regulatory regimes;
- enable easier comparison (within a single legislative instrument) of equivalent rules for different circumstances; and
- provide a more appropriate location for content in navigable, thematically organised legislative instruments ('rules').

10.86 As noted above, this approach would work best as part of a principled legislative hierarchy. For example, under a principled legislative hierarchy the *Corporations Act* may contain the core and generally applicable obligations, a legislative instrument would contain any exemptions (if necessary), and rules would contain the details necessary to adapt the law to particular circumstances. This is essential to ensuring that the text of the primary law would not need to be notionally amended and the applicable rules could be clearly and accessibly tailored to particular circumstances in the rules (as currently done by way of notional amendments to the Act). Given comparable sets of rules for different circumstances would be contained in one legislative instrument focused on a particular theme (disclosure, for example), different rules could be more easily compared than is currently possible under disparate legislative instruments. Parliament could in any event grant notional amendment powers if it was thought necessary during an emergency.[56] However, because notional amendments result in significant complexity and reduced navigability, any such emergency powers, and instruments made under them, should be limited in duration.

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56 See, eg, s 1362A of the *Corporations Act*, introduced by the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth).

A single rule-maker

10.87 A rule-making power could be granted to any of the Minister, ASIC, or another institution. It may be possible to grant a single rule-making power to more than one rule-maker. For example, several existing exemption and notional amendment powers in the *Corporations Act* can be exercised both by ASIC and through regulations. However, a high level of coordination would be required to ensure any such power was exercised consistently. In the interests of consistency and coherence, it would be preferable that a rule-making power be granted to only one rule-maker.

10.88 The ALRC seeks stakeholder feedback on its suggestion that a rule-making power be conferred on ASIC. As the regulator with industry and institutional experience, ASIC would likely be well placed to create rules, subject to appropriate oversight. To date, consultees have indicated that they value the ability of ASIC to respond to industry and market developments in a more timely way than would be possible through regulations or amendments to the *Corporations Act*. ASIC could be supported in its rule-making role by an advisory body, similar to the former Corporations and Markets Advisory Committee, which would be able to contribute industry knowledge and to advise on significant developments.

10.89 One alternative would be to confer a rule-making power on the Minister instead, and to permit the Minister to delegate that power to ASIC. An advantage to this approach is that it may allow greater whole-of-government coordination in the exercise of the power than would be possible if it were granted only to ASIC.

10.90 Granting to the Minister a delegable power would also enable the incumbent Minister from time to time to perform a 'gatekeeper' role in deciding which matters may be appropriate for ASIC to address, and which matters are more appropriate for the Minister to address, assisted by Treasury. Put differently, this would give the Minister control over where the line is drawn between matters of 'policy' that are to be decided by the Government, and matters that are more suitable for ASIC's decision. Arguably, it would be more appropriate for the Parliament (rather than the incumbent Minister) to decide where that line is drawn, and it should be provided for in the *Corporations Act*. Placing such 'control' with the Minister may risk over-politicisation of the process.

10.91 The ALRC does not suggest creating a general rule-making power akin to that of the Financial Conduct Authority (UK). Arguably, doing so would require a fundamental shift in the legislation's underlying policy and the existing regulatory approach in Australia. The rule-making powers discussed here are more limited in scope than the current broad exemption and notional amendment powers conferred on ASIC and exercisable by regulations. The ALRC's Inquiry presents an opportunity to explore whether, and if so how, powers to make delegated legislation could more clearly draw a line between matters that should, and should not, be subject to delegation.

Limits on rule-making powers

10.92 Exemption and notional amendment powers in similar terms to those currently granted to ASIC (and exercisable by regulations) have been held to confer a 'wide discretionary power'.[57] The ALRC envisages that any new rule-making power would not be broader than these existing powers. Rather, granting a new rule-making power would present an opportunity to circumscribe delegated power appropriately, to re-examine mechanisms for oversight or approval, and to provide for more transparent exercise of delegated legislative power than is presently the case.

10.93 Existing rule-making powers in Chapter 7 of the *Corporations Act* illustrate some of the different ways that rule-making powers can be expressed and circumscribed. For example, ASIC's power to make market integrity rules (s 798G) is expressed much more broadly than the power to make derivative transaction rules (s 901A), which more closely circumscribes the subject matter of rules, and which requires ASIC to have regard to specified matters (listed in s 901H) when making rules.

10.94 Various methods of oversight or approval could also be built into the rule-making power. Four out of ASIC's five current rule-making powers are subject to ministerial consent (except in emergencies). It would be possible to make any new rule-making power subject to ministerial consent. In addition, s 12 of the *ASIC Act* empowers the Minister to give directions to ASIC about specified matters. That power, or a similar new power, could allow the Minister to direct ASIC to make or vary a rule.[58] Any direction made under s 12 of the *ASIC Act* is a legislative instrument and is therefore disallowable by Parliament.

10.95 Rules in thematic legislative instruments, and any amendments to those rules, would be subject to the consultation requirements contained in s 17 of the *Legislation Act*: the rule-maker must be satisfied that any consultation the rule-maker considers 'appropriate', and that is 'reasonably practicable', has been undertaken. Any new rule-making power could specify the required level of consultation in a more objective way.[59] For example, s 901J of the *Corporations Act* requires ASIC to consult 'the public', APRA, and the Reserve Bank of Australia before making derivative transaction rules.

10.96 The terms used to prescribe and circumscribe the scope of a rule-making power may also enable much closer scrutiny of the exercise of those powers than is currently the case. For example, a rule-making power may prescribe certain matters that must (or potentially must not) be taken into consideration when considering whether to exercise that power.[60] Requiring that rules be consolidated thematically,

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57 *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 [47].

58 For discussion of the implications that such powers may have for the perceived independence of ASIC, see International Monetary Fund, *Financial System Stability Assessment (Australia)* (IMF Country Report No 19/54, February 2019) 28. No direction has been given to ASIC under s 12 of the *ASIC Act* in at least the past 20 years.

59 In the case of emergency rule-making, the consultation requirements could be dispensed with.

60 See, eg, *Corporations Act 2001* (Cth) ss 903F, 908CK.

as opposed to being scattered across myriad legislative instruments, could also greatly improve accessibility, transparency, and scrutiny of the exercise of the rule-making power.

10.97 The prototype legislation contained in **Appendix E** illustrates how a rule-making power in relation to disclosure could be more narrowly circumscribed than existing exemption and notional amendment powers. For example, prototype s 1098 sets out a list of considerations to which the rule-maker (ASIC) must have regard when making rules (as discussed above). Additionally, prototype s 1007 describes the range of substantive matters in relation to which rules on a particular subject (here, PDSs) can be made. The current prototype legislation does not contain specific consultation requirements, and the ALRC invites stakeholder feedback about their utility.

10.98 More narrowly circumscribed powers and enhanced oversight may help to avoid situations such as that which has arisen in relation to the regulation of foreign financial services providers. The Government has announced it will revisit regulatory reforms that were implemented by ASIC in accordance with ASIC's currently broad powers to make decisions on the design and scope of regulatory regimes within the *Corporations Act*.[61] If a new rule-making power were to be granted to ASIC, then providing for oversight or approval of proposed rules by the Minister would likely reduce the need for arrangements to be revisited.

10.99 Finally, ASIC's exercise of any new rule-making power would be subject to oversight by the recently established Financial Regulator Assessment Authority. That Authority is required to assess the effectiveness and capability of APRA and ASIC every two years, and to undertake ad hoc assessments as requested by the Minister.[62]

Sunsetting

10.100 Subject to some exceptions, legislative instruments are automatically repealed after a fixed period of time.[63] This process of automatic repeal is known as 'sunsetting', and typically occurs after 10 years. Sunsetting operates as a form of control or oversight of delegated legislation, by limiting the period for which a legislative instrument is in force, and requiring that the instrument be reviewed and re-made if it is to continue in force beyond that period. Particular legislative instruments can be excluded from sunsetting by the Act that authorises the making of the instrument, or by the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth).

10.101 It may be desirable to exclude from sunsetting any legislative instruments containing 'rules' under the *Corporations Act*. This would arguably provide the

61 The Department of the Treasury (Cth), *Relief to Foreign Financial Service Providers* (Consultation Paper, July 2021) [1]–[4].
62 *Financial Regulator Assessment Authority Act 2021* (Cth) ss 12–14.
63 *Legislation Act 2003* (Cth) s 50.

regulated community, consumers, and investors with greater certainty as to their rights and obligations than if rules were subject to automatic repeal.[64] Currently, ASIC market integrity rules are exempt from sunsetting.[65] However, sunsetting also brings important benefits, including 'prevent[ing] the persistence of antiquated or unnecessary legislative instruments'.[66] Sunsetting can also support parliamentary scrutiny, as instruments that replace sunsetting instruments can be reviewed by Parliament and even disallowed.[67]

10.102 If rules were exempt from sunsetting but it was thought desirable to make them time-limited, this could be expressed in the provision of the Act authorising the rules, or in the legislative instrument itself. This may be preferable to the current approach, whereby the sunsetting date of a legislative instrument is not apparent on the face of the instrument itself, but rather is located separately on the Federal Register of Legislation.

Form

10.103 As noted above, the prototype legislation at **Appendix E** demonstrates how a legislative instrument could be used to present rules relating to one theme (for example, financial product disclosure) adopting the same thematic structure as the *Corporations Act*. Other legislative instruments could similarly contain rules relating to another theme (such as licensing, for example). Presently the *Corporations Regulations* follow the same structure as the Act. However, as noted in previous chapters, not all regulations relevant to a particular part of the Act are necessarily located in the corresponding part of the Regulations.

10.104 Thematic organisation facilitates navigation and comprehension of information. For example, one legislative instrument could contain rules relating to licensing, and another could contain rules relating to disclosure. Subsequent additions, amendments, or repeals would be executed by way of amending instruments, the content of which would be incorporated into an updated compilation of each relevant thematic legislative instrument published on the Federal Register of Legislation.

10.105 Thematically organised legislative instruments are used in other areas of regulation, such as accounting standards made under s 334 of the *Corporations Act*, and prudential and reporting standards issued by APRA. APRA's website presents the standards and guidance applicable to various industries by grouping them

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64 See, for example, the second reading speech to the Legislative Instruments Bill 2003, where the Attorney-General (Cth) stated that 'targeted exemptions from the sunsetting provisions' would be made where 'the nature of the instrument would make sunsetting inappropriate — for example, where commercial certainty would be undermined by sunsetting or the instrument is clearly designed to be enduring': Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17623 (Daryl Williams, Attorney-General).

65 *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) reg 12 item 18.

66 Explanatory Memorandum, Legislative Instruments Bill 2003 (Cth) 25.

67 See also Stephen Argument, 'Is "sunsetting" Limping off into the Sunset?: Recent Developments in the Regime for Sunsetting of Commonwealth Delegated Legislation' (2019) 95 *AIAL Forum* 37.

under five overarching themes: capital, financial statements, governance, other requirements, and risk management.[68]

10.106 Thematic organisation may mean that a reader needs to consult more than one legislative instrument to answer a particular query. The complexity this may cause could be minimised, however, by the use of navigational aids and technology.[69] In any event, thematically organised legislative instruments and a more principled allocation of material across the legislative hierarchy would be significantly more navigable than the existing law.

10.107 Navigability could be further enhanced by, for example, the tailored publication of rules structured by industry sector or type of service. Relevant exclusions and exemptions (which would be consolidated in one legislative instrument under **Proposal A10**) could be integrated into publications of rules. These publications could potentially be prepared either by government agencies or private publishers. It would also be possible to publish a compendium of all legislative instruments currently in force in a way that would be more useful and comprehensible than would presently be possible. This compendium could integrate regulatory guidance issued by ASIC, just as the Financial Conduct Authority's 'FCA Handbook' integrates guidance with rules in the UK.

10.108 Incorporating amendments into updated compilations of each thematic legislative instrument would make it easier to scrutinise the exercise of any rule-making power than it is to scrutinise the exercise of existing exemption and notional amendment powers. Amendments to exemption and notional amendment instruments need to be understood alongside the text of the existing instruments as well as the text of the Act, whereas amendments to rules would need only be read alongside the rules themselves. Point-in-time versions of all compilations of legislative instruments, available on the Federal Register of Legislation, would make it easy to understand the complete effect of any amendments to the rules.

10.109 Finally, a rule-making power would potentially enable a less legalistic drafting style than is currently necessitated by exemption and notional amendment powers. Notional amendments, in particular, can result in tortuous expressions in instruments that can be difficult to read and comprehend.

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68 See, eg, Australian Prudential Regulation Authority, 'Prudential and Reporting Standards for Authorised Deposit-Taking Institutions' <www.apra.gov.au/industries/1/standards>.

69 See Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021).

Example: The wording of notional amendments

ASIC Corporations (Mortgage Investment Schemes) Instrument 2017/857 notionally amends the *Corporations Act* by providing as follows:

> Chapter 5C of the Act applies to all persons in relation to a mortgage investment scheme in respect of which the operator has relied on the exemption in section 6 as if subsection 601GA(4) and Part 5C.6 were modified or varied as follows:
>
> (a) after "members" (wherever appearing, other than at the end of subsection 601GA(4), in paragraph 601KB(2)(b), in subsection 601KB(4) and in section 601KE), inserting:
>
> (i) in subsection 601KB(1) (wherever appearing) and in the formula in section 601KD:
>
> "who have an interest in the particular mortgage loan"; and
>
> (ii) otherwise, "who have an interest in a particular mortgage loan"; …

Restructuring content for greater coherence

10.110 As a result of numerous ad hoc amendments over the past 20 years, several parts and divisions of Chapter 7 of the *Corporations Act* have lost much of their thematic consistency. In Interim Report C, the ALRC will consider how the provisions contained in Chapter 7 of the *Corporations Act* and the *Corporations Regulations* could be reframed or restructured.

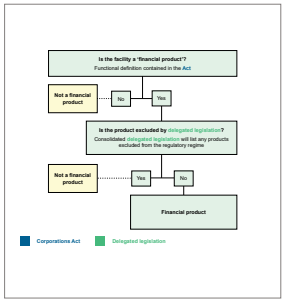
10.111 Restructuring should seek to restore the thematic consistency of provisions, such as parts. For example, Part 7.6 includes licensing of financial services providers generally, as well as specific requirements for 'relevant providers', a narrow class of AFS Licensees. This reduces the navigability of Chapter 7. **Chapter 9** of this Interim Report also discusses the potential for restructuring the contents of Part 7.9 of the *Corporations Act* to improve internal coherence. Reframing or restructuring provisions may also reduce the need for provision-specific notional amendments to scope and help to further improve navigability.

10.112 Granting an appropriately circumscribed rule-making power would facilitate restructuring Chapter 7 of the *Corporations Act* by enabling the relocation of detail to delegated legislation. An improved structure of Chapter 7 would also enable better structured and more navigable delegated legislation. These matters will be the subject of detailed in consideration in Interim Reports B and C.

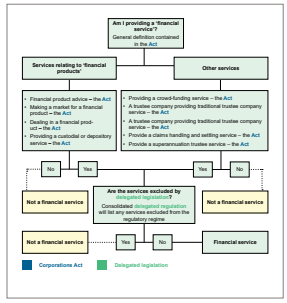
Applying the model to 'financial product' and 'financial service'

10.113 The model outlined in this chapter represents an approach to determining the perimeter of regulation without repeatedly altering the meaning of defined terms.[70] The diagrams at **Appendix C.14** ('financial product') and **Appendix C.15** ('financial service') demonstrate how this model can be applied to the definitions of 'financial product' and 'financial service' in the *Corporations Act*.

Appendix C.14



Appendix C.15



10.114 Comparing those diagrams to the equivalent diagrams that illustrate the current law, discussed in **Chapter 7** and contained at **Appendix C.6** and **Appendix C.7**, demonstrates the extent to which the model discussed in this chapter could potentially simplify these definitions. In particular, comparing the diagrams demonstrates how the number of potential 'exit ramps' from the definitions (and therefore large parts of the Chapter 7 regulatory regime) can be reduced — in the case of 'financial product', from four exit ramps to two, and in the case of 'financial service', from seven exit ramps to three.

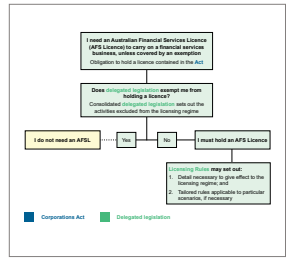
Exclusions and exemptions from the AFSL regime

10.115 The proliferation of exclusions and exemptions from licensing requirements is a product of the policy that the AFSL regime be applied flexibly.[71] The current manner of implementing that policy (using exemptions and notional amendments spread across the *Corporations Act*, the *Corporations Regulations*, and ASIC legislative instruments) creates considerable unnecessary complexity. That complexity could be reduced by using application provisions, and by consolidating exclusions and exemptions in delegated legislation.

70 The model is consistent with the principles discussed in **Chapter 4** of this Interim Report.
71 See further **Chapter 8**.

10.116 The diagram at **Appendix C.16** illustrates how, when compared to the diagram at **Appendix C.10** discussed in **Chapter 7**, determining the scope of the obligation in s 911A of the *Corporations Act* to hold an AFS Licence can be considerably simplified. The number of potential 'exit ramps' from the general obligation can be reduced from six to one.

Appendix C.16



10.117 Section 911A(2) of the *Corporations Act* is long and complex, and sets out a range of exemptions from the obligation in s 911A(1). The exemptions in s 911A(2) are expressed as applying to 'a person … for a financial service they provide' in any of the circumstances listed in the subsequent 27 paragraphs. Those paragraphs refer to various characteristics of the person, the services they provide, or the circumstances in which those services are provided. A further five subsections qualify the exemptions contained in sub-s (2) before a reader arrives at sub-s (5B) which, by way of a note, informs the reader that contravention of sub-s (1) may lead to imposition of a civil penalty.

10.118 The prototype legislative provisions at **Appendix E** (in particular ss 765A, 766J) demonstrate how using an application provision in the *Corporations Act* and situating exemptions from the obligation to hold an AFS Licence in one legislative instrument could improve readability and navigability by:

- clearly presenting the obligation to hold an AFS Licence in s 911A(1), including notes containing cross-references to key definitions;
- removing the exemptions from s 911A(2) so as to 'declutter' the section;
- consolidating in one place exemptions currently spread across the Act, Regulations, and ASIC legislative instruments; and
- restructuring the exemptions currently contained in s 911A(2) and expressing them more clearly in a table format.

10.119 Section 911A(2) in the prototype draft (**Appendix E**) demonstrates a rare exception to the general position that all exclusions and exemptions to the *Corporations Act* be contained in delegated legislation. This provision replicates the exemption currently in s 911A(2)(a) that applies to representatives of an AFS Licensee. This exemption gives effect to the current policy that a principal financial services provider must be licensed, but agents of a licensed principal need not be. In this way, the exemption is 'structural' in character and sufficiently significant to warrant being included in the Act, rather than in delegated legislation. This alerts a reader of the Act to the existence of this key policy.

10.120 The prototype legislation also demonstrates how 'decluttering' the section means a reader is more clearly put on notice that failure to hold an AFS Licence may give rise to a civil penalty (as well as being an offence).

10.121 Further simplification may be achieved by rationalising and consolidating (by industry, service, or other common themes) what are currently separate

exclusions or exemptions. Many current exemptions relate to particular topics, such as superannuation,[72] and notified foreign passport funds,[73] such that exemptions related to the same topic could potentially be consolidated. The prototype drafting at **Appendix E** demonstrates how a range of current exemptions could be organised and, where possible, consolidated thematically to assist the reader to easily locate applicable items.

10.122 The suggested model would accommodate conditional exemptions in a more transparent and logical way than existing law. For example, an exemption from the AFSL regime that currently has conditions attached relating to financial product disclosure could be effected as follows:

- the activity could be excluded from the licensing provisions by a legislative instrument dedicated to exclusions and exemptions;
- an application provision in respect of financial product disclosure could provide that relevant disclosure requirements apply to the relevant activity; and
- the relevant disclosure requirements could be set out in a legislative instrument relating specifically to disclosure, expressed as rules applicable to the relevant activity.

'Relevant financial products' and application provisions

10.123 The definitions of 'relevant financial products' and 'relevant provider' effectively narrow the scope of several divisions and subdivisions of Part 7.6 of the *Corporations Act*.[74] Rather than using these defined terms for that purpose, application provisions could be used as outlined in the example below.

Example: Using application provisions in place of defined terms

Application provisions could be used in each of Part 7.6 Div 8A, Div 8B, Div 9 Subdiv B, and Div 9 Subdiv C to specify that:

- the financial products currently listed in the definition of 'relevant financial products' are excluded from the provisions in those divisions and subdivisions; and
- those divisions and subdivisions only apply to the people and circumstances currently captured by the definition of 'relevant provider'.

As a result, the defined terms 'relevant financial products' and 'relevant provider' would be unnecessary. The effect of these changes would be to limit the scope of the relevant divisions and subdivisions in a more transparent way than is currently the case.

72 *Corporations Act 2001* (Cth) ss 912A(2)(ga), (j); *Corporations Regulations 2001* (Cth) regs 7.6.01(1)(b)–(da).

73 See, eg, *Corporations Act 2001* (Cth) ss 911A(2)(eh)–(ei).

74 See [8.100]–[8.106].

Applying the model to financial product disclosure

10.124 This section outlines how the ALRC's suggested model could be implemented to simplify the current Part 7.9 of the *Corporations Act* relating to financial product disclosure.

Consolidation of necessary exemptions and exclusions

10.125 As outlined in **Chapter 9** of this Interim Report, the nature and volume of exclusions and exemptions in relation to disclosure obligations, and their location across the *Corporations Act*, *Corporations Regulations*, and ASIC legislative instruments presents challenges for understanding the application of the disclosure regimes in the *Corporations Act*. A reader must consult multiple legislative sources to ascertain whether or not they must comply with the Act's obligations and the precise content of those obligations. This challenge is particularly acute in relation to Part 7.9, which deals primarily with financial product disclosure.

10.126 The legislative framework is likely to be more navigable if exclusions and exemptions are arranged in a more appropriate structure. Part 7.9 of the *Corporations Act* could be reorganised such that key obligations remain in the Act, exclusions and exemptions are consolidated in a legislative instrument, and other detail is set out in a legislative instrument relating to disclosure.

10.127 Exclusions and exemptions from Part 7.9 of the *Corporations Act* that could helpfully be consolidated into a single legislative instrument are currently contained in at least:

- ss 1010A, 1010B, 1010BA, 1012D, 1012DAA, 1012DA, and 1012E of the Act;
- Part 7.9 Div 2C and Div 14 of the *Corporations Regulations*; [75] and
- 69 in force ASIC legislative instruments.[76]

10.128 Exclusions and exemptions could be organised thematically within the single legislative instrument. This could include, for example, grouping together exclusions and exemptions relating to similar circumstances, products, or persons. **Appendix E** provides an illustration of how this might be achieved for a sample of exclusions and exemptions.

A clearer legislative hierarchy for the regulation of disclosure

10.129 The regulation of disclosure could helpfully be restructured by relocating and consolidating detailed content requirements for disclosure from the *Corporations*

75 See also *Corporations Regulations 2001* (Cth) reg 7.9.16A.

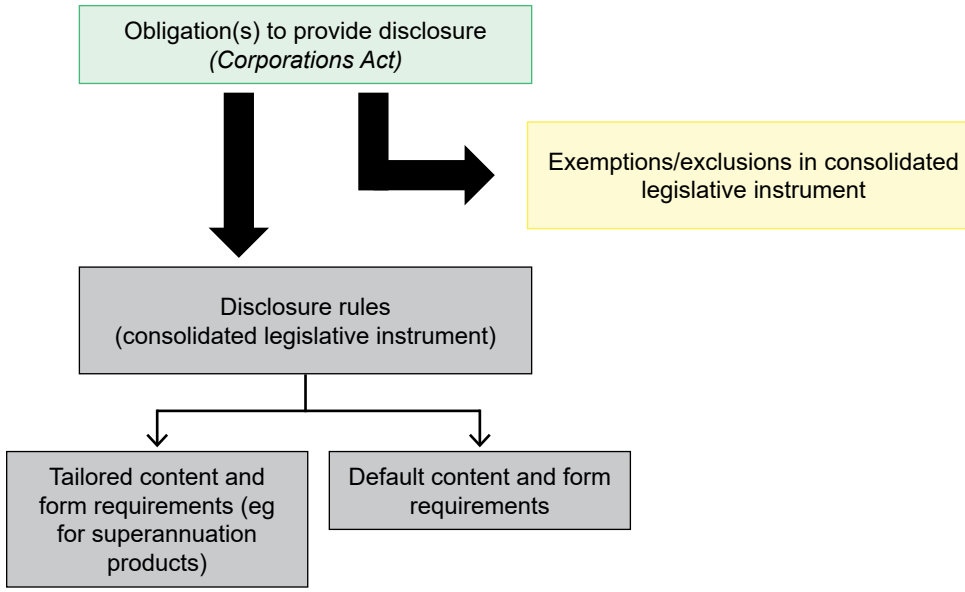
76 See Australian Law Reform Commission, 'ASIC-Made Legislative Instruments (Qualitative) – 30 June 2021' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/legislative-data>.

Act, *Corporations Regulations,* and ASIC legislative instruments into a legislative instrument dedicated to 'disclosure rules'.

10.130 The purpose of the disclosure rules would be to prescribe, where necessary, specific information or statements that must be disclosed as part of fulfilling an obligation of disclosure contained in the *Corporations Act*. For example, the rules would include requirements relating to the disclosure of fees and costs.

10.131 The rules could be organised on the basis of different products, persons, services, or circumstances to assist users to locate applicable rules. 'Default' rules of general application could apply in circumstances where tailored rules (currently effected by way of notional amendments) are not necessary. **Figure 10.1** provides a high-level overview of this model.

Figure 10.1: Application of suggested model to regulation of disclosure



10.132 **Appendix E** provides an illustration of how a sample of financial product disclosure requirements could be restructured in accordance with this model.

10.133 The appropriate legislative hierarchy for the regulation of disclosure and other topics will be explored in greater detail in Interim Report B. In the meantime, the ALRC is seeking stakeholder views on the general approach outlined in this chapter.

10.134 There are several options for how obligations to provide disclosure contained in the *Corporations Act* could be framed to accommodate a more principled

legislative hierarchy and remove prescriptive detail from the Act. For example, in relation to the current product disclosure requirements:

- One option would be to retain the existing provisions in the *Corporations Act* that impose the obligation to give a PDS,[77] and to relocate to a legislative instrument dedicated to exclusions all provisions that set out when a PDS is not required.[78] Provisions that prescribe the contents of the PDS and how it must be given (currently contained in the Act, the Regulations and ASIC legislative instruments) could be made as rules in a legislative instrument relating to disclosure. General requirements, such as those set out in s 1013D–1013F, could be expressed as 'default rules', while tailored requirements, such as those in relation to continuously quoted securities in s 1013FA, could be incorporated as tailored rules.
- A second option would be to reframe the current obligation to provide a PDS as a more general obligation to provide disclosure, which could apply to both prospectuses and PDSs.[79] The provision of either a PDS or a prospectus could be prescribed by rules in the legislative instrument relating to disclosure, as the means by which disclosure must be provided in respect of particular products. Further rules could prescribe the contents of a PDS or prospectus, including default and tailored rules.

10.135 The second option would better facilitate the conversion of conditional exemptions that impose alternative disclosure requirements into tailored rules. For example, under the current framework, disclosure requirements for 'offer documents' in relation to employee incentive schemes are regulated by a conditional exemption from the PDS requirements.[80] Under the second option, it would no longer be necessary to provide for exemptions from an obligation in the Act to provide disclosure in the form of a PDS — instead, rules could prescribe an offer document as the means of providing disclosure in relation to employee incentive schemes.

10.136 The second option would also present opportunities to rationalise existing disclosure obligations, including in relation to financial product and securities disclosure, as canvassed in **Chapter 9** of this Interim Report.

10.137 The ALRC considers that either option would achieve the greatest simplification if paired with reforms to reframe the obligation to provide disclosure to incorporate an outcomes-based standard, in accordance with **Proposal A8** in **Chapter 9**.

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77 See, eg, *Corporations Act 2001* (Cth) ss 1012A–1012C, 1012H–1012IA.

78 This would include, for example, ss 1012D–1012E.

79 See further **Chapter 9**.

80 See, eg, *ASIC Class Order — Employee Incentive Schemes: Listed Bodies* (CO 14/1000); *ASIC Class Order — Employee Incentive Schemes: Unlisted Bodies* (CO 14/1001). The Australian Government is consulting on draft legislation that would replace these class orders and introduce provisions in the *Corporations Act* that would regulate offer documents: see Exposure Draft, Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021: Employee Share Schemes.

10.138 Consideration would need to be given to the implications of the restructuring proposed above for the framing of offences and civil liability provisions currently set out in Part 7.9 Div 7. Relevant issues include, for example, how a failure to comply with content requirements set out in rules might be appropriately incorporated in the definition of a 'defective' disclosure document under ss 1021B and 1022A. These issues will be explored further in Interim Report B.

Steps towards implementation

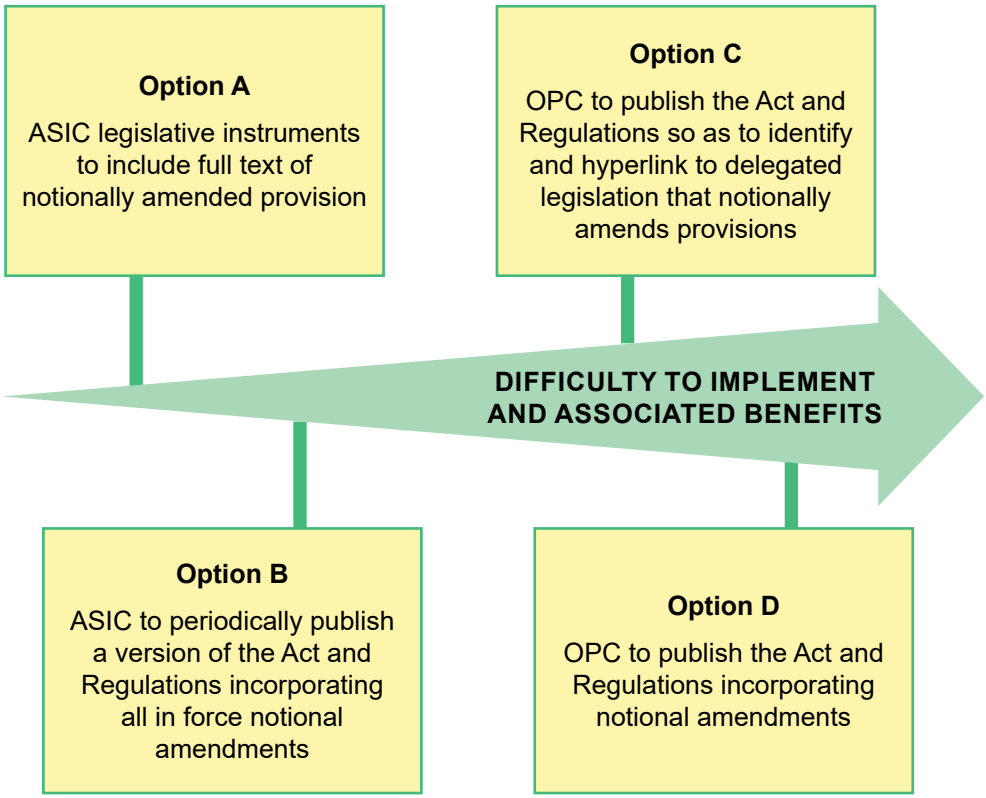
Proposal A12: As an interim measure, the Australian Securities and Investments Commission, the Department of the Treasury (Cth), and the Office of Parliamentary Counsel (Cth) should develop a mechanism to improve the visibility and accessibility of notional amendments to the *Corporations Act 2001* (Cth) made by delegated legislation.

10.139 Implementing **Proposals A9** and **A10**, and the model described in **Question A11**, would require significant legislative change. As set out at the beginning of this chapter, implementing these proposals would likely need to be staged.

10.140 Notional amendments to the *Corporations Act* are a significant driver of complexity and a problem that warrants more urgent attention than the proposals made in this chapter would permit. **Proposal A12** is therefore suggested as an interim measure to improve the visibility and accessibility of material that is currently provided for by way of notional amendments. The process of developing and implementing **Proposal A12** may itself aid future implementation of other proposals by enabling ASIC, Treasury, and OPC to 'take stock' of the current proliferation of delegated legislation and its interaction with the *Corporations Act*. It would also be desirable to consider improving the visibility and accessibility of notional amendments made to the *Corporations Regulations*, which can occur through ASIC legislative instruments. Coordination between the Treasury and ASIC could even eliminate notional amendments to the regulations, which could instead be textually amended through the normal processes for amending regulations.

10.141 There are several potential mechanisms that could improve the visibility and accessibility of notional amendments to the *Corporations Act*, though none of them can eliminate all complexity inherent in the use of notional amendments. Some potential options for further consideration are discussed below. **Figure 10.2** demonstrates how some options could be conceptualised as being on a spectrum, with the level of difficulty of implementation increasing correlative with the potential benefits of implementation. Each of these options has advantages and disadvantages that would need to be explored.

Figure 10.2: Potential interim measures to address notional amendments



10.142 Under Option A, any ASIC legislative instrument that notionally amends the *Corporations Act* or *Corporations Regulations* would set out the full text of the section as it reads after having been notionally amended. In contrast, the current practice is for legislative instruments to set out only the words that are being inserted, omitted, or substituted in the notionally amended provisions.[81] The current practice makes it very difficult to read and understand the effect of the notional amendment. Accordingly, Option A would help by making particular notional amendments easier to read, but it would not make their existence more visible or navigable. Users of legislation would still need to navigate multiple instruments containing notional amendments. Option A would likely be the easiest option to implement, and would result in the most modest simplification.

10.143 Option A could potentially be extended to include the *Corporations Regulations*, meaning that any regulation that notionally amended another provision would set out the full text of the provision. Doing this, however, could significantly lengthen the Regulations. This is less of a problem in the case of ASIC legislative instruments because each instrument generally only deals with one subject matter,

81 See the example above at [10.109].

whereas the Regulations cover a large number of subjects, relating to the whole of the *Corporations Act*, in a single instrument.

10.144 Under Option B, ASIC would periodically publish on its website a version of the *Corporations Act*, and of the *Corporations Regulations*, which would include the full text of all provisions in their notionally amended form, as well as in their unamended form. This option is expressed in similar terms to a suggestion first made by Bottomley in 2011.[82] One downside to this option would be the potentially confusing or misleading position of having an authoritative version of the legislation published on the Federal Register of Legislation, and a different version on ASIC's website, which will not always be up to date. A further difficulty would arise when attempting to clearly distinguish in the version published on the ASIC website between notional amendments and the text of the Act as made and amended by Parliament. Option B would be more difficult than Option A to implement, but would likely deliver greater simplification, particularly in terms of the visibility of notional amendments.

10.145 Under Option C, the authoritative version of each of the *Corporations Act* and the *Corporations Regulations*, as published by OPC on the Federal Register of Legislation from time to time, would:

- indicate the name of any instrument that has notionally amended particular provisions; and
- include a hyperlink to enable the reader to easily access the instrument containing the notional amendment.

10.146 Option C would require changes to the way legislation is currently published on the Federal Register of Legislation. The UK legislation website currently includes annotations to individual provisions with links to relevant delegated legislation.[83] However, that would not be possible using the current structure and format of the Federal Register of Legislation. Utilising XML (see **Recommendation 11**) may assist to implement Option C. OPC would also need to establish guidelines for users of the Federal Register of Legislation regarding the status of hyperlinks, their completeness, and their currency. Option C would be more difficult than Option A or Option B to implement, but would achieve greater simplification, particularly in terms of the visibility and navigability of notional amendments.

10.147 Under Option D, the authoritative version of each of the *Corporations Act* and the *Corporations Regulations* as published by OPC on the Federal Register of Legislation from time to time would incorporate the substance of all notional amendments made. Option D would require changes to OPC's processes of either drafting or publishing legislation. Notional amendments could potentially be incorporated by way of legislative notes following relevant provisions, although changes to the *Legislation Act* might arguably be necessary to permit such notes to be made by OPC. Alternatively, the authoritative text of each of the Act and the

82 Bottomley (n 7) 30.

83 See Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [117]–[119].

Regulations itself could remain unchanged, and notional amendments could be displayed on a separate version of each document that would be displayed in a separate page of the Federal Register of Legislation website. Option D has the downside that it would increase the length of the legislation as displayed on the Federal Register of Legislation, and could potentially confuse readers if notional amendments were not clearly distinguished from the text of the legislation itself. In consultations, some legal advisers have told the ALRC that they have prepared, for their own use, a version of the legislation incorporating amendments by delegated legislation. Option D would be the most difficult to implement, but would achieve the greatest simplification, especially in terms of the visibility and navigability of notional amendments.

10.148 None of these four options would significantly reduce the inherent complexity of notional amendments. Accordingly, none of the potential interim measures discussed above should be regarded as a long-term solution to the voluminous body of notional amendments made to the *Corporations Act*. In addition, purely technological or presentational solutions would not address the underlying complexity or incoherence within the current law that leads to notional amendments, nor the rule of law implications of notional amendments. The focus should therefore be on reducing the need for, and use of, notional amendments, rather than on improving their visibility or navigability. The model proposed in this chapter is directed to that goal.

11. Definition of ‘Financial Product Advice’

Contents

Introduction

11.1 In this chapter, the ALRC makes proposals to simplify, clarify, and improve the navigability of concepts relating to ‘financial product advice’.

11.2 In Chapter 7 of the *Corporations Act*, 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.[1] As discussed in **Chapter 7** and **Chapter 8** of this Interim Report, the provision of financial product advice also constitutes a ‘financial service’,[2] for which an AFS Licence will be required in certain circumstances.[3]

11.3 The regulation of financial advice has been the subject of significant debate in recent years. There have been recent calls from financial advice industry

1 See further **Chapter 9** and **Chapter 13**.
2 *Corporations Act 2001* (Cth) s 766A(1)(a).
3 Ibid s 911A.

associations for substantive reforms to reduce the cost and complexity of providing financial advice.[4] Notably, in April 2021 the Australian Government announced that it would conduct the Quality of Advice Review in 2022.[5] 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.

11.4 Before considering potential reforms, this chapter will endeavour to articulate the policy settings that are currently reflected in the use and definition of the concept of financial product advice in Chapter 7 of the *Corporations Act*. In accordance with the ambit of the ALRC's current inquiry, the proposals that then follow principally aim to simplify, clarify, and aid navigability within these existing policy settings.

11.5 Ultimately, this chapter proposes a number of potential reforms, including in relation to:

- removing the intermediary concept of financial product advice;
- decoupling the concepts of personal advice and financial service; and
- renaming the concept of general advice.

11.6 The chapter also includes discussion of opportunities to simplify the structure of exemptions for financial product advice, in accordance with proposals outlined in **Chapter 10**.

11.7 Implementation of reforms proposed in this chapter may have implications for consideration of broader reforms to 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.

11.8 These policy issues are not the subject of ALRC proposals in this chapter, but it is suggested that these issues may merit further consideration in future substantive reviews of the regulation of financial advice, such as the Quality of Advice Review.

Policy settings

11.9 The definitions of 'financial product advice', 'personal advice', and 'general advice' are relevant in setting the regulatory perimeters for the application of licensing, conduct, and disclosure requirements. These requirements serve two primary policy objectives in respect of financial advice:

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4 See, eg, Financial Services Council, *White Paper on Financial Advice* (2021); CPA Australia, *The Value of Advice* (Research Report, 2020); SMSF Association et al, Joint Submission to National COVID-19 Coordination Commission, Department of the Prime Minister and Cabinet (26 June 2020).

5 See Senator the Hon Jane Hume, 'Address to the 12th Annual Financial Services Council's Life Insurance Summit 2021' (Speech, 21 April 2021).

- to put in place safeguards in relation to the standard of financial advice;[6] and
- to assist retail clients to evaluate the advice they receive and make an informed decision about whether to act on that advice.[7]

11.10 The relative emphasis placed on these two objectives has shifted in the 20 years since the introduction of a harmonised framework for the regulation of financial product advice by the *FSR Act*.

11.11 When the *FSR Act* was first enacted, the main safeguards for the regulation of the standard of financial advice mirrored the minimum standards applicable to other financial services — namely, the requirement to be licensed,[8] and the imposition of standard conduct obligations for licensees.[9] This was consistent with recommendations from the Wallis Inquiry to introduce a single licensing regime and minimum standards of competence and ethical behaviour for financial sales and advice.[10]

11.12 Section 945A of the *Corporations Act* imposed one additional safeguard for advice by requiring there to be a reasonable basis for personal advice provided to a retail client.[11]

11.13 Reliance was otherwise placed on regulation of disclosures by financial advisers in order to assist retail clients in making an informed decision about whether to act on advice they receive. Accordingly, requirements were introduced in relation to the preparation and provision of FSGs and, in relation to personal advice, SoAs.[12] The content requirements for an SoA were 'intended to ensure that consumers receive information necessary to make informed decisions about whether to act on the advice'.[13]

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6 See, eg, Department of the Treasury (Cth), *Financial Markets and Investment Products: Promoting Competition, Financial Innovation and Investment* (Corporate Law Economic Reform Program Proposals for Reform: Paper No 6, 1997) 99; Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.40]; Revised Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Cth) 3; Explanatory Memorandum, Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016 (Cth) 3; Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2016, 4067–70 (Kelly O'Dwyer).

7 See, eg, Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [12.14], [12.51]; Commonwealth, *Parliamentary Debates*, House of Representatives, 5 April 2001, 26521–6, 26522–3.

8 *Corporations Act 2001* (Cth) s 911A. See further **Chapter 9** in relation to financial product and services disclosure.

9 Ibid s 912A. See **Chapter 13** for discussion of conduct obligations.

10 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.7]. See Stan Wallis et al, *Financial System Inquiry* (Final Report, 1997) Recommendations 13 and 15.

11 Section 945A was repealed and replaced as part of the FOFA reforms in 2012: see *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth).

12 *Corporations Act 2001* (Cth) pt 7.7 divs 2–3.

13 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [12.51]. See also [12.14] in relation to the requirements for FSGs.

11.14 There is also a requirement to inform retail clients where the advice is 'general' so they are not led to believe they have been given tailored advice that has considered their needs, objectives, or financial circumstances when this is not the case.[14]

11.15 Restrictions on the use of terminology such as 'independent' and 'financial adviser' also serve the purpose of assisting consumer evaluation of advice by limiting the use of these terms by providers that do not meet relevant standards of independence or professionalism.[15]

11.16 There has, however, been a subsequent shift towards the introduction of additional safeguards in relation to the standard of financial advice. The FOFA reforms in 2012 introduced a suite of targeted requirements for the provision of financial product advice that extend beyond the safeguards for financial services more generally.[16]

11.17 The Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 described the underlying objective of the reforms as being:

> to improve the quality of financial advice while building trust and confidence in the financial advice industry through enhanced standards which align the interests of the adviser with the client and reduce conflicts of interest.[17]

11.18 The FOFA reforms notably introduced an obligation not to accept conflicted remuneration when providing financial product advice to retail clients.[18] Further obligations were also introduced in relation to the provision of personal advice to retail clients, including obligations to act in the best interests of a client in relation to the advice,[19] to 'only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under s 961B to act in the best interests of the client',[20] and to give priority to the client's interests in circumstances of conflict.[21] Some of these obligations are discussed in further detail in **Chapter 13** of this Interim Report.

11.19 Further requirements targeting the standard of advice were introduced by the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth). These reforms introduced requirements for providers of personal advice to retail clients to meet minimum education and training and ethical standards set by

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14 This requirement is contained in *Corporations Act 2001* (Cth) s 949A.
15 Ibid pt 7.6 div 10. See, in particular, ss 923A(5), 923C(8).
16 See *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth); *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth).
17 Revised Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Cth) 3.
18 *Corporations Act 2001* (Cth) pt 7.7 div 4.
19 Ibid s 961B.
20 Ibid s 961G.
21 Ibid s 961J.

an external body.[22] In the Second Reading Speech for the Bill, the Minister noted that two recent reviews had

> identified that the existing professional standards for financial advisers are too low and do not ensure that all financial advisers have the necessary skills to provide high-quality advice to consumers.[23]

11.20 The progressive introduction of additional safeguards in relation to the standard of advice represented a shift in the relative emphasis placed on the twin objectives outlined above.[24] Under the initial regulatory framework introduced by the FSR Bill, the primary means of regulating the impact of conflicted remuneration on advice was mandating disclosure to allow retail clients to take this into account when evaluating whether to act on advice. It was suggested at that time that

> disclosure of benefits received by an intermediary and any conflicts of interest assists clients in assessing the merits of a product recommendation and reduces the opportunity for advisers to act in self interest to the disadvantage of the client.[25]

11.21 However, as discussed above, the FOFA reforms introduced prohibitions on conflicted remuneration structures, and obligations for advisers to act in the best interests of retail clients. The shift in emphasis from disclosure of conflicts to regulation of conflicts reflected findings that disclosure of conflicts was ineffective, and was based on evidence 'suggesting that the most effective way to improve the quality of financial advice for consumers is to remove conflicts altogether by banning commissions and other conflicted remuneration practices'.[26]

11.22 Nonetheless, in circumstances where the conflicted remuneration ban does not apply, such as in relation to general insurance and life insurance products,[27] there remains an obligation to disclose certain remuneration or benefits in SoAs.[28]

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22 Ibid pt 7.6 divs 8A–8C.

23 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2016, 4067–70 (Kelly O'Dwyer) 4068, referencing Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Proposals to Lift the Professional, Ethical and Education Standards in the Financial Services Industry* (2014) and David Murray et al, *Financial System Inquiry* (Final Report, 2014).

24 See outline of policy objectives at [11.9].

25 Department of the Treasury (Cth) (n 6) 102.

26 Revised Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Cth) 23–4, citing Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (November 2009).

27 *Corporations Act 2001* (Cth) ss 963B–963D.

28 Ibid ss 947B(2)(d), 947C(2)(e).

'Financial product advice', 'general advice', and 'personal advice'

11.23 The term 'financial product advice', and its two subcategories ('general advice' and 'personal advice'), are defined in s 766B of the *Corporations Act*.[29]

Financial product advice

11.24 Section 766B(1) provides that for the purposes of Chapter 7 of the *Corporations Act*, financial product advice means

> a recommendation or a statement of opinion, or a report of either of those things, that:
>
> (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
>
> (b) could reasonably be regarded as being intended to have such an influence.

11.25 ASIC guidance indicates that a 'recommendation or statement of opinion' connotes something more than the provision of mere 'factual information'.[30] On ASIC's view, factual information may be understood as 'objectively ascertainable information, the truth or accuracy of which cannot reasonably be questioned'.[31] By comparison, financial product advice 'will generally involve a qualitative judgement about, or an evaluation, assessment or comparison of, some or all of the features of one or more financial product(s)'.[32] Nonetheless, ASIC notes factual information may constitute advice 'if it is presented in a way that is intended to, or can reasonably suggest or imply an intention to, make a recommendation about what a client should do'.[33] As observed by Sackville AJA in *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)*:

> The authorities have accepted that the statutory language should be given a broad interpretation. Specifically, they support the proposition that a person

29 There is no reference to 'financial product advice', 'general advice', or 'personal advice' in the *Corporations Act*'s s 9 dictionary. Instead, the definitions section for Chapter 7 (s 761A) provides that each of these terms has the meaning given by s 766B.

30 Australian Securities and Investments Commission, *Licensing: Financial Product Advice and Dealing* (Regulatory Guide 36, June 2016) [RG 36.23].

31 Australian Securities and Investments Commission, *Giving Information, General Advice and Scaled Advice* (Regulatory Guide 244, December 2012) [RG 244.24]. See also Australian Securities and Investments Commission (n 30) [RG 36.23].

32 Australian Securities and Investments Commission (n 30) [RG 36.20]. See also Australian Securities and Investments Commission (n 31) [RG 244.26].

33 Australian Securities and Investments Commission (n 31) [RG 244.29]. See also Australian Securities and Investments Commission (n 30) [RG 36.24].

> may provide information or present material in a way that implicitly makes a recommendation or states an opinion in relation to a financial product.[34]

11.26 The recommendation or statement of opinion must either be 'intended to influence' a person in making a decision relating to a financial product or 'could reasonably be regarded as being intended to have such an influence'. In *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)*, White J summarised the effect of this requirement as follows:

> a recommendation, statement of opinion or report will be of the defined kind if it was the subjective intention of the maker to have the prescribed influence or if, considered objectively, the recommendation, statement of opinion or report could be regarded as having been intended to have such an influence.[35]

11.27 The final element of the definition of financial product advice is that the recommendation or statement of opinion relates to 'a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products'.[36] ASIC guidance provides examples of the types of decisions that may be captured by this language. These include decisions to: 'exercise a right or option to acquire or dispose of a financial product'; 'acquire an equitable interest in a financial product'; or 'accept or reject a takeover offer'.[37] In the context of superannuation, ASIC suggests that the types of decisions covered will include, for example, decisions about the level of contributions to be paid to a superannuation fund and claiming superannuation benefits.[38]

11.28 Consultees and stakeholders have noted that although the definition in s 766B is framed in terms of advice about 'financial products', the breadth of 'a decision in relation to a … class of financial products' means that the definition also captures advice in relation to most investment strategies.[39]

Personal and general advice

11.29 Section 766B(2) provides that there are two types of financial product advice: personal advice and general advice.

11.30 Personal advice is then defined in s 766B(3):

> For the purposes of this Chapter, personal advice is financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

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34 *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 [366].

35 *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181 [296].

36 *Corporations Act 2001* (Cth) s 766B(1)(a).

37 Australian Securities and Investments Commission (n 30) [RG 36.27].

38 Ibid [RG 36.29].

39 See, eg, Financial Services Council, *Affordable and Accessible Advice: FSC Green Paper on Financial Advice* (2021) 20.

(a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs (otherwise than for the purposes of compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or with regulations, or AML/CTF Rules, under that Act); or

(b) a reasonable person might expect the provider to have considered one or more of those matters.

11.31 General advice is in turn defined as 'financial product advice that is not personal advice'.[40]

11.32 The obligations attaching to financial product advice differ according to whether the advice is general or personal, with a higher level of consumer protection applying to personal advice. **Table 11.1** provides a high-level comparison of the key provisions that are engaged by the different categories of advice. The obligations below are in addition to the obligations that apply to the provision of financial product advice as a financial service, such as licensing requirements and the obligation to provide an FSG.

Table 11.1: Obligations attaching to general advice compared with personal advice

***Corporations Act* provision(s)**	**Obligation**	**Personal advice**	**General advice**
Part 7.6 Divs 8A–8C	Requirements for 'relevant providers' to have and maintain certain education and training standards, and to comply with a Code of Ethics	✓	X
Part 7.7 Div 3	Provision and preparation of an SoA	✓	X
s 949A	Provision of a prescribed 'general advice warning'	X	✓
Part 7.7A Div 2	Best interests obligations, including obligations that advice be 'appropriate' for clients, and that priority be given to a client's interests	✓	X
Part 7.7A Div 3	Requirements to periodically notify a client of ongoing fee arrangements and renewal	✓	X

40 *Corporations Act 2001* (Cth) s 766B(4).

***Corporations Act* provision(s)**	**Obligation**	**Personal advice**	**General advice**
Part 7.7A Divs 4, 5	Prohibition of certain kinds of remuneration, including 'conflicted remuneration', certain 'volume-based shelf-space fees' and certain 'asset-based fees'	✓	✓
s 1012A	Requirement to provide a PDS	✓	X
s 1020AI	Requirement to provide an information statement for CGS (Commonwealth Government Securities) depository interests	✓	X

11.33 The distinction between general and personal advice — and whether it should be clarified in some way — is discussed in further detail later in this chapter.[41]

Related definitions in comparable jurisdictions

United Kingdom

11.34 In the UK, Chapter XII of the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* outlines when advising on investments will constitute a regulated activity for the purposes of the *FSM Act* (UK).

11.35 Article 53 provides that advising a person is a specified kind of activity if the advice is:

> (a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and
>
> (b) advice on the merits of his doing any of the following (whether as principal or agent)—
>
> (i) buying, selling, subscribing for, exchanging, redeeming, holding or underwriting a particular investment which is a security, structured deposit or a relevant investment, or
>
> (ii) exercising or not exercising any right conferred by such an investment to buy, sell, subscribe for, exchange or redeem such an investment.[42]

11.36 The *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* does not make a distinction analogous to that applying to 'general advice'

41 See [11.107]–[11.117].

42 *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (UK) SI 2001/544 art 53(1). See further Financial Conduct Authority (UK), *FCA Handbook*, PERG 8.24–8.31.

and 'personal advice' under the *Corporations Act*. However, article 53 utilises the concept of 'a personal recommendation' to define circumstances when advice by an 'appropriately authorised' person will be regulated. A personal recommendation involves a recommendation that is presented as suitable for the person to whom it is made, or based on a consideration of the circumstances of that person.[43]

11.37 Articles 53A, 53B, 53C, 54D, 53DA, and 53E outline when advice will be regulated with respect to particular circumstances — namely, advising on: regulated mortgage contracts; regulated home reversion or purchase plans; regulated sale and rent back agreements; regulated credit agreements for the acquisition of land; and conversion or transfer of pension benefits.

11.38 Exclusions are set out in articles 54, 54A, 54B, and 55.

New Zealand

11.39 The *FMC Act* (NZ) includes definitions for 'financial advice', 'regulated financial advice', and 'financial advice service'.[44] The definition of financial advice in s 431C(1) sets out four circumstances in which a person gives financial advice. The first circumstance most closely resembles the *Corporations Act* definition of financial product advice, although it does not incorporate an intention element or make reference to a 'class of financial products' as s 766B(1) of the *Corporations Act* does. The other circumstances in which a person gives financial advice relate to: recommendations about switching funds within a managed investment scheme; the design of an investment plan; and the provision of financial planning.

11.40 Section 431C(1) provides that a person gives financial advice if the person:

> (a) makes a recommendation or gives an opinion about acquiring or disposing of (or not acquiring or disposing of) a financial advice product; or
>
> (b) makes a recommendation or gives an opinion about switching funds within a managed investment scheme; or
>
> (c) designs an investment plan for a person that—
>
> (i) purports to be based on—
>
> (A) an analysis of the person's current and future overall financial situation (including investment needs); and
>
> (B) the identification of the person's investment goals; and
>
> (ii) includes 1 or more recommendations or opinions on how to realise 1 or more of those goals; or
>
> (d) provides financial planning of a kind prescribed by the regulations.[45]

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43 See *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (UK) SI 2001/544 arts 53(1C), (1D).

44 *Financial Markets Conduct Act 2013* (NZ) ss 431C, 431D.

45 For the definition of 'financial advice product' see ibid s 6. There were no regulations prescribing relevant types of financial planning as at the time of writing.

11.41 Regulated financial advice is defined as financial advice that is given in the ordinary course of business and that is not excluded under relevant clauses of a schedule to the Act.[46]

11.42 In contrast to the *Corporations Act*, the *FMC Act* (NZ) does not distinguish between 'personal' and 'general' financial advice.

Structure of key definitions and related regulation

11.43 Under the existing structure for the regulation of financial product advice:

- financial product advice is defined as either general advice or personal advice;
- financial product advice is deemed a financial service for the purposes of licensing, conduct, and disclosure obligations;
- the provision of personal advice attracts a number of additional obligations that do not apply to general advice, or other financial services; and
- advice-related activities may be exempted from any of:
  - the definition of financial product advice;
  - the definition of financial service;
  - the requirement to hold an AFS Licence;
  - specific conduct or disclosure obligations applying to AFS Licensees.

11.44 The following sections analyse these structural features and consider whether greater coherence and navigability could be achieved by amending aspects of the existing definitional structure.

Financial product advice as an intermediary concept

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'.

46 Ibid s 431C(3). Exclusions from this definition in New Zealand are discussed further below: see [11.91].

11.45 Financial product advice always constitutes *either* general advice or personal advice. The only use for the broader term is to refer to these two types of advice collectively. In this way, general advice and personal advice are instances of 'interconnected' definitions. As discussed in **Chapter 6**, interconnected definitions should be used sparingly, because they require a reader to keep multiple concepts in their mind in order to understand a term. Accordingly, there is cause to consider whether this nesting of definitions can be avoided.

11.46 As outlined above, the imposition of, or exemptions from, advice obligations is often a function of whether the advice is general or personal. Substantive deployment of the overarching concept of financial product advice is comparatively limited. Key uses of the overarching term include the application of provisions relating to the ban on conflicted remuneration,[47] and the classification of financial product advice as a financial service.[48]

11.47 To the extent that general and personal advice are more frequently distinguished than they are grouped together, simplification can be achieved by removing the collective label of 'financial product advice' and instead referring to either 'personal advice and general advice' or 'personal advice or general advice', as required by relevant provisions. Apart from reducing interconnected definitions, this would also reduce the number of relevant concepts with which users of the legislation must be acquainted from three to two.

11.48 Implementation of this proposal would also facilitate the structural changes contemplated by **Proposal A14**, as outlined below, by enabling separate treatment of general and personal advice in relation to the definition of 'financial service'. Removing the overarching term of financial product advice would also assist to maintain definitional coherence in the event of any future changes to the label for 'general advice' involving replacement of the term 'advice', as discussed below.[49]

11.49 The definition of financial product advice does serve to apply common elements of the definitions of personal advice and general advice. However, s 766B could be redrafted to apply the substance of the definition of 'financial product advice' directly to the definitions of 'personal advice' and 'general advice'. This could be achieved, for example, by duplicating relevant elements of existing sub-ss (1) and (3) of s 766B for the definitions of general advice and personal advice, or incorporating these elements into the definition of personal advice and defining general advice using cross-references.[50]

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47 *Corporations Act 2001* (Cth) ss 963, 963A, 963B, 963C, 963D, 963L, 963N. See also ss 964B and 964F in relation to asset-based fees on borrowed amounts.

48 Ibid s 766A(1)(a). References to financial product advice also appear, for example, in provisions relating to: the requirement to hold an AFS Licence (s 911A); exemptions from the obligation to provide an FSG or SoA (ss 941C, 946B); and the definitions of 'dealing' and 'class of product advice' (ss 766C, 910A).

49 See [11.61]–[11.79].

50 For example, 'general advice is a recommendation or a statement of opinion, or a report of either of those things, that: (a) satisfies subsection (1)(a); and (b) does not satisfy subsection (1)(b)'.

11.50 Implementation of **Proposal A13** would entail amendments to the structure of the definitions under s 766B rather than the substance of those definitions. Case law interpreting the key elements of the definitions of financial product advice and personal advice would, accordingly, remain relevant to interpreting the revised definitions of personal advice and general advice.

11.51 This definitional restructuring would also necessitate consequential amendments to replace existing references to 'financial product advice' within the *Corporations Act*, *Corporations Regulations* and ASIC-made legislative instruments,[51] as well as cross-references in other statutes.[52]

Financial product advice as a 'financial service'

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'.

11.52 Section 766A(1)(a) treats the provision of financial product advice as a financial service for the purposes of Chapter 7 of the *Corporations Act*. The provision of financial product advice is accordingly captured by requirements applicable to all financial services, including licensing requirements, the requirement to provide an FSG, and licensee conduct obligations.[53]

11.53 **Figure 11.1** below depicts, at a high level, the key aspects of the regulatory framework that apply, in substance, to financial product advice as compared with those aspects applicable to other financial services. The sub-circles for general advice and personal advice highlight aspects that relate specifically to those types of advice, while aspects that apply to financial product advice generally are captured in the primary circle. The centre of the diagram illustrates the aspects of regulation that attach to all financial services, including financial product advice; while the aspects that sit outside the overlapping portion of the circles are unique to the regulation of financial product advice (or a subset thereof), or the regulation of other financial services.

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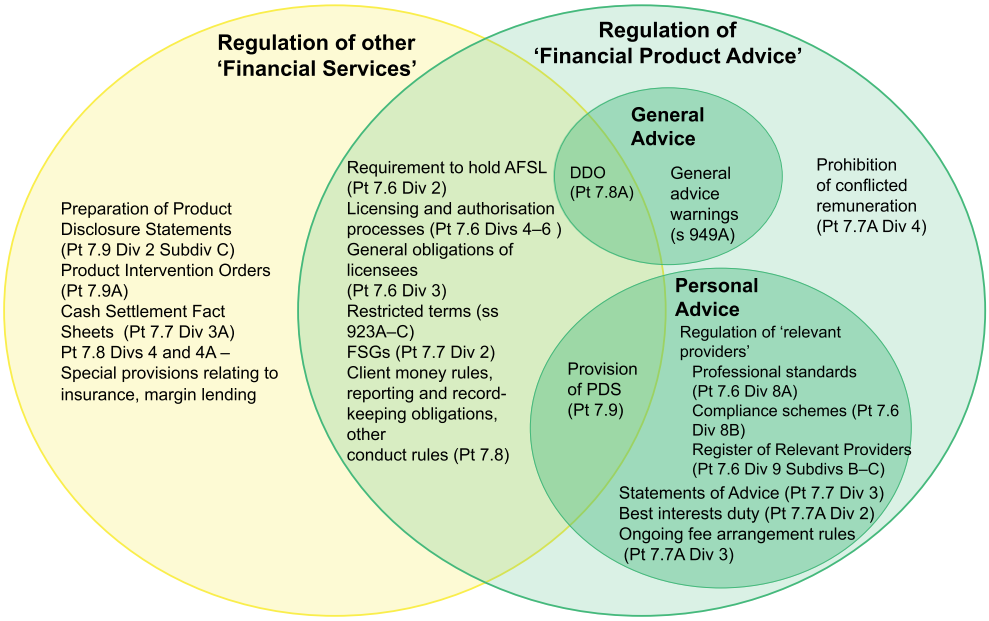
51 As at 30 June 2021, the term 'financial product advice' was used: 64 times across 25 sections of the *Corporations Act*; 72 times across 31 regulations and one schedule in the *Corporations Regulations*; and 79 times across 25 in force ASIC legislative instruments. In the *Corporations Act*, the term appears most frequently in the definitional provisions of ss 761A (8 times) and 766B (12 times).

52 The *Superannuation Industry (Supervision) Act 1993* (Cth) and *Australian Securities and Investments Commission Act 2001* (Cth) both refer to 'financial product advice'.

53 See **Chapter 8**, **Chapter 9**, and **Chapter 13** for discussion of licensing, disclosure, and conduct obligations respectively.

Figure 11.1: Comparison of the regulation of financial product advice and other financial services



11.54 This figure demonstrates that there is a significant number of provisions that apply to financial product advice — and, in particular, personal advice — that do not apply to other financial services. This includes provisions relating to the regulation of 'relevant providers' through special licensing requirements; the best interests duty and conflicted remuneration prohibitions; and the obligation to provide an SoA.

11.55 Under the regulatory framework as first enacted by the *FSR Act* the minimum standards for financial product advice largely mirrored those applicable to other financial services. The treatment of financial product advice as a financial service was convenient at this time, when SoAs were the only unique aspect of personal advice regulation. However, a shift in the relative emphasis on the policy objectives underpinning financial product advice has led to the introduction of a number of requirements targeting, in particular, personal advice provided to retail clients.[54]

11.56 'Financial service' functions solely as a convenient label for the purpose of grouping together activities that Parliament has determined should be regulated alike.[55] Given the substantive distinction between personal advice and other financial services under the existing regulatory framework, consideration should be given to whether the classification of personal advice as a financial service remains the most coherent approach.

54 See discussion above at [11.9]–[11.22].
55 See comments at [7.36] in **Chapter 7**.

11.57 The ALRC proposes decoupling personal advice from the definition of financial service. Existing references to 'financial service' could be amended to 'financial service and personal advice' or 'financial service or personal advice' as appropriate in order to maintain the application of relevant aspects of the regulation of financial services, including licensing requirements, FSG requirements, and licensee obligations. This structural amendment would be consistent with the principle, outlined in **Chapter 6**, that interconnected definitions should be used sparingly.

11.58 The treatment of general advice as a financial service would, however, be maintained by replacing the reference to 'financial product advice' in the definition of financial service with 'general advice'. Creating a structural distinction between general advice and personal advice in this manner would be consistent with the regulatory distinctions between these two activities. As highlighted by **Figure 11.1**, the regulation of general advice largely consists of requirements that are common to the regulation of financial services more generally. The unique aspects of regulation relate to general advice warnings, and the prohibition of conflicted remuneration (which applies to general and personal advice). This contrasts to the more extensive bespoke requirements that have developed in relation to personal advice. The ALRC's proposed relabelling of general advice (as discussed below) would serve to reinforce the existing regulatory distinction between these activities.

11.59 The proposed amendments would also facilitate, but not necessitate, potential changes in relation to the regulation of financial advice. Decoupling personal advice from 'financial service' would accommodate amendments to the regulation of licensing and conduct obligations of advisers by facilitating the introduction of further tailored requirements, for example, in relation to individual licensing of advisers,[56] without the need to introduce exemptions from generally applicable requirements for financial services. This possibility is discussed further at the end of this chapter.[57]

11.60 The ALRC also foreshadows giving greater consideration, as part of Interim Report C, to restructuring Chapter 7 to aggregate aspects of the regulatory framework that are specific to personal advice. At present, it is not evident on the face of the structure of Chapter 7 that significant aspects of the framework are only applicable to the provision of personal financial product advice. For example, the requirements in relation to 'relevant providers' relate only to providers of personal advice to retail clients, but are not readily identifiable as such based on the terminology used or their relative location within the *Corporations Act*.[58] Grouping these requirements together as licensing requirements for personal advice providers, and labelling them as such,

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56 This would be consistent with reforms called for by some industry representatives, in line with the general trend towards the 'professionalisation' of the financial advice sector: see, eg, CPA Australia (n 4) 4. The ALRC notes that there are a range of views on these issues: compare, eg, Stockbrokers and Financial Advisers Association, Submission to Financial Services Council, *Green Paper on Financial Advice: Affordable and Accessible Advice* (30 June 2021).

57 See discussion below at [11.118]–[11.135].

58 For further discussion of the concept of 'relevant provider' and the related concept of 'relevant financial product', see **Chapter 8**.

may enable users of the legislation to more readily identify whether or not these provisions are relevant to them.

Terminology: general and personal 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.

Renaming general advice

11.61 Previous inquiries have recommended replacement of the term 'general advice' on the basis that it is non-intuitive and may mislead consumers. However, no change has yet been made. Accordingly, consideration of whether a replacement term would better promote 'robust regulatory boundaries, understanding and general compliance with the law' falls within the ALRC's Terms of Reference for this Interim Report. The choice of a replacement term may be a matter considered by the Quality of Advice Review.

11.62 The relationship between general advice and personal advice may also benefit from clearer regulatory boundaries. A view expressed by stakeholders in consultations with the ALRC to date has been that 'the distinction is unclear' and 'not workable in practice in client interactions'.[59] Whether the boundary could be made clearer is explored further later in this chapter.[60] However, it is worth noting for present purposes that a replacement term for 'general advice' may assist in more clearly marking the existing distinction.

11.63 Concerns about the term 'general advice' arise from the use of the word 'advice', which may be understood by consumers to imply that their individual circumstances, objectives, or needs have been taken into account. However, as previously outlined, 'general advice' is broadly defined to encompass any recommendation or statement of opinion that is intended to influence a person in making a decision in relation to a particular product or class of financial products (or an interest therein), or which could reasonably be regarded as intended to have such an influence. It may readily include advertising or promotional materials,[61] which arguably would not be described as 'advice' in the ordinary sense of the term.

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59 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) 9.

60 See [11.107]–[11.117].

61 Advertising material is not excluded from the definition of financial product advice, but may be exempt from certain requirements: see, eg, *Corporations Act 2001* (Cth) ss 911A(2)(ea)–(ec), 949A(1)(c); *Corporations Regulations 2001* (Cth) regs 7.6.01(1)(o), 7.7.02(5A).

11.64 A concern along these lines was articulated in the Final Report of the 2014 *Financial System Inquiry*, which considered that

> consumers may misinterpret or excessively rely on guidance, advertising and promotional and sales material when it is described as 'general advice'. The use of the word 'advice' may cause consumers to believe the information is tailored to their needs. Behavioural economics literature and ASIC's financial literacy and consumer research suggests that terminology affects consumer understanding and perceptions. …
>
> The Inquiry believes greater transparency regarding the nature of advice and the ownership of advisers would help to build confidence and trust in the financial advice sector. In particular, 'general advice' should be replaced with a more appropriate, consumer-tested term to help reduce consumer misinterpretation and excessive reliance on this type of information. Consumer testing will generate some costs for Government, and relabelling will generate transitional costs for industry — although these are expected to be small. The Inquiry believes the benefits to consumers from clearer distinction and the reduced need for warnings outweigh these costs.[62]

11.65 Notably, the Inquiry did not itself outline a proposed replacement term. However, in its response, the Australian Government indicated its agreement to rename 'general advice' to improve consumer understanding and expressed a commitment to consult widely and conduct consumer testing before finalising the new term.[63]

11.66 Also published in 2014 was the Final Report of the Inquiry into Proposals to Lift the Professional, Ethical and Education Standards in the Financial Services Industry, which was conducted by the Parliamentary Joint Committee on Corporations and Financial Services.[64] The Joint Committee noted that:

> The majority of the evidence received by the committee supports a change to the term 'general advice' to ensure that it more closely describes the nature of the information communicated which as the FSI report highlights, often contains sales and advertising information. The committee notes that industry associations including the [Financial Planning Association, Financial Services Council, Australian Banking Association and Self-Managed Super Fund Professionals Association of Australia] … have acknowledged the need for change.[65]

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62 David Murray et al, *Financial System Inquiry* (Final Report, 2014) 271–2.

63 Australian Government, *Improving Australia's Financial System: Government Response to the Financial System Inquiry* (2015) 22.

64 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Proposals to Lift the Professional, Ethical and Education Standards in the Financial Services Industry* (2014).

65 Ibid [2.22].

11.67 The Joint Committee therefore recommended a change to the term 'general advice' to 'make the nature of the information communicated clearer to consumers and investors'.[66] The Joint Committee went further than the Financial System Inquiry in suggesting a particular replacement: namely, the term 'product sales information', which would 'more closely reflect the nature of the advice that is currently given under the term "general advice"'.[67]

11.68 As with the Financial System Inquiry, the Australian Government's response to this report noted its agreement to rename 'general advice' and advised that it would 'consult with a wide range of stakeholders and conduct consumer testing before finalising the new term'.[68]

11.69 The Productivity Commission, in its inquiry into *Competition in the Australian Financial System*, also considered that there was 'widespread acknowledgment that consumers do not fully understand the nature of the advice provided in general advice' and that 'the label of "advice" is an important consideration for consumers when making an assessment of the material received'.[69] It was further said that the 'framing of general advice in certain ways can exploit the behavioural aspects of financial decision-making … by giving the consumer the impression that the advice is suitable for them'.[70] It was recommended that 'general advice' be renamed 'to reduce consumer misinterpretation and excessive reliance on this type of information'.[71] The Commission also said in relation to the proposed reform:

> The aim is to improve consumer understanding of the nature of the information and guidance being provided through a more informative description. In particular, this label would ideally emphasise that the information or other material is not tailored to a consumer's circumstances nor is there any obligation to consider the consumer's best interest.[72]

11.70 However, the Commission did not propose a specific replacement term. Instead, it suggested consumer testing be undertaken to find a suitable term.[73]

11.71 In accordance with the Government's commitment to exploring a replacement term, consumer testing of replacement terms was commissioned by ASIC in 2020.[74]

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66 Ibid [2.23].
67 Ibid.
68 Australian Government, *Australian Government Response to the Parliamentary Joint Committee on Corporations and Financial Services Report: Inquiry into Proposals to Lift the Professional, Ethical and Education Standards in the Financial Services Industry* (August 2017) 1.
69 Productivity Commission, *Competition in the Australian Financial System* (2018) 291.
70 Ibid 292.
71 Ibid.
72 Ibid.
73 Ibid 293.
74 Australian Securities and Investments Commission, 'Findings from Consumer Research on "General Advice" Label' (News Item, 4 May 2021) <www.asic.gov.au/about-asic/news-centre/news-items/findings-from-consumer-research-on-general-advice-label>. The consumer research was conducted by Newgate Communications Pty Ltd.

ASIC reported that:

> The research found no evidence to suggest that changing the general advice label, including adding the word 'only' to the general advice label, will have any measurable effect on consumers' perceptions about the nature of the advice given. This includes perceptions about the personalisation of the advice, understanding of the advice provider's obligations and the importance of seeking further information.[75]

11.72 As part of the commissioned research, a shortlist of 15 alternative labels was tested with a nationally representative sample of 3,642 participants. In ASIC's view:

> the survey results showed no effect on consumers' understanding of general advice when a label was used compared to when no label was used. The majority of participants in the qualitative research also indicated they did not notice the label.[76]

11.73 A key finding from the research was that consumers were more likely to be influenced by factors other than the term used, with ASIC noting that 'the circumstances in which general advice is received could significantly increase the risk of consumer misunderstanding of the nature of the advice given'.[77] In particular, participants'

> perceptions that the general advice was tailored to their personal circumstances was increased when the hypothetical interaction was personal in nature, such as when:
>
> - the advice was given one on one (in person or by phone);
> - they had some prior relationship with the person giving the advice;
> - they had asked a direct question about what would be best for them; and/or
> - they had provided some initial contextualising information (e.g. personal details).[78]

11.74 The findings from this research suggest that any change to the label of 'general advice' is unlikely to have a significant impact on consumers. Nonetheless, as discussed in **Chapter 6**, defined terms should correspond intuitively with the substance of the definition. This principle supports the replacement of 'general advice' with a more accurate term. There appears to be little reason to retain the existing term, and a potential benefit gained — at least to users of the legislation, if not to consumers — if a more accurate term is used.

11.75 Accordingly, the ALRC considers that the term should be replaced with a term that corresponds intuitively with the substance of the definition. Later in this chapter, the ALRC considers whether the provision of an amended general advice warning could help address concerns about consumer misunderstanding, if it were

75 Ibid.
76 Ibid.
77 Ibid.
78 Ibid.

determined that a replacement term would be unlikely to meaningfully assist in this regard.

11.76 A question remains as to what term should be used to replace 'general advice'. As discussed, most reviews have eschewed suggesting a specific replacement. The term 'product sales information' was suggested by the Joint Parliamentary Committee. However, that term is arguably inapt because 'information' suggests material that is merely factual and not intended to persuade a person to acquire a product, which would be inconsistent with the substance of the definition.

11.77 It would be more consistent with the substantive definition — being a recommendation or statement of opinion that is intended to influence (or may reasonably be regarded as having such an influence) the making of a decision in relation to a financial product — to replace 'general advice' with a term such as 'non-personalised recommendation' or 'non-tailored recommendation'.

11.78 However, at this stage the ALRC has decided not to formally propose a specific replacement term, on the basis that this may be considered as part of the Quality of Advice Review.

11.79 Ultimately, the ALRC is of the view that the term 'general advice' does not properly reflect the substance of the definition and should therefore be replaced, even if consumer understanding is not enhanced. The key concern for any replacement term is that it accurately reflects the substance of the definition, and that any change will not have a detrimental effect on consumer understanding.

Renaming personal advice

11.80 If a replacement term for general advice is to be introduced, the ALRC suggests that consideration should also be given to renaming personal advice.

11.81 Although the term 'personal advice' generally reflects the substance of its definition, a new term could help sharpen the distinction with 'general advice' (or its replacement term), particularly if the proposals to decouple personal advice from the concept of financial service, and to remove the overarching concept of 'financial product advice', are adopted. For example, using the term 'financial advice' to refer to what is now 'personal advice', may be appropriate to mark the distinction between the concepts now termed general and personal advice, and the different regulatory requirements that attach to them. Such a change may also be consistent with further professionalisation of the industry, by signalling a sharper distinction between sales-related and promotional activities, and the provision of more tailored advice, which is subject to much greater regulation. However, consideration should also be given to whether a less generic term than 'financial advice' would be more suitable.

11.82 It is noteworthy that explanatory materials accompanying the FOFA reforms in 2012 invoked the language of 'financial advice' when referring to what is now termed

'personal advice'. For example, the Explanatory Memorandum for the relevant Bill observed that:

> The reforms focus on the framework for the provision of financial advice. The underlying objective of the reforms is to improve the quality of financial advice while building trust and confidence in the financial planning industry through enhanced standards which align the interests of the adviser with the client and reduce conflicts of interest.[79]

Advice-related exclusions and exemptions from Chapter 7

11.83 As noted above, under the existing regulatory framework, particular advice-related activities are variously exempted from:

- the definition of financial product advice;
- the definition of financial service;
- the requirement to hold an AFS Licence; and
- specific conduct or disclosure obligations applying to AFS Licensees.

11.84 These exemptions are dispersed across the *Corporations Act*, the *Corporations Regulations*, and ASIC legislative instruments (or class orders).

11.85 The ALRC's primary analysis of exemptions and exclusions for advice-related activities identified as at 30 June 2021:

- 8 sections of the *Corporations Act* that grant one or more exemptions or exclusions;[80]
- 9 sections of the *Corporations Act* that provide authority for regulations or ASIC legislative instruments to exclude or exempt;[81]
- 28 regulations in the *Corporations Regulations* that grant at least one exemption or exclusion, or modify or prescribe the circumstances for the application of exemptions in the *Corporations Act*; and
- 21 in force ASIC legislative instruments that grant exemptions from the requirement to hold an AFS Licence and/or specific conduct or disclosure obligations applying to AFS Licensees.[82]

11.86 **Figure 11.2** illustrates the structure and source of existing exemptions for advice-related activities under Chapter 7 of the *Corporations Act*.[83]

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79 Revised Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Cth) 3.

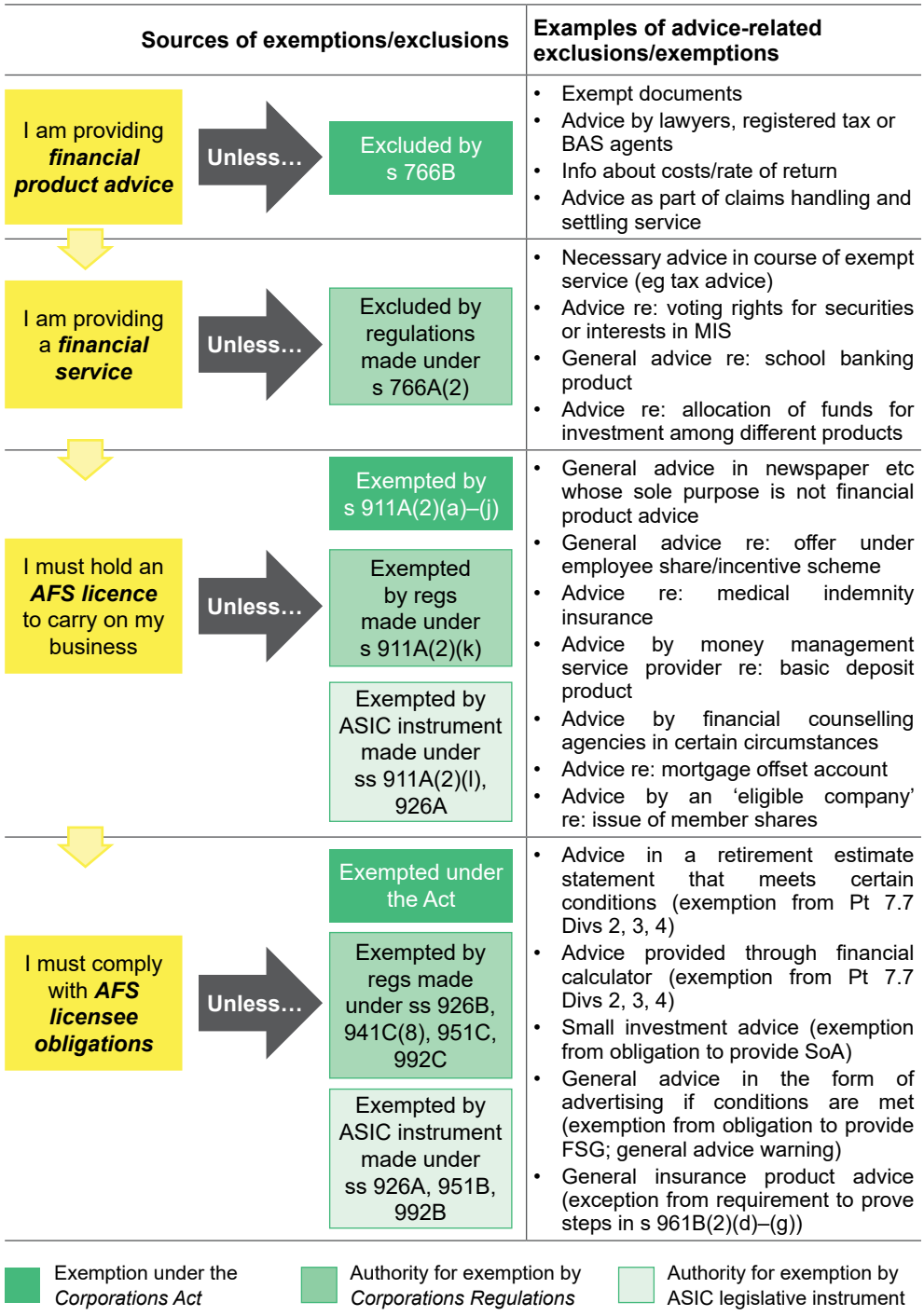
80 See *Corporations Act 2001* (Cth) ss 766B(1A),(5)–(7), 911A(2)(ea)–(ed), 916F(1AA), 941C(4)–(7), 946A, 946B, 949A(1)(c), 1200F.

81 See ibid ss 766A(2), 911A(2)(k)–(l), 926A, 926B, 941C(8), 951B, 951C, 992B, 992C. See also the general power for regulations to exempt from provisions of Chapter 7 in s 1368.

82 This number does not include exclusions in relation to Part 7.9 or ss 992A and 992AA, as the application of these obligations is not limited to licensees.

83 A more detailed version of this flowchart, which summarises the effect of relevant provisions, regulations, and ASIC legislative instruments that grant exclusions or exemptions for advice-related activities is available on the ALRC website <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-FSL-Financial-product-advice-exemptions-flowchart.pdf>.

Figure 11.2: Summary overview of advice-related exclusions and exemptions



11.87 The current framework for exemptions results in significant challenges for navigability and obscures the intended scope of the regulation of financial product advice for the purposes of Chapter 7 of the *Corporations Act*.

11.88 In accordance with **Proposal A10** from Chapter 10, existing exemptions and exclusions that are currently reflected in the *Corporations Act*, *Corporations Regulations*, and ASIC legislative instruments should be consolidated in a thematic legislative instrument. This would significantly reduce the number of sources that a reader of the Act would need to consult in order to determine whether they need to hold a licence or comply with obligations under Chapter 7 in respect of the provision of advice.

11.89 As part of this consolidation process, exemptions and exclusions should also be restructured so that related or similar exemptions appear together under appropriate subheadings, or are rationalised where possible, as discussed in **Chapter 10**.

11.90 For example, there appears to be scope for consolidation of existing exemptions in relation to general advice provided in the media or in advertising. At present there are relevant exemptions from both the requirement to be licensed and disclosure obligations in relation to general advice in the media or advertising that appear across multiple sources, including the *Corporations Act*, the *Corporations Regulations*, and an ASIC legislative instrument:

- Licensing exemptions:
  - Section 911A(2)(ea)–(ec): Licensing exemption for general advice provided in a newspaper, periodical, through an information service, or in sound/video/data recordings which are generally available to the public and whose principal or sole purpose is not the provision of financial product advice. Conditions may apply per reg 7.6.01B.
  - Regulation 7.6.01(1)(o): Licensing exemption for general advice by a product issuer provided in the media with disclosures equivalent to general advice warning.
  - *ASIC Corporations (Advertising by Product Issuers) Instrument 2015/539*: Licensing exemption for general advice in the form of an advertisement from the product issuer if the advertisement indicates that a person should consider whether or not the product is appropriate for the person.
- Disclosure exemptions:
  - Regulation 7.7.02(5A): Exemption from requirement to provide an FSG for general advice in the form of advertising on a billboard or poster, or in the media by a product issuer if the advertisement indicates that a person should consider whether or not the product is appropriate for the person.
  - Section 941C(4), reg 7.7.02(2): Exemption from requirement to provide an FSG for a broadcast of general advice to the public, or a section of the public, that may be viewed or heard by any person, or distributing

or displaying promotional material that provides general advice to the public.

- Section 949A(1)(c): Exemption from requirement to provide general advice warning in circumstances prescribed in the regulations. Regulations 7.7.20 and 7.7.02(5A) prescribe general advice in the form of advertising on a billboard or poster, or in the media by a product issuer if the advertisement indicates that a person should consider whether or not the product is appropriate for the person.
- *ASIC Corporations (Advertising by Product Issuers) Instrument 2015/539*: Exemption from Part 7.7 Divs 2, 3, and 4 in relation to general advice in the form of an advertisement of issue of securities to be listed by the licensee if the advertisement indicates that a person should consider whether or not the securities are appropriate for the person.

11.91 The drafting of exclusions from financial advice obligations in the *FMC Act* (NZ) is instructive in terms of how exclusions may be structured to better aid reader understanding of the scope of advice. Financial advice exclusions in that legislation are centralised in Schedule 5 Part 2,[84] and are arranged under clear subheadings that flag the subject of the exclusion, such as 'Non-financial not-for-profit organisation', 'Advice to product provider', and 'Advice given for purpose of complying with lender responsibilities'. Clause 8 of Schedule 5 addresses exclusions for 'Ancillary services and other occupations'. This exclusion provides that financial advice is not 'regulated financial advice' if the person giving the advice carries on a listed occupation (such as, journalist, lawyer, qualified statutory accountant, tax agent, real estate agent, or teacher) and provides advice in the ordinary course of carrying on that occupation and as an ancillary part of carrying on the principal activity of that occupation. This can be compared to a range of exemptions in the Australian framework that are relevant to persons in these occupations.[85]

Harmonisation of related concepts across Commonwealth Acts

11.92 As observed in **Chapter 5**, consistent use of terminology in related Acts makes it easier for readers of legislation to understand and apply the law. Accordingly, to the extent possible, the usage of key terminology should be the same across financial services legislation.

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84 Three additional exclusions are prescribed by the *Financial Markets Conduct Regulations 2014* (NZ) pursuant to clause 17 of Schedule 5. See reg 299K, sch 21B.

85 See, eg, *Corporations Act 2001* (Cth) ss 766B(5) [advice given by lawyers and registered tax or BAS agents], 911A(2)(ea)–(ec) [general advice in newspaper etc], 941C(4) [reg 7.7.02(2) prescribes, eg, broadcast of general advice to public]; *Corporations Regulations 2001* (Cth) regs 7.1.29 [advice provided in course of exempt service], 7.1.33F [school banking product]; *ASIC Corporations (Real Estate Companies) Instrument 2015/1049* [general advice to vendor by licensed real estate agent in relation to offer for sale of eligible shares in real estate company]; *ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/869* [general advice by operator of a strata scheme or real estate agent in relation to interests in strata scheme].

11.93 The term 'financial product advice' is also defined in the *ASIC Act* for the purposes of the definition of when 'a person provides a financial service'.[86] The core of the definition appears in s 12BAB(5). The definition resembles, but does not mirror, the definition in the *Corporations Act*.

11.94 Notably, the specific exclusions from the definition of 'financial product advice' in the *Corporations Act* are only partly reflected in the *ASIC Act* definition. The *ASIC Act* definition does not include exclusions equivalent to those outlined in s 766B(5)(b)–(c), (6), or (7) of the *Corporations Act*. The *ASIC Act* also does not distinguish between 'personal advice' and 'general advice'. Section 12BAB(5) does, however, make provision for the exclusion of documents prescribed by regulations from the scope of the definition (although it does not define 'exempt document or statement' in line with s 766B).[87] Section 12BAB(6) of the *ASIC Act* replicates the exclusion in s 766B(5)(a) of the *Corporations Act* in relation to advice given by a lawyer.

11.95 The *ASIC Act*'s definition of financial product advice is used for the purposes of defining 'financial service' in that legislation, which in turn is used in relation to consumer protection provisions in Part 2 Div 2. Accordingly, the differential definition of 'financial product advice' serves the purpose of enabling a broader application of those provisions.

11.96 In **Chapter 7**, the ALRC proposes the enactment of a uniform definition of 'financial service' in corporations and financial services legislation (**Proposal A3**). In order to maintain consistency between the definitions of 'financial service' across the *ASIC Act* and *Corporations Act*, the *ASIC Act* should also be amended in accordance with **Proposal A13** so that, in place of the term 'financial product advice', it uses 'personal advice' and 'general advice' (or any replacement term introduced in accordance with **Proposal A15**). The definitions of 'personal advice' and 'general advice' in the *ASIC Act* should mirror the definitions for those terms in the *Corporations Act*. Differences in the types of activities that are currently excluded from the definitions of financial product advice can be accommodated through implementation of **Proposal A10**, which would entail the consolidation of exclusions in delegated legislation.

11.97 If **Proposal A14** is implemented, the maintenance of consistency in the definitions of 'financial service' across the *ASIC Act* and *Corporations Act* would additionally require consequential amendments to the *ASIC Act* to decouple 'personal advice' from the definition of 'financial service', and replace references to 'financial service' in substantive provisions with 'financial service and personal advice' or 'financial service or personal advice' as appropriate.

11.98 The *SIS Act* directly adopts the *Corporations Act* definition of 'financial product advice'.[88] Consequential amendments to align terminology will accordingly need to

86 See *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAB.
87 There are currently no regulations prescribing exempt documents for the purposes of s 12BAB(5).
88 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

be made to the *SIS Act* if the *Corporations Act* is to no longer use the term 'financial product advice' in accordance with **Proposal A13**.

11.99 There may be other legislation in which simplification could be achieved by aligning broadly analogous terms or concepts. For example, the *Tax Agent Services Act 2009* (Cth) makes reference to 'advice of a kind usually given by financial services licensee or a representative [thereof]' (s 90-15), but does not define 'advice'. The ALRC invites the views of stakeholders on whether the terminology in this, or other legislation, could also be aligned with the terminology suggested in this chapter, without altering existing policy settings.

Other opportunities for simplification or clarification

Redundant definition: 'financial product advice law'

11.100 Currently, s 761A defines the term 'financial product advice law'. However, the term is not used in the *Corporations Act*, the *Corporations Regulations*, or any legislative instruments made by ASIC. The term also does not appear in the *ASIC Act,* to which the definition refers.

11.101 The inclusion of this definition appears to be a drafting mistake arising from the last-minute removal of special rules relating to 'Declared Professional Bodies' ('DPBs') from the FSR Bill. DPBs would have been exempt from the requirement to hold an AFS Licence for the provision of financial product advice, but would have been required to comply with specified obligations.[89] Relevantly, DPBs would have been required 'to take reasonable steps to ensure that their members comply with the "financial product advice laws"'.[90]

11.102 The term serves no purpose in the current regime, and appears to have never served a purpose since the enactment of the *FSR Act*. In accordance with **Recommendation 2** in Chapter 4, the definition of the term should be repealed.

Changes to legislative presentation

11.103 The ALRC considers that if, contrary to **Proposal A13**, the concept of 'financial product advice' is retained, greater clarity in presentation could be achieved by splitting s 766B of the *Corporations Act* into two separate provisions which deal separately with each of 'financial product advice' and the subsidiary concepts of 'general advice' and 'personal advice'.

11.104 As already discussed, additional clarity would also be provided by consolidating the various exclusions outlined in ss 766B(1A)–(1B) and (5)–(9), in

89 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [11.48]–[11.57].
90 Ibid [11.56].

addition to the limitation in s 766B(3)(a) with respect to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), into a consolidated legislative instrument, as per **Proposal A10**. These exclusions add considerably to the complexity of s 766B and obscure the provision's core purpose.

11.105 By way of illustration, if the term 'financial product advice' is retained, the clarity of s 766B could be substantially improved by amending it and inserting a new s 766BA, so as to provide:

766B Definition of financial product advice

In this Act, ***financial product advice*** means a recommendation or a statement of opinion, or a report of either of those things, that:

(a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or

(b) could reasonably be regarded as being so intended.

766BA Definitions of personal advice and general advice

(1) Financial product advice is either personal advice or general advice.

(2) ***Personal advice*** means financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

(a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs; or

(b) a reasonable person might expect the provider to have considered one or more of those matters.

(3) ***General advice*** means financial product advice that is not personal advice.

Potential future directions

11.106 In the remainder of this chapter, the ALRC considers policy issues that merit further consideration in future reviews concerning financial advice, such as the Quality of Advice Review. This analysis addresses some key issues that were raised in consultations with the ALRC in relation to the definitions, and regulation, of personal and general advice. As the types of reforms canvassed below would involve a change in current policy settings, they fall outside of the ALRC's remit, and are therefore not the subject of any formal proposals. Nevertheless, the analysis below highlights how the reforms proposed in this chapter could complement potential future directions for the regulation of advice.

Delineation between personal and general advice

11.107 The substantive delineation between the concepts of 'personal advice' and 'general advice' has been the subject of some contention in recent years. In consultations with the ALRC, some stakeholders were staunchly of the view that the conceptual distinction between the two types of advice is 'unclear' and 'not workable in practice in client interactions'.[91]

11.108 The characterisation of any particular conduct as 'personal' or 'general' advice will turn on whether the provider has considered one or more of the person's objectives, financial situation and needs, or whether a reasonable person might expect the provider to have considered one or more of those matters. The latter limb, in particular, may be viewed as having created uncertainty in practice; whether conduct will be 'personal advice' will turn on how a reasonable person *might* understand things in a set of particular circumstances.

11.109 The application of this test was recently considered by the High Court in relation to proceedings brought by ASIC against Westpac Securities Administration Ltd ('Westpac'). Those proceedings arose out of a campaign by Westpac to increase the funds under management in superannuation products.[92] The Court's judgment indicates that, to achieve that end, Westpac contacted existing customers and invited them to consider having Westpac, on their behalf, roll over monies from other superannuation accounts into their Westpac account.[93] Phone calls conducted with each customer began with a general advice warning — to the effect that their particular needs, objectives and circumstances were not taken into account — but subsequently the customer's needs and objectives were elicited by the Westpac representative.[94] After asking why a customer was interested in rolling-over their superannuation, Westpac used 'social proofing' techniques to confirm the validity of those objectives, and offered the roll-over service in that context.[95]

11.110 At first instance, the primary judge concluded that 'personal advice' had not been given.[96] However, the Full Federal Court allowed an appeal by ASIC and concluded that 'personal advice' had been given.[97] The High Court unanimously upheld that conclusion after a further appeal. As the plurality of the Court wrote:

> On the undisputed facts of the case, a reasonable person in the position of each of the members called by Westpac might expect Westpac, in recommending that the member accept Westpac's offer to procure the roll-over of the

91 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) 9.

92 *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3 [42] (Gordon J).

93 Ibid [44] (Gordon J).

94 Ibid [45] (Gordon J).

95 Ibid.

96 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2018) 133 ACSR 1 [148], [158], [394].

97 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170.

> member's external superannuation accounts into the member's BT account, to have considered one or more of the member's objectives, financial situation and needs.[98]

11.111 Although customers had received a warning that the advice they received was only general in nature, the plurality of the High Court considered that this warning was insufficient to prevent characterisation of the advice as personal advice. This was principally because, after giving the warning, the Westpac representatives set about 'eliciting from each member a statement of the member's objectives insofar as they were germane to the decision as to whether it was in each member's best interests to roll over external superannuation accounts'.[99] The Westpac representatives then confirmed the validity of the expressed objectives.[100]

11.112 It was particularly significant that the text of s 766B(3) of the *Corporations Act* only requires that the provider has considered (or that a reasonable person *might* expect them to have considered) 'one or more of the person's objectives, financial situation and needs'.[101] By eliciting the members' objectives, confirming the validity of those objectives, and recommending the roll-over service in that context, the statutory test had been satisfied.[102]

11.113 This decision highlights how the line between general advice and personal advice is necessarily influenced by the context of the advice and the view that a reasonable person may arrive at in that context. In consultations with the ALRC, stakeholders noted that the contextual nature of the statutory test can make it difficult for advisers to know what kind of advice they are providing, and accordingly what obligations they need to comply with. Further, as already discussed, the non-intuitive meaning attributed to 'general advice' may also mislead consumers into believing they have received advice that is tailored to their circumstances, needs, or objectives.

11.114 The benefit of the current test is that it is sensitive to context, in an area where consumers themselves are most likely to come to a view as to whether they have received personal advice based on that context (as the consumer research discussed earlier indicated).

11.115 In the ALRC's view, rather than changing the legislative boundary between these two concepts, a better way to reduce the risk of accidental non-compliance by advisers, and the potential for consumer misunderstanding or harm, would be to ensure that the distinction between the concepts — and its implications — is communicated more clearly to consumers when the intention is to provide general advice only.

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98 *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3 [5] (Kiefel CJ, Bell, Gageler and Keane JJ).
99 Ibid [8].
100 Ibid.
101 Ibid [10].
102 Ibid.

11.116 Currently the general advice warning in s 949A must be given when general advice is given to a retail client. The client must be warned that the advice has been prepared without taking account of their objectives, financial situation or needs, and therefore that the client should, before acting on the advice, consider the appropriateness of the advice taking account of those matters, and consider any applicable PDS or information statement (if the advice relates to the acquisition, or possible acquisition, of a financial product).[103] Notably, the warning does not inform clients of the *practical implications* of receiving only general, as opposed to personal, advice.

11.117 Amendment of the general advice warning was raised by the research report commissioned by ASIC, which 'identified potential means of clarifying general advice to consumers such as by … explicitly stating in the general advice warning that the provider of general advice is not required to act in the consumers' best interests'.[104]

Professionalising financial advice

11.118 The Financial Services Royal Commission considered that the history of the financial advice industry in Australia was a 'story of an incomplete transformation — from an industry dedicated to the sale of financial products to a profession concerned with the provision of financial advice'.[105] For some time now, the Financial Services Royal Commission observed, 'a financial adviser has been something between a salesperson and a professional adviser'.[106]

11.119 Over the past decade, a number of legislative changes have progressed the industry towards becoming a profession. For example, the FOFA reforms in 2012 introduced a ban on conflicted remuneration, and imposed more stringent behavioural obligations. Further, as also discussed earlier in this chapter, amendments in 2017 were designed to lift the standards of advisers, including by imposing stricter educational requirements. As the Financial Services Royal Commission noted, these measures represent 'a further important step towards making financial advice a profession'.[107]

11.120 The Financial Services Royal Commission considered that there were 'three matters that will need to be addressed before the provision of financial advice can truly be regarded as a profession'.[108] The first was the practice of charging 'fees

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103 The required warning is modified in certain circumstances by *Corporations Regulations 2001* (Cth) regs 7.7.20, 7.7.02(5A); *ASIC Corporations (Advertising by Product Issuers) Instrument 2015/539*.

104 Australian Securities and Investments Commission, 'Findings from Consumer Research on "General Advice" Label' (News Item, 4 May 2021) <www.asic.gov.au/about-asic/news-centre/news-items/findings-from-consumer-research-on-general-advice-label>.

105 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019) 119.

106 Ibid 120.

107 Ibid 134.

108 Ibid.

for no service'; the second was poor advice 'which, too often, is the result of the conflicts of interest that continue to characterise the financial advice industry'; and the third was the need for a 'credible and coherent system of professional discipline', noting that the arrangements at the time were 'fragmented, and hampered by inadequate sharing of information'.[109]

11.121 To ameliorate these issues, the Financial Services Royal Commission made a number of recommendations, including to: require annual renewal of ongoing fee arrangements; require advisers to disclose when they are not independent; conduct a future review of measures to improve the quality of advice; repeal grandfathering provisions and certain other exceptions that permitted conflicted remuneration; introduce reference checking, information sharing, and reporting obligations for advisers; and introduce a new disciplinary system for advisers.[110] In its response to the Financial Services Royal Commission, the Australian Government agreed to all of these recommendations.[111]

11.122 There were two key substantive policy reforms raised in consultations with the ALRC as potential avenues to further advance the professionalisation of the financial advice industry, and thereby improve the quality of advice and consumer outcomes. The first concerns the individual licensing of advisers. The second concerns the current legislative link between financial advice regulation and financial products. The ALRC considers that these are complex issues that should be explored further in Treasury's forthcoming Quality of Advice Review.

Individual licensing of advisers

11.123 The Financial Services Royal Commission observed that a requirement of individual registration was 'common to most professions', including for health practitioners, lawyers, architects, and teachers.[112] However, as discussed in **Chapter 8**, the current AFSL regime permits an AFS Licence to be held by a corporate entity, which in turn may appoint 'authorised representatives' and employ large numbers of individuals who provide financial services on behalf of the licensee. It may be argued that such a system runs the risk of diluting individual accountability, since non-compliance may lead to an adviser's loss of employment with a particular licensee, but not complete exclusion from the industry (subject to ASIC's power to make banning orders).[113]

11.124 Notably, the Financial Services Royal Commission considered that a key feature of any new approach to discipline should be that 'each financial adviser

109 Ibid 134–5.
110 Ibid 178–217.
111 Australian Government, *Restoring Trust in Australia's Financial System: Government Response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (February 2019) 13–17.
112 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 105) 213.
113 *Corporations Act 2001* (Cth) s 920A.

… be individually registered'.[114] It was considered that this would have a number of benefits, including by ensuring valuable information about advisers is made available to the public; facilitating a central disciplinary body enabling complaints about individual advisers; facilitating the introduction of additional requirements for advisers; and impressing upon advisers that they occupy a position of trust.[115] Further, the Financial Services Royal Commission wrote, such a system

> would not detract in any way from the existing obligations of AFSL holders who employ financial advisers or appoint authorised representatives. Rather, it would ensure that financial advisers who fail to adhere to the standards expected of them would face consequences that extend beyond their employment or appointment by a particular licensee, and affect their capacity to provide financial advice more generally.[116]

11.125 Although the Financial Adviser Standards and Ethics Authority now approves educational requirements for individual advisers and provides a Code of Ethics with which individual advisers must comply, individual advisers are not subject to a licensing requirement.[117]

11.126 The *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (Cth) has recently been passed by Parliament, which amends the *ASIC Act* and *Corporations Act* to introduce a new registration system for financial advisers. The *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (Cth) distinguishes between 'Stage 1 registration' (commencing after 1 January 2022), which involves a one-off registration administered by ASIC, using the existing Register of Relevant Providers, and 'Stage 2 registration', which will commence on a day set by proclamation (or four years after Royal Assent), and require 'eligible individuals' to register themselves and renew their registration annually.[118]

11.127 Although the creation of a register may be a step towards greater individual accountability, it is not an individual licensing system. Notably, upon receiving a valid application, ASIC will be required to 'register a financial adviser, unless one or more grounds for refusal apply'. ASIC must refuse to register an adviser if they are banned, disqualified, or subject to a registration prohibition order.[119] In contrast, as discussed in **Chapter 8**, a key incident of the AFSL regime is that an applicant must satisfy ASIC that they are a 'fit and proper' person.

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114 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 105) 212.

115 Ibid 213–14.

116 Ibid 214.

117 Financial Adviser Standards and Ethics Authority, 'Our Work' <www.fasea.gov.au/about>. This Authority was created by the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth). Pursuant to the new framework established by the *Financial Sector Reform (Hayne Royal Commission Response— Better Advice) Act 2021* (Cth), the Authority is being wound up and its functions transferred to ASIC and Treasury.

118 Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021 (Cth) 12.

119 Ibid 49.

11.128 A useful model for substantive future reforms may be provided by New Zealand's new financial advice regime. As of 15 March 2021, the *FMC Act* (NZ) requires individuals who wish to provide regulated financial advice to retail clients to obtain a Financial Advice Provider licence.[120] A transitional licensing regime applies for some existing providers, but a full licensing requirement will also apply to those persons from 16 March 2023.[121] New Zealand's new regime was developed following a review of the existing regulatory regime for financial advice.[122]

11.129 **Proposal A14**, which would remove personal advice from the definition of financial service, could facilitate reforms to introduce individual licensing of advisers, by more easily enabling the introduction of tailored requirements without the need to introduce exemptions from requirements that are generally applicable to financial services.

Severing the connection with 'financial product'

11.130 Another potential avenue for further professionalising the industry is to sever the connection that the current regulation of financial advice has with financial products. As outlined earlier, the current definition of 'financial product advice' in s 766B of the *Corporations Act* contains a connection to the defined term of 'financial product' (discussed further in **Chapter 7** of this Interim Report). Removing this connection could provide at least two benefits.

11.131 First, the current invocation of 'financial product' in s 766B is an instance of definitional interconnection which, as explained in **Chapter 6**, should be avoided where possible. The current usage of the term 'financial product' in s 766B defines the regulatory perimeter of regulated financial advice. Given the broad scope of the term 'financial product', this definitional 'nesting' might be justified on the basis that there are not likely to be many examples of advice relating to a person's finances that would not involve a 'financial product'. Almost all financial advice is therefore likely to be caught by the 'financial product advice' definition.

11.132 On the other hand, it was suggested in consultations that there may be examples of 'strategic advice' that would not relate to financial products, and therefore would not constitute 'financial product advice'.[123] Further, advice to invest in areas that are the subject of an exclusion from the definition of 'financial product' would also not constitute 'financial product advice'.

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120 Financial Markets Authority (NZ), 'About the New Financial Advice Regime' <www.fma.govt.nz/compliance/role/fap-new-regime/about-the-changes>. Financial advisers who provide advice on behalf of another financial advice provider are not required to hold a licence.

121 Ibid.

122 Ministry of Business, Innovation and Employment (NZ), 'Development of the Financial Services Legislation Amendment Act' <www.mbie.govt.nz/business-and-employment/business/financial-markets-regulation/regulation-of-financial-advice>.

123 For example, advice in relation to property, cash flow, or estate planning.

11.133 Second, the current linkage with 'financial product' reflects the historical conception of the industry as being 'dedicated to the sale of financial products'.[124] Removal of the linkage with financial product could serve to underscore a new conception of the industry as being concerned with the provision of advice that may affect a person's finances and financial wellbeing, which may or may not involve a recommendation or a statement of opinion about a financial product or class of financial products.

11.134 While the current linkage to 'financial product' may provide greater particularity about regulatory scope, many professions are governed by regimes that do not exhaustively define the products or services provided by persons in that profession who are caught by regulatory requirements. For example, the *Legal Profession Uniform Law* prohibits a person from engaging in 'legal practice' unless they are qualified, without attempting to define that term with great particularity.[125] That law simply provides that the term 'engage in law practice' includes providing 'legal services', which 'means work done, or business transacted, in the ordinary course of legal practice'.[126]

11.135 Removal of this linkage would expand the regulatory scope of the current regime. The ALRC makes no formal proposals, and instead suggests that this is a matter that may benefit from further consideration in future reviews. It may be noted, however, that the ALRC's earlier proposals to remove the overarching concept of financial product advice and to rename general and personal advice, would be consistent with severing the nexus between financial advice and the definition of financial product.

124 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 105) 119.
125 As implemented in Victoria, see *Legal Profession Uniform Law Application Act 2014* (Vic) s 10.
126 Ibid sch 1 s 6.

12. Definitions of 'Retail Client' and 'Wholesale Client'

Contents

Introduction

12.1 The distinction between 'retail clients' and 'wholesale clients' is pivotal to the operation of Chapter 7 of the *Corporations Act*. 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;[1] the design and distribution obligations in Part 7.8A;[2] the disclosure obligations under Part 7.9;[3] 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.

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1 For further discussion of conduct obligations see **Chapter 13**.

2 See, for example, the references to 'retail client' in the definitions of 'excluded dealing', 'retail product distribution conduct' and 'target market' in s 994A, which defines terms for use in Part 7.8A (Design and distribution requirements relating to financial products for retail clients).

3 For further discussion of disclosure requirements see **Chapter 9**.

12.2 The distinction between 'retail clients' and 'wholesale clients' is of critical importance from a policy perspective as it determines when particular protections are available (to 'retail clients') and when a less protective regime applies (to 'wholesale clients'). The definition of 'retail client' is subject to various exclusions. Ongoing debate about the efficacy and clarity of these exclusions casts some doubt on the terms used and the definitions of those terms. This chapter therefore examines the current policy settings as reflected in the definition of 'retail client' and tests whether they are consistent with the underlying policy rationale.

12.3 As outlined below, the policy rationale for distinguishing wholesale clients from retail clients is that wholesale clients are 'better informed and better able to assess the risks involved in financial transactions' and therefore do not need the same level of protection as retail clients.[4] In addition, wholesale clients have 'the means to acquire appropriate advice'. Case law and commentary, including preliminary feedback from stakeholders, have raised questions as to how the policy rationale applies to exceptions in respect of certain categories of investors.[5] The presumption that wholesale clients have the means to seek appropriate advice may be correct in theory but it does not necessarily lead to the obtaining of appropriate advice in practice.

12.4 Accordingly, a key question canvassed in this chapter is whether the definition of retail client should be amended to:

- achieve greater consistency with the legislative intent; 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.

12.5 The ALRC also invites views on the conditions or criteria in respect of the sophisticated investor exception in s 761GA of the *Corporations Act*.

12.6 This chapter additionally notes connections between the concepts of 'retail client' and 'wholesale client' within Chapter 7 of the *Corporations Act* and other aspects of the regulatory framework for financial products and services, including the securities disclosure requirements under Chapter 6D of the *Corporations Act,* and the consumer protection provisions set out in Part 2 Div 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.

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4 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.25].

5 In particular, the exceptions based on product value and individual wealth have been the subject of debate.

Policy settings

12.7 The policy rationale for distinguishing wholesale clients from retail clients is that wholesale clients are 'better informed and better able to assess the risks involved in financial transactions' and therefore do not need the same level of protection as retail clients.[6] The position reflected in the existing definition is that all persons should be treated as retail clients unless an exception applies.[7]

12.8 At the time of the FSR Bill, retail client status largely attracted the application of disclosure obligations. This was consistent with the recognition that 'retail investors in financial markets require greater protection as they may find it more difficult to, and face greater costs in, gathering the information required to make an informed decision' and that, conversely, 'sophisticated participants in financial markets have the resources to enable them to gain relevant information and have sufficient experience and judgment to protect their own interests'.[8] The Revised Explanatory Memorandum for the FSR Bill noted that additional

> protections are afforded to retail clients in the form of: the Financial Services Guide; the Statement of Advice; the Product Disclosure Statement; and compensation and complaint handling arrangements.[9]

12.9 However, in recent years, a greater suite of protections that are contingent on classification as a retail client have been introduced. These include:

- the prohibition of conflicted remuneration and the imposition of best interests obligations in relation to the provision of financial product advice;[10]
- the introduction of the design and distribution obligations and ASIC powers to make product intervention orders;[11] and
- the imposition of additional professional and ethical standards for providers of personal advice to retail clients.[12]

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6 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.25].

7 *Corporations Act 2001* (Cth) s 761G(1).

8 Department of the Treasury (Cth), *Financial Markets and Investment Products: Promoting Competition, Financial Innovation and Investment* (Corporate Law Economic Reform Program Proposals for Reform: Paper No 6, 1997) 27. For the purposes of this chapter, the terms 'retail investor' and 'wholesale investor' are used synonymously with 'retail client' and 'wholesale client'.

9 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [6.16].

10 See *Corporations Act 2001* (Cth) pt 7.7A. This was part of the FOFA reforms, which were introduced by the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) and the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) in response to the recommendations of the Ripoll Report: Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (November 2009). The legislation took effect from 1 July 2012, with compliance becoming mandatory from 1 July 2013.

11 *Corporations Act 2001* (Cth) pts 7.8A, 7.9A.

12 See ibid pt 7.6 divs 8A–8C.

12.10 The introduction of these additional protections in part reflects a recognition of the inherent limits on the ability of individuals to understand and appropriately account for risk when making financial decisions.[13] It also reflects the increased range and complexity of financial products that are now being offered to retail clients such as derivatives and exchange traded funds. Of further relevance are the higher potential returns (and consequential higher risk) on some complex products as compared with basic financial products such as bank deposits.

12.11 As a result of these reforms, the classification of a client as retail or wholesale is of greater consequence now than it was at the time of the FSR Bill, from the perspective of both clients and financial service providers. From the perspective of a client, there may be an incentive to access additional product types that are exclusively offered to wholesale clients in the hope of enjoying higher returns and lower fees. However, classification as a wholesale client means forgoing a range of protections that are designed to safeguard the appropriateness of financial services and products provided to retail clients. From the perspective of financial service providers, there is an incentive to classify clients as wholesale clients in order to limit compliance costs associated with additional disclosure, to avoid or reduce conduct obligations, and to limit the application of design and distribution obligations, product intervention orders, and prohibitions on conflicted remuneration.

12.12 In relation to binary options and contracts for difference ('CFDs'), ASIC has noted that almost 9,200 retail clients were reclassified as wholesale clients during the period 1 January 2018 to 31 March 2019 and has expressed concerns about this 'because wholesale clients do not receive the same protection as retail clients … [and] these clients may not be aware that retail protections no longer apply to them'.[14] ASIC subsequently made product intervention orders under s 1023D of the *Corporations Act*.[15] Although making clear the position in relation to retail clients, these product intervention orders do not remove the risk of retail clients inappropriately being reclassified as wholesale clients on the basis of the 'sophisticated investor' exception.

12.13 Given the shift in function of the definition of retail client and underlying assumptions in the regulatory framework about consumer understanding of risk, particularly in relation to complex products, it is pertinent to consider whether the existing 'retail client' definition remains fit for purpose. Relevant questions include:

- whether previous assumptions about which clients are 'better informed and better able to assess the risks involved in financial transactions' still hold in determining who should benefit from the protections associated with being a retail client;

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13 See further **Chapter 9**.

14 Australian Securities and Investments Commission, *Product Intervention: OTC Binary Options and CFDs* (Consultation Paper 322, August 2019) [141]. This consultation paper makes reference to similar trends and regulatory responses in the European Union.

15 *ASIC Corporations (Product Intervention Order—Contracts for Difference) Instrument 2020/986*; *ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240*.

- whether the existing definition of retail client effectively promotes the identified policy objective; and
- whether there is scope for reforms to achieve the intended objective with greater clarity and simplicity.

12.14 As outlined below, the policy rationale that underpins the retail client/wholesale client distinction has been examined in previous reports and has been the subject of debate in both case law and commentary. Preliminary feedback from stakeholders suggests that the policy rationale is sometimes difficult to glean as a result of the following:

- the relatively low thresholds for the exception to being treated as a retail client in s 761G(7)(c) (being net assets of $2.5 million and/or gross income for the past two financial years of at least $250,000 a year), which have not been updated to take into account increases in property values or incomes and inflation generally; and
- the recognition of the 'sophisticated investor' exception in s 761GA and its reliance on the AFS Licensee's subjective assessment of the client's previous experience.

Previous reviews of the distinction between retail and wholesale clients

12.15 In 2011, Treasury issued an options paper entitled 'Wholesale and Retail Clients Future of Financial Advice' ('2011 Treasury Options Paper').[16] This paper examined the appropriateness of the distinction between wholesale and retail clients as part of the FOFA reforms. Four options for change to the Australian model were identified:

- Option 1 — Retain and update the current system.[17]
- Option 2 — Remove the distinction between wholesale and retail clients.[18]
- Option 3 — Introduce a 'sophisticated investor' test as the sole way to distinguish between wholesale and retail clients.[19]

16 Department of the Treasury (Cth), *Wholesale and Retail Clients: Future of Financial Advice* (Options Paper, January 2011).

17 Mechanisms outlined for this purpose included: updating the product thresholds; introducing an indexing mechanism; excluding illiquid assets; introducing extra requirements for certain complex products; and repealing the 'sophisticated investor' test under s 761GA: ibid [7.3]–[7.10]. For a recent recommendation that the threshold for the asset test increase to $5 million and be indexed to the Consumer Price Index see the Financial Services Council, *White Paper on Financial Advice* (2021) 14.

18 Under this option, all 'investors (except professional investors as defined in section 9 of the Corporations Act) would receive the protections and disclosures currently afforded only to retail clients. This would remove distinctions which can sometimes be arbitrary and difficult to administer and ensure that there is consistency and simplicity across the Corporations Act': Department of the Treasury (Cth) (n 16) [7.11].

19 This option would recognise 'that a distinction based on wealth is arbitrary and that a true measure of financial literacy should be the test used to distinguish retail clients from wholesale clients': ibid [7.12]. See also Dimity Kingsford Smith, Submission No 153 to the Senate Economic References

- Option 4 — Do nothing.[20]

12.16 Analysis undertaken by the ALRC indicates that the majority of submissions in response to the four options outlined favoured Option 1, with some support for Option 4 and Option 3 in that order.

12.17 Subsequently, the 2014 Senate Economics References Committee Final Report on the Performance of ASIC recommended that 'the government clarify the definitions of retail and wholesale investors',[21] noting that the 'submissions that have expressed the most dissatisfaction with ASIC's performance often relate to financial products that should not have been available to retail clients or badly managed liquidations'.[22] In addition, the report noted that the committee had sought

> ASIC's advice on the requirement for a consumer to be informed of their classification as either a retail or wholesale investor and the consumer protections that go with their classification. ASIC informed the committee that a client's awareness of such a status was an issue raised in Treasury's 2011 options paper *Wholesale and Retail Clients Future of Financial Advice*. ASIC suggested that this issue 'should be considered in any changes the government may make to the law in this area following the conclusion of this review'.[23]

12.18 In Recommendation 60 of the Final Report, the committee recommended that 'the government consider measures that would ensure investors are informed of their assessment as a retail or wholesale investor and the consumer protections that accompany the classification'.[24]

12.19 Some uncertainty has also arisen in respect of the position of self-managed superannuation funds (SMSFs), leading to clarification by ASIC of how the wholesale investor test should be applied to SMSFs. In a 2014 Media Release, ASIC referred to both the 2011 Treasury Options Paper and the 2014 Senate Economics References Committee Final Report and noted that this had 'been an area of ongoing legal uncertainty' and that ASIC was 'aware of general uncertainty in the market about when a financial service relates to a superannuation product'. ASIC stated that it would revise its approach to 'take regulatory action where financial service providers miscategorise their clients'. According to the statement:

Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (21 October 2013) 19, as cited in Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (Final Report, June 2014) [27.33]: 'Using wealth as a proxy of financial literacy is suitable in some cases but not in others. For example, individuals who suddenly acquire inheritance money or superannuation lump sums could be placed in a position where they might be legally classified as sophisticated clients, irrespective of their financial experience.' See also Department of the Treasury (Cth) (n 16) [5.5].

20 This option would retain the existing tests and thresholds: Department of the Treasury (Cth) (n 16) [7.13].

21 Senate Economics References Committee, Parliament of Australia (n 19) Recommendation 59.

22 Ibid [27.2].

23 Ibid [27.35].

24 Ibid.

> legal uncertainty – particularly in relation to an issue as important as whether clients should receive the benefit of the retail client consumer protections – is undesirable and [ASIC] supports a review of the test to ensure that it is both clear and appropriate.[25]

12.20 Similar debates arise in other jurisdictions as to the policy settings and the circumstances in which exceptions should be recognised in terms of the consumer protections for individual clients.[26] The ALRC considers that the policy settings could be revisited as part of broader policy review.

Definitions of retail client and wholesale client

12.21 Section 761A of the *Corporations Act* signposts the definitions of 'retail client' and 'wholesale client' as follows:

> ***retail client*** has the meaning given by sections 761G and 761GA.
>
> ***wholesale client*** has the meaning given by section 761G.

12.22 Section 761G of the *Corporations Act* provides that a financial product or financial service is provided to a person as a retail client unless sub-ss (5), (6), (6A), or (7) otherwise provide. Those subsections specify when certain financial products and financial services are provided to a person as a retail client and, conversely, when the relevant financial product or financial service is not provided to a person as a retail client. Section 761G(4) provides that a financial product or a financial service is provided to, or acquired by, a person as a wholesale client if it is not provided to, or acquired by, the person as a retail client. Accordingly, a 'wholesale client' is defined as the converse of a 'retail client'.

12.23 The effect of ss 761G(5), (6), (6A), and (7) is as follows:

- subsection (5) prescribes the circumstances in which general insurance products will be provided to a person as a retail client;
- subsection (6) prescribes the circumstances in which products and services relating to superannuation and RSAs will be provided to a person as a retail client;
- subsection (6A) provides that traditional trustee company services will be provided to a person as a retail client (unless regulations provide otherwise); and
- subsection (7) lists exceptions from the circumstances when a financial product (except for general insurance, superannuation, and RSA products) or a financial service (other than a traditional trustee company service or a

25 Australian Securities and Investments Commission, 'Statement on Wholesale and Retail Investors and SMSFs' (Media Release 14-191MR, 8 August 2014).

26 For a comparative analysis of these exceptions in Singapore, Hong Kong, and Australia, see Wai Yee Wan, Andrew Godwin and Qinzhe Yao, 'When Is an Individual Investor Not in Need of Consumer Protection? A Comparative Analysis of Singapore, Hong Kong and Australia' [2020] *Singapore Journal of Legal Studies* 190.

superannuation trustee service) is provided to a person as a retail client as follows:

- s 761G(7)(a) — where the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations;[27]
- s 761G(7)(b) — where the financial product, or the financial service, is provided for use in connection with a business that is not a small business (as defined in s 761G(12));
- s 761G(7)(c) — where the person has net assets, or gross income for each of the last two financial years, above certain threshold amounts specified in the regulations and supported by a certificate given by a 'qualified accountant' (as defined in ss 9 and 88B);[28] and
- s 761G(7)(d) — where the person qualifies as a 'professional investor'.

12.24 Section 761GA recognises a further exception where the person qualifies as a 'sophisticated investor'.[29]

12.25 **Figure 12.1** illustrates the structure of the existing definition of 'retail client'.[30]

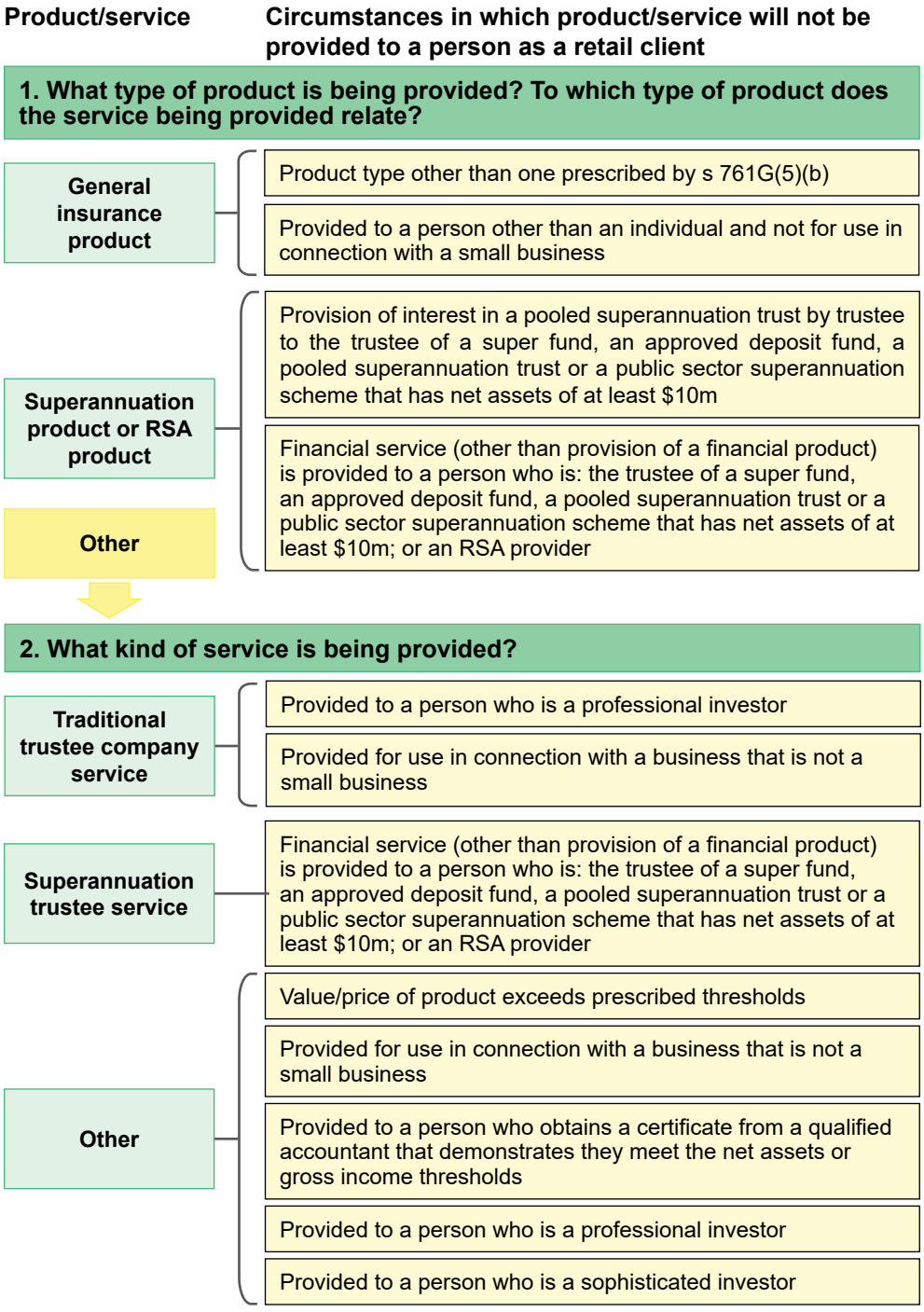
27 Under the *Corporations Regulations 2001* (Cth) regs 7.1.18–7.1.24, the applicable threshold amount is $500,000. This amount has not increased since 2001.

28 This has also been referred to as the 'high net worth clients' exception. See Pamela Hanrahan, *Legal Framework for the Provision of Financial Advice and Sale of Financial Products to Australian Households* (Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Background Paper No 7, 2018) 23.

29 The 'sophisticated investor' test for the retail/wholesale client distinction was inserted by the *Corporations Legislation Amendment (Simpler Regulatory System) Act 2007* (Cth).

30 A more detailed outline of the steps involved in determining whether a product or service is provided to a person as a retail client pursuant to s 761G is available on the ALRC website <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-FSL-Retail-client-flowchart.pdf>.

Figure 12.1: Current model for the 'retail client' definition



Provision of financial products or services to a person as a retail client

12.26 The way in which the term 'retail client' is defined is different from many other definitions in the *Corporations Act* in terms of being contextual in nature; namely, instead of adopting the conventional approach of 'retail client means X' (or 'retail client does not include Y'), it is defined by reference to the context and is subject to certain conditions or exceptions as follows:

> For the purposes of this Chapter, a financial product or a financial service is provided to a person as a ***retail client*** unless subsection (5), (6), (6A) or (7), or section 761GA, provides otherwise.

12.27 Under this approach, the focus is on the circumstances in which a financial product or a financial service is provided to a person 'as a retail client' and most of the provisions in Chapter 7 that refer to a 'retail client' as outlined above are expressed accordingly.[31]

12.28 A similar approach is adopted in s 761GA for the purpose of the 'sophisticated investor' exception:

> For the purposes of this Chapter, a financial product, or a financial service (other than a traditional trustee company service, a crowd-funding service or a superannuation trustee service) in relation to a financial product, is not provided by one person to another person as a ***retail client*** if …

12.29 Although it would be possible to adopt the conventional approach in defining the term 'retail client' as 'a person to whom a financial product or a financial service is provided except [as otherwise provided]', it is not certain that this would achieve any greater clarity, particularly given the extent to which the existing approach has become established in practice (including in case law and regulatory guidance). The ALRC invites views on this issue.

Regulations and ASIC legislative instruments

12.30 Currently, exclusions from the retail client definition are dealt with both in the *Corporations Act* and the *Corporations Regulations*, increasing complexity and creating navigability challenges. Further, a definition so complex and with many exceptions is vulnerable to regulatory arbitrage. There are 29 regulations that affect the meaning of 'retail client' and 'wholesale client'.[32] These regulations span 8,832 words, adding considerable volume to the provisions relevant to determining the status of a person as a 'retail client'. When a critical definition, which enlivens key statutory protections, is so long and can only be fully understood by reading multiple sources, its useability is questionable. The proposed legislative architecture in

31 See the obligations listed in [12.1].
32 See *Corporations Regulations 2001* (Cth) regs 7.1.11–7.1.28, 7.6.02AB–7.6.02AF.

Chapter 10, under which exclusions would be listed in a consolidated legislative instrument, would reduce complexity and achieve greater navigability.

12.31 The functions currently performed by relevant regulations include:

- defining different types of general insurance products for the purposes of s 761G(5), which sets out when a general insurance product will be provided to a person as a retail client;[33]
- prescribing a medical indemnity insurance product as an additional type of general insurance product that will be provided to a person as a retail client (where provided to an individual or for small business) for s 761G(5)(b);[34]
- prescribing values/prices affecting whether a person will be treated as a retail client in particular circumstances;[35]
- prescribing an exception to the treatment of persons as a retail client in relation to the provision of traditional trustee company services;[36]
- extending the wholesale client classification for a person to related bodies;[37] and
- correcting drafting anomalies in the primary legislation.[38]

12.32 There are also a small number of ASIC legislative instruments that have the effect of modifying the scope of the definitions of 'retail client' and 'wholesale client', or introducing novel related terms,[39] for the purposes of those instruments. For example, *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* defines 'retail client' in relation to debentures for the purposes of the Instrument with reference to the application of disclosure requirements under Part 6D.2.

33 Ibid regs 7.1.11–7.1.17.
34 Ibid reg 7.1.17A.
35 Ibid regs 7.1.18–7.1.22, 7.1.22A–7.1.24.
36 Ibid reg 7.1.17C.
37 Ibid regs 7.6.02AB, 7.6.02AD.
38 Ibid reg 7.6.02AE.
39 See, eg, definition of 'exempt investor' in *ASIC Corporations (Takeovers—Accelerated Rights Issues) Instrument 2015/1069*; definition of 'wholesale equity scheme' in *ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/849*.

Reframing the definition of 'retail client'

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?

12.33 Previous reviews and preliminary feedback to the ALRC from stakeholders suggest that:

- the asset and income thresholds for the purposes of the 'investor wealth' test (which have not been updated since 2001) are out of date in view of increasing asset values;
- there is hesitation on the part of AFS Licensees to apply the 'sophisticated investor' exception;[40] and
- providers are often incentivised to characterise a client as a wholesale client in view of the compliance requirements associated with providing products or services to a retail client, the greater ease with which providers can sell complex products to wholesale clients, and the opportunity for providers to generate greater returns with complex products or investments.

12.34 Case law has also identified challenges with the interpretation and application of the definitions of 'retail client' and 'wholesale client'.

12.35 In *Australian Securities and Investments Commission v Westpac Banking Corporation*, Wigney J referred to the 'rather tortuous' definition of 'retail client':

> It is perhaps even more fortunate that it is unnecessary to give any detailed consideration to the rather tortuous definition of 'retail client' (and the converse expression 'wholesale client') in ss 761G and 761GA of the Act. Those provisions extended to over five pages and in turn require one to go to the detailed definitions of various other words or expressions, including 'financial product' (see ss 763A and 764A), 'financial service' (see s 766A), 'general insurance product' (see ss 761A and 764A(1)(d)) and 'superannuation product'

40 See also Department of the Treasury (Cth) (n 16) [7.10]: 'Preliminary feedback from industry also indicates that the subjective test is difficult to administer and many licensees fear liability if they are deemed to have incorrectly classified an investor as a wholesale client.'

(see ss 761A and 764A(1)(g)). It suffices to note that it is common ground that each of the clients in this matter was a 'retail client'.[41]

12.36 Notably, the definition of 'retail client' contains 25 other defined terms including 'general insurance product',[42] 'professional investor' (defined in s 9),[43] and 'sophisticated investor' (as provided in s 761GA).[44] These terms are variously defined within s 761G, in the definitions section for the Act or for Chapter 7, in other sections of Chapter 7, in the *Corporations Regulations*, and in other Commonwealth legislation.[45]

12.37 **Question A16** outlines one way in which the definition of 'retail client' in s 761G could be amended to simplify the existing multi-limbed test and express it in a clearer manner. The effect of amending s 761G as proposed would be that a financial product or a financial service would be provided to a retail client except where:

- the financial service or product is provided for use in connection with a business that is not a small business (unless the product is, or the service relates to, a superannuation or RSA product);
- the person is a professional investor (unless the service is a superannuation trustee service, or the product is, or the service relates to, a superannuation or RSA product, or a general insurance product);
- the person is an exempt trustee or provider (unless the financial service is the provision of a superannuation or RSA product);
- the person is a sophisticated investor; or
- a specific exclusion applies.

12.38 As outlined below, implementation of the amendments outlined in **Question A16** would substantially maintain the existing policy boundaries in respect of the definition of 'retail client'. However, it is suggested that consideration should be given to removing certain exclusions from the existing 'retail client' definition — namely, the product value exception and the assets and income exception — on the basis that they are inconsistent with the underlying policy rationale.

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

42 It is relevant to note that the term 'general insurance product' is defined without reference to 'insurance product'. Under s 761A, the term 'general insurance product' is defined as 'a financial product described in paragraph 764A(1)(d)', which does not refer to 'insurance product'. Section 761A defines 'insurance product' as 'a financial product described in paragraph 764A(1)(d), (e) or (f)'.

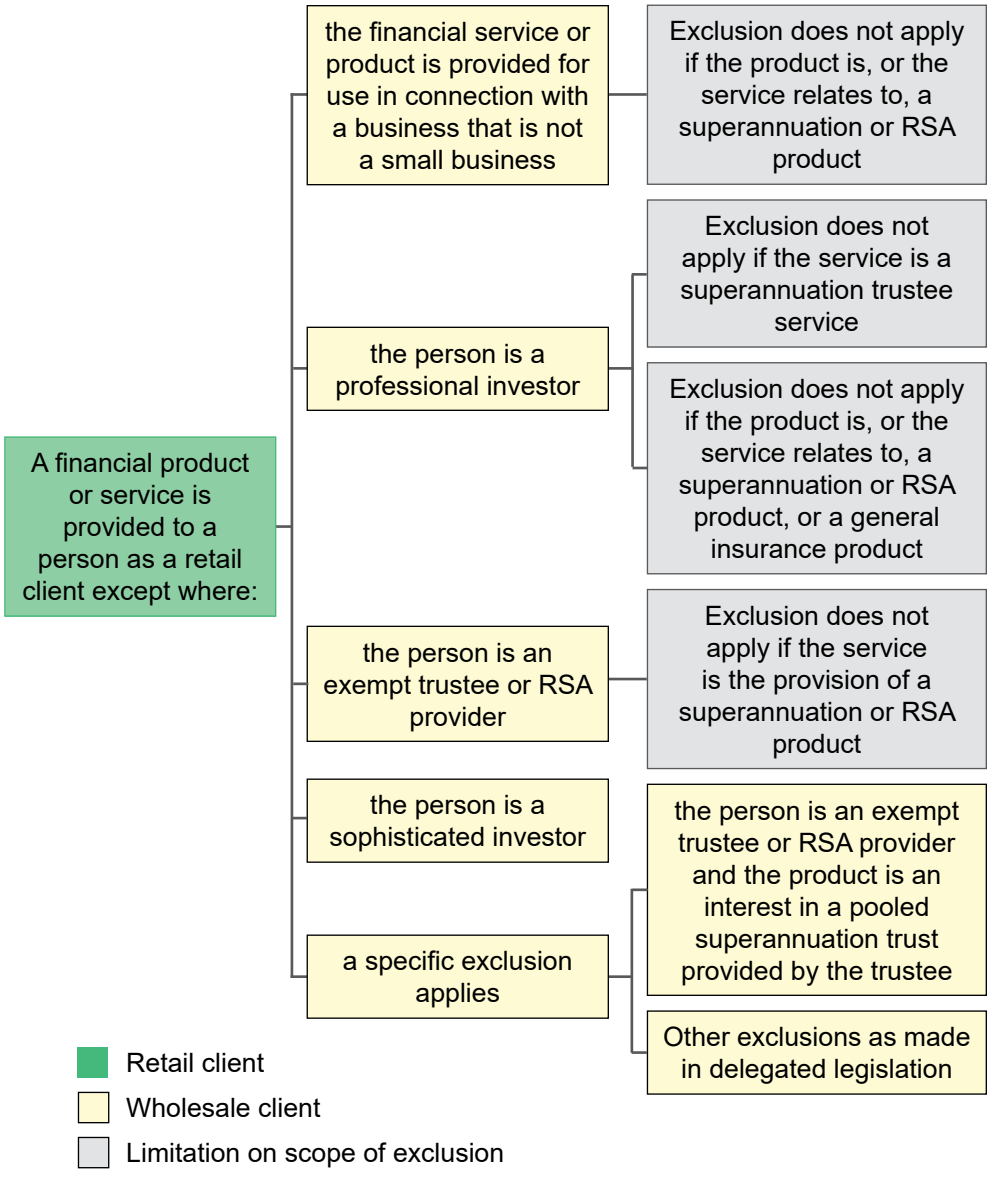
43 The term 'professional investor' is used outside Chapter 7 in Chapter 6D s 708 (Offers that do not need disclosure) with respect to prospectuses, although the s 9 definition is modified in this context. See further below.

44 The term 'sophisticated investor' is also used in Chapter 6D in s 708 (Offers that do not need disclosure), but as a label for certain exceptions rather than a defined term.

45 See **Chapter 6** for a discussion of the difficulties that 'interconnected definitions' can create.

12.39 **Figure 12.2** illustrates the structure of the definition of retail client as amended in accordance with paragraph (a) of **Question A16**.[46] The analysis that follows outlines in further detail how these amendments could be achieved, and why the ALRC considers the amendments would simplify the definition of retail client and better align the definition with the underlying policy rationale. The ALRC invites views on these proposed amendments, and any alternative reforms to achieve these aims.

Figure 12.2: Suggested model for the 'retail client' definition



46 Compare **Figure 12.1**, which illustrates the existing definition of retail client.

Treatment of certain products and services

12.40 **Question A16** raises the possibility of removing s 761G(5)–(6A), which make special provision in relation to general insurance products, superannuation and RSA products, and traditional trustee company services, on the basis that application of the general exclusions as outlined below and carve-outs from the professional investor exclusion could appropriately emulate the effect of these provisions.

General insurance products

12.41 The special test for general insurance products under s 761G(5) has the effect that general insurance products will only be acquired by a person as a retail client if: the product is acquired by an individual, or in connection with a small business; and the product is a specified type. The specified general insurance products are:

- motor vehicle insurance;
- home building insurance;
- home contents insurance;
- sickness and accident insurance;
- consumer credit insurance;
- travel insurance;
- personal and domestic property insurance; and
- other general insurance products prescribed by regulations (for example, medical indemnity insurance).[47]

12.42 Special provision for general insurance products was deemed necessary on the basis that 'it is difficult to identify a meaningful monetary limit for insurance' and 'few (if any) policies would exceed the product-value test' pursuant to s 761G(7)(a).[48] The Revised Explanatory Memorandum for the FSR Bill noted that the specified types of general insurance products 'are essentially policies for personal, domestic and household protection, or "consumer" policies'.[49] It was suggested that it is 'not desirable from a policy perspective to capture wholesale products, such as marine insurance and property insurance for businesses'.[50] It was on this basis that specific provision was made in s 761G(5) to exclude general insurance for business (other than small business).[51]

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47 See *Corporations Regulations 2001* (Cth) regs 7.1.11–7.1.17A. Queries regarding the inclusion of medical indemnity insurance in the category of financial products that are acquired by a person as a retail client have been raised by consultees on the basis that medical indemnity insurance is not comparable to other general insurance products and therefore should be treated in the same way as other professional indemnity insurance.

48 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.26].

49 Ibid [6.23].

50 Ibid [2.26].

51 Ibid [2.28]. This is similar to the approach taken under the *National Consumer Credit Protection Act 2009* (Cth) for consumer credit products and service.

12.43 The treatment of the general insurance products listed in s 761G(5)(b) could be maintained pursuant to the reforms outlined in **Question A16** without the need to make special provision for them. This would obviate the need for the seven existing regulations (spanning 1,772 words) that serve to define the specified types of general insurance products.[52] Consistent with the generally applicable test, general insurance products would be acquired by a person as a retail client unless acquired for use in connection with a business that is not a small business. As discussed further below, the product-value and assets/income exceptions would no longer apply under the outlined amendments, and general insurance products could be appropriately carved out for the purposes of the professional investor exclusion to maintain the existing position.

12.44 Under the existing definition, general insurance products that are not one of the types of products listed in s 761G(5)(b) will always be acquired by a person as a wholesale client. Pursuant to the suggested amendments, these types of products could be acquired by a person as a retail client if they are acquired in connection with a small business or are not acquired in connection with a business. If deemed necessary, exclusions in relation to particular general insurance products that might be inappropriately captured by the amended test could be listed in a consolidated legislative instrument, in accordance with **Proposal A10** in **Chapter 10**.

Superannuation and RSA products

12.45 As stated in the Revised Explanatory Memorandum to the FSR Bill:

> a person will always be considered a retail client where the relevant financial product is a superannuation product or a retirement savings account (RSA). This will ensure that disclosure is given to all persons in relation to superannuation and RSA products. This is consistent with the long term nature and complexity of such products and will ensure the integrity of the regime in a choice of superannuation fund environment.[53]

12.46 This approach would be maintained under the suggested amendments by recognising exceptions in respect of the exclusions for: (i) professional investors; and (ii) products and services acquired for use in connection with a business that is not a small business. Superannuation and RSA products, and services in relation to such products, would be acquired by a person as a retail client under the amended test regardless of whether the products or services are acquired by a professional investor, or in connection with a business.

12.47 The circumstances in which superannuation trustees and RSA providers will be treated as wholesale clients in accordance with s 761G(6)(aa)–(c) could be dealt with by way of an exclusion related to professional investors, as discussed further below.[54]

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52 See *Corporations Regulations 2001* (Cth) regs 7.1.11–7.1.17.
53 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.27].
54 See discussion at [12.58]–[12.63].

Traditional trustee company services

12.48 Under s 761G(6A), traditional trustee company services will be regarded as provided to a person as a retail client unless regulations provide otherwise. Relevantly, regulation 7.1.17C provides that a traditional trustee company will not be provided to a person as a retail client if it is provided for use in relation to a business that is not a small business, or if the person to whom the service is provided is a professional investor. This position would be emulated under the outlined amendments without the need for specific provision, as services that are provided for use in relation to business that is not a small business would be generally excluded. As discussed below, the professional investor test would be maintained as an exclusion to the 'retail client' definition.

Product value and assets/income exceptions

12.49 As acknowledged by the Revised Explanatory Memorandum to the FSR Bill, the product-value test reflected in s 761G(7)(a) was

> based on the assumption that persons who can afford to acquire financial products or services with a value above the prescribed amount do not require protection as retail clients, as they may be presumed to have either adequate knowledge of the product or service, or the means to acquire appropriate advice.[55]

12.50 Similarly, in relation to the net assets or gross income exception under s 761G(7)(c), the Revised Explanatory Memorandum noted:

> If a person produces a certificate to this effect, they will not be regarded as retail. Wealthy individuals may therefore choose to decline the retail protections, presumably on the basis that they either have considerable experience in making investments or have the means to seek appropriate advice.[56]

12.51 However, experience over the past decade suggests that, contrary to the view expressed in the Revised Explanatory Memorandum, persons who can afford to acquire financial products or services with a value above a certain prescribed amount or whose net assets or income is above certain threshold amounts cannot be presumed to have the requisite knowledge of the product or service to make an informed decision, and are no more inclined to acquire appropriate financial advice than people who qualify as retail clients.[57]

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55 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [6.27].

56 Ibid [6.32]. This test is triggered under s 761(7)(c) where the person who acquires the product or service gives the provider of the product or service, before the provision of the product or service, a copy of a certificate given within the preceding two years by a qualified accountant that states that the person has net assets of at least $2.5 million or has a gross income for each of the last two financial years of at least $250,000. See *Corporations Regulations 2001* (Cth) regs 7.1.28, 7.6.02AB, 7.6.02AC, 7.6.02AF.

57 See further nn **79–80** below.

12.52 The recent case of *Australian Securities and Investments Commission v M101 Nominees Pty Ltd (No 3)* involved the offer of financial products to persons who ostensibly qualified as 'wholesale clients' under s 761G of the *Corporations Act*, but were not necessarily sophisticated in matters of finance. Anderson J made the following findings:

> The relevant corporate entities were engaged in offering financial products to wholesale investors, which is a category of investors that are not subject to the usual protections afforded to retail investors. On the basis of the evidence, as a matter of fact, the relevant investors were not sophisticated in matters of finance.
>
> …
>
> In the circumstances, I conclude that Mr Mawhinney's fields of activity have a high potential to do very significant financial damage to persons who:
>
> (a) as a matter of fact, are not sophisticated in matters relating to finance and investment;
>
> (b) as a matter of law, may qualify as wholesale investors and may not therefore be subject to various protections afforded to 'retail clients'; and
>
> (c) in any event, invest a large proportion of their life savings in products which they were led to believe, and believed, were low risk investment products.[58]

12.53 Accordingly, consideration should be given to removing the exceptions in s 761G(7)(a) and s 761G(7)(c), on the basis that they are not consistent with the underlying policy rationale. The same arguments may be made for removal of s 708(8), which recognises these exceptions in the context of an offer of securities in Chapter 6D.

12.54 Removal of the exception in s 761G(7)(a) would also reduce the volume of regulations that are relevant to the determination of a person's retail client status by eliminating the need for the 14 existing regulations (spanning 6,113 words) that affect the application of the product-value test in different circumstances.[59] Subsections (10) and (10A) of s 761G, which authorise the use of regulations to prescribe relevant detail for ss 761G(7)(a) and (c), could also be removed.

'Professional investor'

12.55 The term 'professional investor' is defined in s 9 of the *Corporations Act* as modified by reg 7.6.02AE of the *Corporations Regulations*.[60] Transparency

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58 *Australian Securities and Investments Commission v M101 Nominees Pty Ltd (No 3)* [2021] FCA 354 [445], [447] (currently on appeal).

59 See *Corporations Regulations 2001* (Cth) regs 7.1.17B, 7.1.18–7.1.27.

60 Regulation 7.6.02AE replaces paragraph (e) of the definition of 'professional investor', which refers to a person who 'controls at least $10 million (including any amount held by an associate or under a trust that the person manages)'. The substituted paragraph refers to: a person who '*has* or controls *gross assets* of at least $10 million (including any *assets* held by an associate or under

and navigability challenges arise for the reason that s 9 does not refer to the modifications under reg 7.6.02AE, and the definition is modified only for certain parts of Chapter 7. The term 'professional investor' is defined to include an AFS Licensee, a body regulated by APRA (other than certain trustees), a listed entity or a related body corporate of a listed entity, an exempt public authority, and an investment company. The term also includes a trustee of a superannuation entity with net assets of at least $10 million, and a person who has or controls gross assets of at least $10 million (including any assets held by an associate or under a trust that the person manages).[61] According to the Revised Explanatory Memorandum to the FSR Bill, the 'professional investor test was included in response to considerable concern by industry that retail protections would otherwise apply to financial and investment entities that fell within the definition of "small business"'.[62]

12.56 The 2011 Treasury Options Paper raised the question as to whether the definition of 'professional investor' was still relevant and valid. Stakeholders have not suggested to the ALRC that the definition is problematic.

12.57 Under the current framework, the professional investor exclusion does not apply in relation to general insurance products, superannuation products, RSA products, or superannuation trustee services.[63] To maintain this position, if the amendments outlined in **Question A16** were introduced, the professional investor exclusion should apply unless the service is a superannuation trustee service, or the product is, or the service relates to, a superannuation or RSA product, or a general insurance product.

12.58 However, the effect of s 761G(6)(c) is that a financial service (other than the provision of a financial product) that relates to a superannuation product or an RSA product, or is a superannuation trustee service, will *not* be provided to a person as a retail client if it is provided to a person who is:

> (i) the trustee of a superannuation fund, an approved deposit fund, a pooled superannuation trust or a public sector superannuation scheme (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) that has net assets of at least $10 million; or
>
> (ii) an RSA provider (within the meaning of the *Retirement Savings Accounts Act 1997*) … .

12.59 The type of person described in s 761G(6)(c)(i) mirrors the category of person described in paragraph (d) of the definition of 'professional investor' in s 9:

> (d) the person is the trustee of:

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a trust that the person manages)' (emphasis added).

61 See *Corporations Regulations 2001* (Cth) reg 7.6.02AE.

62 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [6.34].

63 The chapeau to s 761G(7) also excludes the application of the professional investor test to traditional trustee company services. However, as discussed above, this is effectively overridden by regulation 7.1.17C of the *Corporations Regulations*, which provides that a traditional trustee company service will not be provided to a person as a retail client if the person to whom the service is provided is a professional investor.

(i) a superannuation fund; or

(ii) an approved deposit fund; or

(iii) a pooled superannuation trust; or

(iv) a public sector superannuation scheme;

within the meaning of the *Superannuation Industry (Supervision) Ac 1993* and the fund, trust or scheme has net assets of at least $10 million.

12.60 In order to replicate the effect of ss 761G(6)(c) and 761G(7)(d) under a simplified test, a new type of excluded person could be defined to capture trustees covered by paragraph (d) of the definition of professional investor, plus RSA providers (for example, 'excluded trustees or RSA providers'). Paragraph (d) of the definition of professional investor could then be removed. The circumstances in which a person will *not* acquire a financial product or service as a retail client could then be described as follows:

- if the person is a professional investor (unless the product is, or the service relates to, a superannuation or RSA product, or a general insurance product); or
- if the person is an excluded trustee or RSA provider (unless the financial service is the provision of a superannuation or RSA product).[64]

12.61 An RSA provider is not listed as a type of professional investor in the section 9 definition. However, such persons would be captured by the limb in paragraph (b) of s 9, as a body regulated by APRA.[65] Accordingly, the general application of an exclusion in relation to RSA providers as proposed would not alter the existing treatment of such providers.[66]

12.62 A specific exclusion would be required to capture the effect of s 761G(6)(aa) — a person will not acquire a financial product or service as a retail client if the person is an excluded trustee or provider and the product is an interest in a pooled superannuation trust provided by the trustee (within the meaning of the *SIS Act*).

12.63 If the definition of 'professional investor' were amended as proposed, consequential amendments would be required to s 708(11), which provides an exclusion from the disclosure requirements under Part 6D.2, to replace the reference to 'professional investor' with 'professional investor, or excluded trustee or RSA provider'. As outlined above, the explicit inclusion of RSA providers would not affect the scope of the exclusion as such persons are already captured under the definition of professional investor.[67]

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64 See further **Figure 12.2**.

65 See *Australian Prudential Regulation Authority Act 1998* (Cth) s 3(2)(g).

66 Note the APRA website currently lists only eight institutions that offer Retirement Savings Accounts: see Australian Prudential Regulation Authority, 'List of Institutions Offering Retirement Savings Accounts' <www.apra.gov.au/list-of-institutions-offering-retirement-savings-accounts>. Two have ceased offering new retirement savings accounts.

67 See discussion at [12.61].

12.64 In the interests of transparency and consistency, paragraph (e) of the definition of professional investor in s 9 should also be amended to reflect the notional amendment made by reg 7.6.02AE for the purposes of Parts 7.6, 7.7, 7.7A, 7.8, and 7.9: the person has or controls gross assets of at least $10 million (including any assets held by an associate or under a trust that the person manages). This amendment would enable the repeal of s 708(11)(b), and the reference to 'except a person mentioned in paragraph (e) of the definition' in s 708(11)(a), which serve to replicate the effect of reg 7.6.02AE for the purposes of Part 6D.2.[68]

'Sophisticated investor'

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)?

12.65 The term 'sophisticated investor' appears in the heading of s 761GA of the *Corporations Act* but is not used formally as a defined term and, instead, operates as a label.[69] This provision recognises an exception to the definition of a 'retail client' in certain circumstances. To qualify for the exception, the following conditions must be satisfied:

- the AFS Licensee providing the relevant financial product or financial services is satisfied on reasonable grounds that the client has previous experience in using financial services and investing in financial products that allows the client to assess certain factors, including the risks associated with holding the product and the adequacy of the information given by the AFS Licensee and the product issuer;
- the AFS Licensee gives the client before, or at the time when, the product or advice is provided a written statement of the AFS Licensee's reasons for being satisfied as to those matters; and
- the client signs a written acknowledgment before, or at the time when, the product or service is provided that the AFS Licensee has not given the client a PDS, the AFS Licensee has not given the client any other document that would be required to be given to the client under Chapter 7 if the product or service were provided to the client as a retail client, and the AFS Licensee does not have any other obligation to the client under Chapter 7 that the AFS Licensee would have if the product or service were provided to the client as a retail client.[70]

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68 See Explanatory Memorandum, Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 [5.10].

69 See also ss 708, 734, and 736 where the same or a similar approach is adopted.

70 *Corporations Act 2001* (Cth) ss 761GA(d), (e), (f).

12.66 The exception in s 761GA is only available if:

- the financial service is not a traditional trustee company service, a crowd-funding service, or a superannuation trustee service; and
- the financial product is a not a general insurance product, a superannuation product, or an RSA product; and
- the financial product is not provided for use in connection with a business.[71]

12.67 As noted in the 2011 Treasury Options Paper, the introduction of s 761GA in 2007 aimed

> to apply the same tests that apply to securities and debentures in Chapter 6D of the Corporations Act [with a view to providing] a more consistent approach for determining which investors would receive disclosure information and which [would] not.[72]

12.68 Under the section, those 'classed as sophisticated investors waive the rights to disclosure granted to retail investors'.[73] The paper quoted the Explanatory Memorandum as stating that:

> For reasons such as experience or professional training, these investors may wish to be treated as wholesale investors … Such investors may consider retail disclosure an unnecessary hindrance to activities they well understand and would prefer to access wholesale investor status. They may also wish to access wholesale-only products.[74]

12.69 Given the hesitation on the part of AFS Licensees to apply the 'sophisticated investor' exception,[75] further consideration could be given to the basis on which eligibility for this exception is determined to achieve greater consistency with the underlying policy rationale. A key consideration is whether the current legislative framework adequately recognises persons who are 'better informed and better able to assess the risks involved in financial transactions'. At present, the exception is determined on the basis of a subjective assessment by the AFS Licensee. Although the 2011 Treasury Options Paper suggested that 'the approach to defining "sophisticated investors" in ss 761GA and 708(10) is a more appropriate way to distinguish whether [sophisticated investors] are able to deal with complex financial products than a simple wealth test', it noted that 'the subjective nature of the "sophisticated investor" places the onus on the licensee, creates less certainty and makes it difficult to determine if a certificate was properly issued'.[76]

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71 Ibid ss 761GA(b), (c).
72 Department of the Treasury (Cth) (n 16) [2.7].
73 Ibid.
74 Explanatory Memorandum, Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 [1.18].
75 See n 41 above.
76 Department of the Treasury (Cth) (n 16) [2.9].

12.70 The practical difficulties in applying the exception and the risk of inappropriate assessments by AFS Licensees were highlighted in 2017 when ASIC

> clamped down on accountants who [had] inappropriately issued certificates certifying that persons were sophisticated investors in offerings made through trust structures so that they could receive offers to purchase shares without a prospectus.[77]

12.71 Academic commentary has also expressed concerns about the criteria by which sophisticated investors are distinguished from retail clients and has noted the following:

- The assumption that sophisticated investors undertake appropriate due diligence in respect of investments opportunities and can 'fend for themselves' does not always hold.[78]
- Wealthy investors (who meet the eligibility requirements to be classified as sophisticated investors or the equivalent in other jurisdictions such as Singapore and Hong Kong) do not necessarily understand the relevant risks or seek professional financial advice.[79]
- Sophisticated investors frequently engage in sub-optimal decision making.[80]

Possible options

12.72 The 2011 Treasury Options Paper canvassed one possible option in terms of reforming the definition of a sophisticated investor; namely, adopting a subjective test administered by industry. The advantages and disadvantages were outlined as follows:

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77 Wan, Godwin and Yao (n 26) 202–3. See Australian Securities and Investments Commission, 'ASIC Takes Action over Misuse of "Sophisticated Investor" Certificates' (Media Release 17-228MR, 7 July 2017). This was pursuant to the exception in s 708(8) of the *Corporations Act*.

78 See Felicia Smith, 'Madoff Ponzi Scheme Exposes the Myth of the Sophisticated Investor' (2010) 40(2) *University of Baltimore Law Review* 215, 260 (examining sophisticated investors in the context of the Madoff fraud in the US): '[The] seemingly massive failure of sophisticated investors to leverage their financial expertise and wealth to ferret out material information on Madoff's investment program suggests that continued reliance on sophisticated investor status as a basis for exemption from Securities Act registration may be misplaced as a legislative policy matter because it appears that many of Madoff's sophisticated investors either were unable or unwilling to fend for themselves.'

79 See Wan, Godwin and Yao (n 26) 201: 'Moreover, it is often assumed that wealthy investors have the risk appetite to invest in such complex products. Yet these investors could potentially lose all their investment in poorly chosen financial products or services, rendering them in the same position of vulnerability as retail investors who lose all their investment. Regulators have been sensitive to this criticism: for example, Singapore has mitigated some of these risks by requiring that in computing the net worth of individuals, real property assets are to be excluded, increasing the likelihood that they should have sufficient liquidity to withstand the losses. Further, wealthy investors are not necessarily inclined to be risk-takers. Many extremely wealthy persons chose to invest in Bernard Madoff's Ponzi scheme for the simple reason that it promised low-risk, stable returns.'

80 See DC Langevoort, 'Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics about Stockbrokers and Sophisticated Customers' (1996) 84 *California Law Review* 627, 670.

Advantages

A subjective test administered by industry would likely eliminate the wealth threshold tests in section 761G and expand the application of section 761GA to all distinctions between retail and wholesale clients in the Corporations Act. If administered accurately by industry, this option would ensure that investors are given the protections and disclosures that are commensurate with their experiences, as well as giving investors with high financial literacy broader access to complex products.

Disadvantages

As discussed in Option 1, section 761GA has not been well-received by industry due to the difficulty and potential liability associated with administering a subjective test. Many intermediaries may take a cautious approach resulting in inefficiencies and very few investors being classified as wholesale clients. Additionally, a subjective test requires more work by intermediaries in determining whether each investor meets the subjective criteria — under section 761GA, this must be done for every investor and every product accessed by the investor.[81]

12.73 The disadvantages outlined above suggest that a subjective test administered by intermediaries is unlikely to overcome the existing challenges in applying the sophisticated investor exception.

12.74 Other possible options include the adoption of a rating scheme for complex products and the availability of an objective qualification test — namely, a test administered by an independent body — to enable an individual to qualify for the sophisticated investor exception.[82] The qualification obtained through such a test could follow the completion of an educational course and would operate effectively as a licence to acquire financial products and financial services as a wholesale client and without the protections that are provided to a retail client (and the investor could sign a statement or waiver to this effect). If such a qualification process were adopted, a key question would be whether the qualification would be obtained on a one-off basis to cover all financial products or whether it would be obtained in respect of specific products or transactions.

12.75 Accordingly, the ALRC invites views on what conditions or criteria should be considered in respect of the sophisticated investor exception and whether any changes should be adopted, including in respect of the terminology used. A similar question arises in respect of the ‘sophisticated investor’ exception in s 708(10) in Chapter 6D.

81 Option 3 (Introduce a ‘sophisticated investor’ test as the sole way to distinguish between wholesale and retail clients): Department of the Treasury (Cth) (n 16) [7.12].

82 For a discussion of such options, see Wan, Godwin and Yao (n 26).

Consistency of related terminology

Adoption of 'retail client' and 'wholesale client' by other Acts

12.76 The terms 'retail client' and 'wholesale client' are also used in the *ITA Act 1997*, and the market integrity rules made by ASIC under s 798G of the *Corporations Act*.[83] Any amendments to the *Corporations Act* definition of 'retail client' will have flow-on effects to the *ITA Act 1997*, as the *Corporations Act* definition is adopted for the purposes of this legislation.[84] Potential inconsistency in the use of these terms across the various regimes was noted by Treasury in 2011.[85]

Definition of 'consumer' in the *ASIC Act*

12.77 Unlike the *ASIC Act*, Chapter 7 of the *Corporations Act* does not create a definition of 'consumer' and, instead, relies on the definition of 'retail client' for the consumer protection that applies in respect of financial products and services. Chapter 7 nonetheless makes references to the term 'consumer' in s 760A (Object of Chapter) and in references to terms that are defined elsewhere.[86] It also uses the term 'non-party' consumer as a tag in ss 994P and 994Q in Division 6 (Miscellaneous) of Part 7.8A (Design and distribution requirements relating to financial products for retail clients). However, it does not create its own definition of 'consumer' and, instead, relies on the definition of 'retail client' for the consumer protection that applies in respect of financial products and financial services.

12.78 In the *ASIC Act,* the definition of 'consumer' in Part 2 Div 2 plays a similar role to the definition of 'retail client' in Chapter 7 of the *Corporations Act*. Certain consumer protection provisions in relation to financial services under this Division apply only to 'consumers' as defined in s 12BC.[87] Section 12BC(1) provides that:

> For the purposes of this Division, unless the contrary intention appears, a person is taken to have acquired particular financial services as a consumer if, and only if:

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83 The market integrity rules use both 'retail client' and 'wholesale client' (see, eg, ASIC *Market Integrity Rules (Securities Markets) 2017*).

84 See s 275.15 where the term 'retail client' has the meaning given by ss 761G and 761GA of the *Corporations Act*.

85 Department of the Treasury (Cth) (n 16) [3.1]: 'It would be desirable to have a uniform understanding of the meanings of these terms across all these legislative instruments, taking into account whether the same definitions or thresholds might appropriately vary given their relevance for different purposes.' As also noted by the 2011 Treasury Options Paper, the 'terms "retail", "wholesale" and "sophisticated" are used in a wide variety of circumstances, for example in the issuing of market licences (s 798A), in disclosure requirements for investors (one example is s 1012D(2B)) and imposing accreditation requirements for those who provide financial product advice for futures and option contracts to retail clients (MIR 2.4.1) to name but a few': at [3.3].

86 See, for example, the definition of 'consumer credit insurance' in ss 910A and 960.

87 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DH (referral selling), 12EDJ (harassment and coercion), 12ED (warranties in relation to the supply of financial services).

(a) the price of the services did not exceed the prescribed amount; or

(b) if the price of the services exceeded the prescribed amount—the services were of a kind ordinarily acquired for personal, domestic or household use or consumption; or

(c) if the services were acquired for use or consumption in connection with a small business (see subsection (2)) and the price of the services exceeded the prescribed amount—the services were of a kind ordinarily acquired for business use or consumption.[88]

12.79 Subsection (3) makes provision for the prescribed amount, which is $100,000,[89] and outlines rules for the calculation of the price of services.[90]

12.80 The definition of consumer in the *ASIC Act* is consistent with the definition of consumer for the purposes of the *Australian Consumer Law*, and reflects a definition that was initially imported from the *Trade Practices Act 1974* (Cth) when consumer protection functions were conferred on ASIC in the late 1990s.

12.81 The definition of credit to which the *National Credit Code* applies also makes reference to 'personal, domestic or household use or consumption'.[91] However, in contrast to the *ASIC Act*'s adoption of the 'of a kind ordinarily acquired' concept, the *National Credit Code* focuses on the purpose for which the credit is predominantly or wholly acquired.

12.82 There is a body of case law that provides guidance on the interpretation of the concept of goods or services which are 'of a kind ordinarily acquired for personal, domestic or household use or consumption' for the purposes of the *Australian Consumer Law* or its predecessor, the *Trade Practice Act 1974* (Cth). The case law interpreting this phrase in the context of financial services for the purposes of the *ASIC Act* definition is, however, more limited.

12.83 Achieving greater alignment of the definition of 'retail client' in the *Corporations Act* with 'consumer' in the *ASIC Act* would be desirable from the perspective of reducing unnecessary inconsistencies between related terms across the Commonwealth statute book. The questions of whether terminology across the *ASIC Act, NCCP Act* and Chapter 7 of the *Corporations Act* should be harmonised and, if so, what terminology should be used are relevant to the question of whether all or parts of these statutes should be consolidated — a question that will be considered for the purposes of Interim Reports B and C and on which the ALRC invites views.

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88 The definition of small business in s 12BC(2) mirrors the definition in s 761G(12) of the *Corporations Act* for the purposes of the definition of 'retail client'.

89 See *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2DA.

90 Compare *Corporations Regulations 2001* (Cth) regs 7.7.17B–7.1.24 in relation to the prescribed price/value and method for calculating price/value with respect to various financial products for the purposes of the 'retail client' definition.

91 *National Consumer Credit Protection Act 2009* (Cth) sch 1 ('*National Credit Code*') s 5.

Alignment of related concepts within the *Corporations Act*

12.84 As outlined above, Chapter 6D of the *Corporations Act* also employs the terminology of 'sophisticated investors' and 'professional investors' to label persons to whom disclosure obligations will not be owed. The ALRC has suggested that consideration should be given to amending s 708 if removal of the existing exceptions in relation to product value and 'high net worth' individuals is pursued, as contemplated by **Question A16**.[92] However, the exclusions under Chapter 6D do not otherwise mirror the scope of retail clients under Chapter 7. Namely, there is no exception in relation to securities that are acquired for use in connection with a business that is not a small business.

12.85 Chapter 2L (Debentures) and Chapter 5C (Managed investment schemes) indirectly adopt related exclusions as a result of cross-references to, respectively, the application of disclosure requirements under Chapter 6D and Part 7.9.[93] Amendments to the persons who are classified as 'retail clients' for Chapter 7, and 'sophisticated investors' or 'professional investors' for Chapter 6D would accordingly have consequential effects on the scope of Chapters 2L and 5C.

12.86 The interaction between the purpose and subject matter of Chapters 2L, 5C, 6D, and 7 of the *Corporations Act*, in addition to the *ASIC Act* and *NCCP Act*, will be explored further as part of Interim Reports B and C. Any restructuring with respect to these different elements of the regulatory framework will have implications for the appropriate scope and terminology for 'retail client', and related concepts like 'sophisticated investor' and 'professional investor'. These implications will be discussed as part of any proposed restructure.

'Small business'

12.87 The definition of the term 'small business' is relevant for various purposes, including the definition of 'retail client' in Chapter 7. As outlined above, under s 761G(5), a prescribed type of general insurance product is provided to a person 'as a retail client' where the product is acquired for use in connection with a small business. Conversely, under s 761G(7)(b), a financial product or service is not provided to a person as a retail client if it is provided for use in connection with a business that is *not a small business*.

12.88 There are, however, differences in the way in which the term 'small business' is defined across the regulatory framework, including as between the *Corporations Act* and the *ASIC Act*,[94] and also as between those pieces of legislation and the

92 These exceptions are currently reflected in the 'sophisticated investor' category under s 708, in addition to the circumstances covered by s 761GA.

93 See *Corporations Act 2001* (Cth) ss 283AA(1)(a), 601ED(2).

94 See the definition of a 'small business contract' for the purpose of applying the unfair contract terms provisions of the *ASIC Act* to small business contracts. Compare the definition of 'small business' in s 12BC for the purpose of the definition of 'consumer'.

consumer credit legislation.[95] For the purposes of the definition of retail client, s 761G(12) of the *Corporations Act* defines 'small business' as follows:

> ***small business*** means a business employing less than:
>
> (a) if the business is or includes the manufacture of goods — 100 people; or
>
> (b) otherwise — 20 people.

12.89 The definition of 'small business' for the purposes of the definition of 'consumer' under s 12BC of the *ASIC Act* mirrors the definition above.

12.90 However, s 12BF(4) of the *ASIC Act* defines a 'small business contract' as follows:

> A contract is a ***small business contract*** if:
>
> (a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
>
> (b) either of the following applies:
>
> (i) the upfront price payable under the contract does not exceed $300,000;
>
> (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1,000,000.

12.91 Differences in the definition of 'small business' across the regulatory framework (including the Code of Banking Practice) have previously been said to be confusing and to increase the complexity of navigating the regulation in this area.[96] Initial feedback to the ALRC suggests that certain differences are necessary. Consideration should, however, be given to whether the definition should be standardised as between the *Corporations Act* and the *ASIC Act*.

12.92 Relevantly for financial services providers, 'small business' is also defined in other non-statutory documents. The term 'small business' is defined in the Banking Code of Practice by reference to number of employees (fewer than 100 full-time equivalent employees); annual turnover (less than $10 million in the previous financial year); and debt (less than $3 million total debt to all credit providers).[97]

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95 See *Financial Services and Small and Medium-Sized Enterprises (SMEs)* (Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Background Paper No 12, 2018) Figure 1, 5-6. For an outline of the differences in the context of small business lending, see Andrew Godwin, Jeannie Marie Paterson and Nicola Howell, *Credit for Small Business – An Overview of Australian Law Regulating Small Business Loans* (Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Background Paper No 10, 2018) [2.2].

96 Phil Khoury, *Independent Review — Code of Banking Practice* (Report, 31 January 2017) 47.

97 Recommendation 1.10 of the Financial Services Royal Commission was that the 'ABA should amend the definition of "small business" in the Banking Code so that the Code applies to any business or group employing fewer than 100 full-time equivalent employees, where the loan

12.93 The Complaint Resolution Scheme Rules for AFCA define 'Small Business' as meaning:

> a Primary Producer [as defined] or other business that had less than 100 employees at the time of the act or omission by the Financial Firm that gave rise to the complaint.[98]

12.94 The Australian Bureau of Statistics defines a small business as a business employing fewer than 20 people.[99]

International practice

12.95 The terminology adopted in Australia is broadly consistent with the terminology adopted in other jurisdictions. As noted by the 2011 Treasury Options Paper, the US 'have definitions similar to the Australian definition of professional and wholesale investors. However, their wealth standard is to be reviewed periodically by the Securities Exchange Commission'.[100] The regulatory framework in the UK uses the terms 'retail client', 'professional investor', and 'sophisticated investor'.[101] The regulatory framework in New Zealand also recognises a distinction between 'retail clients' and 'wholesale clients'. By comparison with Australia, however, a person is categorised as a retail client in relation to a financial advice service or client money/property service if they are not a wholesale client. In other words, the term 'retail client' is defined as the converse of 'wholesale client'.[102]

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applied for is less than $5 million': Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019) 22.

98 Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (2021) 48.

99 See Geoff Gilfillan, 'Definitions and Data Sources for Small Business in Australia: A Quick Guide', *Parliament of Australia* (December 2015) <www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1516/quick_guides/data>.

100 Department of the Treasury (Cth) (n 16) [6.4]. In the US, the term 'accredited investor' is defined in *General Rules and Regulations, Securities Act of 1933*, 17 CFR §§ 230.215, 230.501(a). On 8 December 2020, the definition was amended 'to identify more effectively investors that have sufficient knowledge and expertise to participate in investment opportunities that do not have the rigorous disclosure and procedural requirements, and related investor protections, provided by registration under the Securities Act of 1933': see Securities and Exchange Commission, *Accredited Investor Definition* (Release No 33-10824; 34-89669; File No S7-25-19, 26 August 2020).

101 See, for example, Financial Conduct Authority (UK), *FCA Handbook*, COBS 3.4.1 (for 'retail client'); COBS 3.5.1 (for 'professional investor'); COBS 4.12.7 (for 'sophisticated investor').

102 The definitions of 'retail client' and 'wholesale client' are contained in Schedule 5 (Other provisions relating to financial advice services and client money or property services) of the *FMC Act* (NZ). Clause 3 provides that: 'A retail client, in respect of a financial advice service or a client money or property service, is a client of a provider of that service who is not a wholesale client.' Clause 4 sets out the circumstances in which a person is a 'wholesale client'.

13. Conduct Obligations

Contents

Introduction

13.1 In this chapter, the ALRC considers reforms to key conduct obligations imposed on AFS Licensees and other entities involved in the financial services ecosystem (including those that are unlicensed).

13.2 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 (pursuant to s 912A of the *Corporations Act*);
- to comply with various prescriptive requirements (also 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*, as discussed below).

13.3 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 ss 961B and 961J).

13.4 The sweeping scope and indeterminate nature of the 'efficiently, honestly and fairly' obligation, the prescriptive compliance obligations currently imposed, the proliferation of overlapping prohibitory provisions, and drafting which promotes a 'tick a box' approach, all give rise to unnecessary complexity in this area of law and

detract from meaningful compliance. In the ALRC's view, this makes understanding and complying with the law more difficult than it needs to be.

13.5 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 this Interim Report.

13.6 The ALRC first 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.

13.7 With the aim of clarifying the 'efficiently, honestly and fairly' standard for the conduct of AFS 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 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.

13.8 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 this Interim Report). To this end, the ALRC proposes to:

- repeal specific obligations imposed on AFS Licensees that are already captured within the requirement to act 'efficiently' in s 912A(1)(a) of the *Corporations Act*;
- repeal more specific 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*; and
- consolidate the many provisions that broadly relate to misleading or deceptive conduct and false or misleading representations into a single provision.

13.9 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.

13.10 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 subsections as indicative behaviours of compliance, to which a court must have regard when assessing compliance with the duty; and

- repealing two definition provisions (ss 961C and 961D) that do not meaningfully assist in understanding this duty.

13.11 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 satisfaction of the duty may be achieved.

Context

13.12 Although the *Corporations Act* contains over 1,913 sections that include obligations-related terms, most of those sections relate to specific circumstances or types of entities.[1] The focus of this chapter is principally on broader obligations — namely:

- the obligation on AFS Licensees and Credit Licensees to act 'efficiently, honestly and fairly';
- prohibitions on engaging in conduct that is misleading or deceptive;
- prohibitions on engaging in conduct that is unconscionable; and
- in the context of personal advice to retail clients, obligations to prioritise and act in a client's best interests.

13.13 A failure to comply with existing conduct obligations, and broader community expectations concerning the conduct of financial services entities, was well documented by the Financial Services Royal Commission. The Commission found that 'conduct by many entities' had 'broken the law' or 'fallen short of the kind of behaviour the community not only expects of financial services entities but is also entitled to expect of them'.[2]

13.14 The Financial Services Royal Commission considered that 'in almost every case, the conduct in issue was driven not only by the relevant entity's pursuit of profit but also by individuals' pursuit of gain'.[3] However, the report also noted that industry, community groups, and regulators 'agreed the current law is too complex'.[4] The Commission seemed to consider that a clearer body of law — particularly as concerns the conduct obligations of financial services entities — may promote compliance, noting that the 'more complicated the law, the harder it is to see unifying and informing principles and purposes'.[5]

13.15 Such complexity might not only impede the ease with which financial services entities are able to understand the law and comply, but also the ability of consumers to understand and assert their rights, and thereby more robustly incentivise

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1 See Australian Law Reform Commission, 'Legislative Data' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/legislative-data>.

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

3 Ibid.

4 Ibid 494.

5 Ibid 44.

compliance. Writing about law in the UK, but in observations that apply equally in Australia, Professor MacNeil has noted that conduct regulation 'has evolved in a manner whereby the complexity of the rules works against their basic objectives'.[6] As the Clearer Laws Committee of the Attorney-General's Department (Cth) has recognised, complex legislation 'makes it difficult, expensive and time-consuming for people to understand their legal rights and obligations'.[7]

Policy settings

13.16 Conduct regulation seeks to 'direct the way in which firms are expected to carry on their businesses'.[8] A rationale for such regulation includes a desire to ensure certain standards of competency and professionalism are satisfied. A further fundamental rationale is the 'protection of users of the financial system'.[9] That protection is arguably essential given the complexity of many financial products and services, and the asymmetry of information that exists between consumers and sellers of those products and services. As Professor Armour and others have recognised, this makes consumers 'particularly vulnerable to unscrupulous sellers'.[10]

13.17 Within the particular context of Australia's financial services regulation, these rationales are given expression in the objects clause for Chapter 7 of the *Corporations Act*, which includes objectives of 'fairness, honesty and professionalism by those who provide financial services' and 'fair, orderly and transparent markets for financial products', among others.[11] The rationales for conduct regulation are also reflected in the particular obligations discussed in this chapter, including the 'efficiently, honestly and fairly' obligation on AFS Licensees and Credit Licensees, and proscriptions on unconscionable conduct and conduct that is false, misleading, or deceptive. While some conduct obligations apply broadly, existing policy also recognises circumstances of particular vulnerability that warrant additional protection, such as where personal advice is provided to retail clients (which attracts a 'best interests' obligation, as discussed later in this chapter).

13.18 In aiming to ensure certain standards of competency and to protect consumers, conduct regulation serves as a complement to other measures discussed in this Interim Report, including licensing (**Chapter 8**) and disclosure (**Chapter 9**). However, unlike those measures — which are operative at particular points in time (namely, prior to the ability to provide financial services, or prior to the sale of financial products) — conduct regulation typically includes the postulation of enduring standards that must be adhered to more generally, as discussed in the remainder of this chapter.

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6 Iain MacNeil, *Rethinking Conduct Regulation* (University of Glasgow, 2015) 16.
7 Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (2014) 1.
8 John Armour et al, *Principles of Financial Regulation* (Oxford University Press, 2016) 75.
9 Ibid 62.
10 Ibid 55.
11 *Corporations Act 2001* (Cth) ss 760A(b), (c).

The expressive power of conduct obligations

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?

13.19 **Questions A18** and **A19** are designed to elicit stakeholder feedback on whether, or how, the norms that underlie existing conduct regulation could be given clearer expression, and thereby serve to guide conduct more effectively towards compliance. Further, clearly expressed norms could assist courts when considering the interpretation of ambiguous provisions, and thereby give better effect to fundamental purposes in this area of law. Statutory expression of such norms may also be a step towards a more principles-based approach to regulation, as discussed in **Chapter 2**.

13.20 If the law is to serve as an effective guide to conduct, what the law expects should be capable of ready identification and comprehension. Unnecessarily complex, incoherent, obscure, or lengthy legislation is likely to undermine that objective.[12] As Professor Fuller has observed, 'clarity represents one of the most essential ingredients of legality' since 'obscure and incoherent legislation can make legality unattainable by anyone'.[13] Rule of law considerations also require the law to be 'accessible in its coherence and writing'.[14]

13.21 The current law concerning conduct obligations on financial services entities is unnecessarily complex. That is particularly evident in the degree to which numerous provisions proscribe similar conduct, but subject to complex threshold requirements, and in the dispersal of conduct obligations across multiple locations. The provisions concerning misleading or deceptive conduct, and unconscionable conduct, as discussed further below, provide a clear demonstration of both of those concerns. Indeed, in the summary for *Wingecarribee Shire Council v Lehman Brothers Australia (in liq)* ('*Wingecarribee*'), Rares J referred to the law proscribing misleading or deceptive conduct as being comprised of a 'plethora of pointlessly technical and befuddling statutory provisions scattered over many Acts in defined situations'.[15]

12 For a discussion of features of legislative complexity, see **Chapter 3**.
13 Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1994) 63.
14 The Hon Chief Justice JLB Allsop AO, 'The Rule of Law Is Not a Law of Rules' (Speech, Annual Quayside Oration, 1 November 2018).
15 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028, 5 (Summary).

13.22 Apart from the other measures outlined later in this chapter, one means of assisting users to navigate this legislative morass would be to introduce a form of signposting or signalling as to the fundamental norms that underlie the various conduct obligations. Notably, in consultations to date, the ALRC has been told by stakeholders that the 'Eggleston Principles' in s 602 of the *Corporations Act* effectively achieve this end in the context of takeovers regulation.[16] Those principles provide four 'purposes' for Chapter 6 of the *Corporations Act* and are 'considered to be the drivers of Australia's takeover legislation'.[17]

13.23 A similar approach could be taken for financial services conduct regulation. As the Financial Services Royal Commission observed in its Final Report, a step towards 'a simpler and more readily understood body of law' would be to

> identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a given subject. Hence, to take one example, the detailed rules about conflicts of interest and conflicted remuneration should be expressly identified as giving effect to the principle that when a person acts for another, the person must act in the best interests of that other. Obviously, including such a statement of objects is useful in resolving any dispute about how the detailed rules should be construed.[18]

13.24 These comments informed Recommendation 7.4 of the Financial Services Royal Commission, which was expressed as follows:

> As far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter.[19]

13.25 In its response to the Financial Services Royal Commission, the Australian Government agreed to this recommendation and considered that a 'clearer focus' on fundamental norms would 'improve the regulatory architecture and ensure that the law's intent is met'.[20] However, the Commission did not recommend a particular model as to how its recommendation should be achieved, and at this stage Parliament has not acted to implement the recommendation, nor indicated how it may seek to do so. Accordingly, the remainder of this section considers how this recommendation could best be achieved.

13.26 There are three possible approaches that could be taken to expressing fundamental norms of conduct in legislative form. The first would be to make such norms directly enforceable. The second would be to include those norms in an objects

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16 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) 3.

17 Benedict Sheehy, 'Australia's Eggleston Principles in Takeover Law: Social and Economic Sense?' (2004) 17(2) *Australian Journal of Corporate Law* 218, 219.

18 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 2) 494.

19 Ibid 42.

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

provision. The third would be simply to present those norms without any indication that they should be considered as objects for the purposes of other provisions.

13.27 The first approach is taken in the UK, where there are 11 foundational 'Principles for Businesses', the breach of which 'makes a firm or other person to whom the Principles apply liable to disciplinary sanctions'.[21] The Financial Conduct Authority ('FCA') Handbook describes these principles as

> a general statement of the fundamental obligations of firms and the other persons to whom they apply under the regulatory system. They derive their authority from the FCA's rule-making powers as set out in the Act … and reflect the statutory objectives.[22]

13.28 **Table 13.1** below sets out the 11 Principles for Business, as provided by the FCA Handbook.[23]

Table 13.1: 'Principles for Business' in the UK

1. Integrity	A firm must conduct its business with integrity.
2. Skill, care and diligence	A firm must conduct its business with due skill, care and diligence.
3. Management and control	A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
4. Financial prudence	A firm must maintain adequate financial resources.
5. Market conduct	A firm must observe proper standards of market conduct.
6. Customers' interests	A firm must pay due regard to the interests of its customers and treat them fairly.
7. Communications with clients	A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.
8. Conflicts of interests	A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.

21 Financial Conduct Authority (UK), *FCA Handbook*, PRIN 1.1.7.
22 Ibid PRIN 1.1.2.
23 Ibid PRIN 2.1.1.

9. Customers: relationships of trust	A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.
10. Clients' assets	A firm must arrange adequate protection for clients' assets when it is responsible for them.
11. Relations with regulators	A firm must deal with its regulators in an open and cooperative way, and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.

13.29 The 'Principles for Business' parallel many of the norms that underpin conduct obligations in Australia, as discussed further below. However, the ALRC's view is that there is no need to legislate an additional set of enforceable fundamental norms. This is because reforms in 2019 made the existing, principles-based conduct obligation that AFS Licensees and Credit Licensees undertake their licensed activities 'efficiently, honestly and fairly' enforceable as civil penalty provisions.[24] As discussed later in this chapter, that obligation already has a very broad remit. Arguably, as the Financial Services Royal Commission concluded, it embraces all the fundamental norms underlying Australian financial services conduct regulation.[25]

13.30 A second approach is to legislate fundamental norms as an objects clause. Apart from potentially providing greater clarity for regulated entities (as to how they should behave) and consumers (as to what they are entitled to expect), such a provision 'can be used to resolve uncertainty and ambiguity' when courts are required to construe other provisions.[26] In addition to acting as a signalling device to regulated entities and consumers, such a provision may thereby also assist courts when construing particular provisions. In this way it may assist to realise the fundamental objectives of conduct regulation, which must currently be gleaned from a more exhaustive consideration of detailed provisions.

13.31 Nonetheless, it is important to note that 'whilst regard may be had to an objects clause to resolve uncertainty or ambiguity', such clauses do 'not control clear statutory language, or command a particular outcome of exercise of discretionary power'.[27] Substantive provisions that are clear in their operation would be unaffected.

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24 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) sch 1 item 76.

25 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 2) 9.

26 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, 2008) [5.90]–[5.91].

27 *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 78 (Cole JA) (citations omitted).

As indicated immediately above, it is only in relation to provisions that are uncertain or ambiguous that an objects clause may help shape a court's interpretation. This approach would not bring about any change in policy — instead, it would simply help to better realise (and communicate) existing policy settings, assuming the norms selected accurately reflect those settings.

13.32 Although the *Corporations Act* cannot currently be described as being 'principles-based legislation', the inclusion of the norms as an objects clause may assist in any transition to a more principles-based approach (at least in relation to conduct obligations). As the ALRC has previously noted:

> the inclusion of an objects clause … is particularly important in principles-based legislation, because principles require constant interpretation and application to particular contexts and an objects clause provides a reference framework to assist with this.[28]

13.33 Apart from implementing the Financial Services Royal Commission's recommendation, the enactment of norms as an objects provision would be consistent with stakeholder feedback received by the ALRC, which indicated support for 'expanding objects clauses as part of a principles-based approach';[29] and is within the ALRC's remit for this Inquiry, of suggesting reforms that fall within 'existing policy settings'.

13.34 A third approach would be to legislate conduct norms, but without presenting the norms as objects. This may be analogised to the inclusion of a simplified outline of a part in an Act, which may assist for the purposes of navigation or communication to users of the legislation, but may be less likely to be used when construing particular provisions. However, given courts may interpret provisions by reference to contextual features of legislation, such a provision may need to expressly state that it is not to be used as an objects clause, or for the purposes of interpretation, if its potential use for such purposes was sought to be entirely excluded.[30]

13.35 In the ALRC's view, the third approach is less desirable than the second approach, since an appropriate set of norms *should* be reflective of the broader policy intent behind specific provisions, and because there is value in allowing that intent to be used when considering the construction of ambiguous provisions. In short, this approach would not fully realise the potential benefits of legislating conduct norms. Legislated norms should speak to the aspiration of more particular provisions, and as OPC recognises, it 'is more appropriate to include aspirational material in objects provisions than in simplified outlines'.[31]

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28 Australian Law Reform Commission (n 26) [5.118].

29 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) 4.

30 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 33.

31 Office of Parliamentary Counsel (Cth), Drafting Direction 1.3A, 'Simplified outlines' (Document release 1.2, November 2016) [58].

13.36 A question remains as to the identification of the norms that could be legislated. Notably, the Financial Services Royal Commission identified six norms which it considered to be 'well-established, widely accepted, and easily understood'. It was the Commission's view that each of these norms was already 'reflected in existing law'.[32] The norms are:

1. Obey the law;
2. Do not mislead or deceive;
3. Act fairly;
4. Provide services that are fit for purpose;
5. Deliver services with reasonable care and skill; and
6. When acting for another, act in the best interests of that other.

13.37 The ALRC agrees that these six norms are reflective of the key financial services conduct obligations, as discussed in the remainder of this chapter — including the prohibitions on misleading, deceptive, and unconscionable conduct; the requirement to undertake licensed activities 'efficiently, honestly and fairly'; and obligations on providers of personal advice to act in the best interests of consumers. The norm of 'obey the law' is arguably referable to specific statutory provisions,[33] although could be considered redundant because the requirement to obey is fundamental to all law, and is not a norm specifically attributable to this statutory regime.[34]

13.38 ALRC consultees broadly indicated support for incorporating these specific norms as an objects clause (or clauses).[35] Concern, or hesitancy, was expressed by some consultees about the 'act fairly' norm.[36] However, such a norm reflects the obligation of fairness imposed in the 'efficiently, honestly and fairly' standard, and in the resolution of consumer disputes by AFCA.[37] Whether greater clarity can be provided in relation to the standard of fairness is considered in greater detail later in this chapter. The ALRC invites interested stakeholders to comment on the suitability of the six norms identified above for inclusion in an objects clause.

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32 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 2) 9.

33 See *Corporations Act 2001* (Cth) ss 912A(1)(c), (ca), which require a licensee to ensure compliance with 'financial services laws' and to take reasonable steps to ensure its representatives also comply with such laws.

34 The ALRC considers that 'obey the law' should be understood to refer to all law (including, for example, equitable obligations), and not simply statutory obligations. The ALRC foreshadows giving further consideration to whether that should be expressly flagged in legislation (for example, in a note accompanying the norms) or could be explained in regulatory guidance issued by ASIC.

35 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) 4.

36 Ibid.

37 For discussion of AFCA's 'fairness jurisdiction', see [13.97] below.

13.39 The ALRC considers that an objects clause incorporating the fundamental norms could be described as the 'Australian Financial Services Conduct Principles'. Each of the norms could be annotated so as to refer to the more particular provisions which give expression to the norms (for example, that the sixth norm relating to acting in the interests of another is reflected in s 961B of the *Corporations Act*, concerning the provision of personal advice to retail clients).

13.40 The objects clause could be included at the beginning of a new part of Chapter 7 of the *Corporations Act*. As part of Interim Report C, the ALRC will consider how such a new part could draw together and rationalise conduct obligations that are currently scattered across various parts of Chapter 7 of the *Corporations Act* (such as s 912A in Part 7.6 and s 1041H in Part 7.10), the *ASIC Act* (in particular, those outlined in Part 2 Div 2), and in other legislation affecting financial services providers (such as s 47 of the *NCCP Act*, s 52 of the *SIS Act*, and potentially portions of the Banking Executive Accountability Regime in Part IIAA of the *Banking Act 1959* (Cth)). The ALRC invites comments on this proposed consolidation, and on whether the six norms may need to be expanded or amended so as to usefully outline the fundamental norms of other conduct obligations that may be consolidated in such a new part.

13.41 The ALRC also invites the views of stakeholders on whether an expanded objects clause for Chapter 7 of the *Corporations Act* in general (for example, to replace s 760A), or for other discrete aspects of financial services law, could strengthen the expressive power of the law and improve compliance.

13.42 Lastly, the ALRC notes that, in addition to statutory obligations, the general law provides a suite of obligations that may sometimes apply to financial services providers, such as where the circumstances give rise to fiduciary obligations (which require a person to avoid a position where their interests may conflict with those of the person to whom they owe the obligation, and not to profit from their position).[38] The ALRC intends to give further consideration in Interim Reports B and C to the appropriate balance between general law and statutory regulation, and as to whether greater clarity or expressive power can be provided by either codifying or signposting the existence of some general law obligations.

38 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1 [733].

Clarifying the 'efficiently, honestly and fairly' obligation

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.

13.43 This proposal is designed to clarify the fundamental obligation on AFS Licensees to undertake their licensed activities 'efficiently, honestly and fairly'. At present, conflicting case law has made it unclear whether the terms are to be understood in composite, or whether they are standalone obligations. The case law has also established that the word 'efficiently' has a meaning inconsistent with its lay meaning, implying a standard of competence or professionalism. Lastly, the obligation to act 'fairly' is uncertain in its application, making compliance difficult for regulated entities. The proposals aim to clarify the law by addressing those concerns.

13.44 The *NCCP Act* and *Corporations Act* impose an obligation on Credit Licensees and AFS Licensees, respectively, to do all things necessary to ensure that the activities authorised by their licence are engaged in or provided 'efficiently, honestly and fairly'.[39]

13.45 In *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* ('*ASIC v Westpac Securities Administration*'), the 'first substantive appellate discussion' of the obligation in the *Corporations Act*,[40] Allsop CJ described the provision as

> part of the statute's legislative policy to require social and commercial norms or standards of behaviour to be adhered to. The rule in the section is directed to a social and commercial norm, expressed as an abstraction.[41]

13.46 This description is consistent with the view expressed in the Explanatory Memorandum that accompanied the introduction of this norm into the *NCCP Act*. The

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39 *National Consumer Credit Protection Act 2009* (Cth) s 47(1)(a); *Corporations Act 2001* (Cth) s 912A(1)(a).

40 Patrick Hall, 'Community Standards and Expectations: Has There Been a Fundamental Shift in the Obligations on Financial Services Licensees under Pt 7.6 of the Corporations Act 2001 (Cth)?' (2020) 31(3) *Journal of Banking and Finance Law and Practice* 221, 228.

41 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 [173].

Explanatory Memorandum considered that the obligation would require 'the licensee to conduct itself in a way that is consistent with, and which reflects an appreciation of, the need to meet community standards of efficiency, honesty and fairness'.[42]

13.47 It is well established that the obligation stands alone, and 'does not require a contravention or a breach of a separately existing legal duty or obligation'.[43] As a result, it is an obligation of potentially enormous breadth, which as Professor Latimer has described, is 'not limited to matters within the broker/client contract, and would extend to all matters incidental but necessary'.[44] Similarly, as Gamertsfelder has noted, the obligation will apply 'in an infinite array of situations' and all

> aspects of a licensee's operations can be scrutinised, including the licensee's business model, product design, compliance arrangements, risk disclosures and general communications with customers.[45]

13.48 In short, it is fair to say that the 'efficiently, honestly and fairly' obligation lies at the heart of financial services conduct regulation and is the obligation of the single greatest significance. At least three considerations support this view:

- first, the breadth of its application (which sets an 'ongoing standard of conduct' for Credit Licensees and AFS Licensees generally);[46]
- second, the scope and generality of its requirements (in being concerned, for instance, with broad issues of 'fairness', rather than more specific norms); and
- third, the fact that it imposes obligations that are positive and not merely prohibitive. As Anderson has noted, it does not merely 'prohibit vices', but instead 'mandates virtuous behaviours'.[47]

13.49 Empirical evidence provides some support for the view that the obligation to act 'efficiently, honestly and fairly' is a central obligation. As observed in **Chapter 3**, the most commonly reported breaches to ASIC concern 'general conduct obligations for financial services licensees' (in s 912A of the *Corporations Act*) and 'general conduct obligations for credit licensees' (in s 47 of the *NCCP Act*) (both of which contain the 'efficiently, honestly and fairly' obligation).

13.50 The opportunity for this obligation to play a larger role in guiding the conduct of AFS Licensees and Credit Licensees — and in ASIC enforcement actions — was brought about in 2019 following the implementation of recommendations from the

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42 Consolidated Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth) [2.112].

43 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 [512].

44 Paul Latimer, 'Providing Financial Services "Efficiently, Honestly and Fairly"' (2006) 24(6) *Company and Securities Law Journal* 362, 373.

45 Leif Gamertsfelder, 'Efficiently, Honestly and Fairly: A Norm That Applies in an Infinite Variety of Circumstances' (2021) 50(2) *Australian Bar Review* 345, 346–7.

46 Latimer (n 44) 364.

47 Joshua Anderson, 'Duties of Efficiency, Honesty and Fairness Post-Westpac: A New Beginning for Financial Services Licensees and the Courts?' (2020) 37(7) *Company and Securities Law Journal* 450, 466.

ASIC Enforcement Review Taskforce Report.[48] As a result of implementation of these recommendations, the obligation to act, 'efficiently, honestly and fairly' became a civil penalty provision from 13 March 2019.[49] As Anderson has observed, this has effectively 'weaponised' the obligation, which now serves as a 'potent standard of conduct'.[50]

13.51 A contravention of the obligation may now give rise to a penalty that, in the case of a corporation, is the greater of: 50,000 penalty units;[51] three times the benefit gained or detriment avoided; or, 10% of annual turnover (capped at 2.5 million penalty units).[52] Contravention can also give rise to a relinquishment order (of the monetary value of the benefit derived or detriment avoided because of a contravention), the suspension or cancellation of a licence, a banning order, or any other order a court sees fit.[53]

13.52 Given the centrality of the obligation, issues concerning its clarity and comprehensibility loom large. Notably, none of the obligation's constituent terms is statutorily defined,[54] and as Anderson has noted, the obligation is 'undeniably broad and amorphous in nature'.[55] As Gamertsfelder has observed, identifying precisely what may be required to discharge the obligation in any given situation could be 'inherently challenging given the task is informed by social and commercial norms which have a protean nature'.[56]

13.53 To some extent, it may be that 'the boundaries and content of the phrase or its various elements are incapable of clear or exhaustive definition'.[57] Nonetheless, the ALRC considers that there are several aspects of the obligation that would benefit from clarification. These include:

- whether the obligation is compendious or not;
- whether 'efficiently' should be replaced with another word; and
- whether 'fairly' should be particularised or clarified in some other way.

13.54 Although it has been suggested to the ALRC that these issues could be the left to the courts, the centrality of the obligation makes it undesirable to do so. In relation to the first and third aspects outlined immediately above, it may take many years for

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48 Australian Government, *ASIC Enforcement Review Taskforce Report* (2017). See Revised Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) [1.1].

49 Following commencement of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).

50 Anderson (n 47) 451.

51 $11,100,000, calculated using the penalty value of $222 as of 1 July 2020. See Attorney-General (Cth), 'Notice of Indexation of the Penalty Unit Amount' (14 May 2020).

52 *Corporations Act 2001* (Cth) s 1317G.

53 Ibid ss 1317GAB, 915C(1)(a), 920A(1)(b), 1101B(1).

54 Anderson (n 47) 452.

55 Ibid 468.

56 Gamertsfelder (n 45) 369.

57 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 [507].

courts to achieve certainty in relation to these issues, if they were to achieve certainty at all.[58] In relation to the second, the issue is the result of a mismatch between the statutory language ('efficiently') and the established case law — an inconsistency which only legislative amendment will resolve.

Whether the obligation is compendious or not

13.55 The compound phraseology of the 'efficiently, honestly and fairly' provisions have given rise to some doubt about whether or not they impose a 'single, composite and omnibus obligation rather than three separate obligations'.[59] In practical terms, the question is whether any one of the words is conditioned by the others, or whether each stands alone.

13.56 The view that the provisions impose an omnibus or 'compendious' obligation was first outlined by Young J in *Story v National Companies and Securities Commission* ('*Story*').[60] On his Honour's reading, the provision requires a licensee to go about their duties

> efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.[61]

13.57 His Honour's rationale for this construction included that there was a potential for inconsistencies between the duties if they were read separately:

> In one sense it is impossible to carry out all three tasks concurrently. To illustrate, a police officer may very well be more efficient in control of crime if he just shot every suspected criminal on sight. It would save a lot of time in arresting, preparing for trial, trying and convicting the offender. However, that would hardly be fair.[62]

13.58 As Anderson has observed, the treatment of 'efficiently, honestly and fairly' as a composite phrase 'firmly took hold in the case law'.[63] For example, Young J's construction was endorsed in a number of single instance decisions of the Federal

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58 The absence of appellate court consideration of the 'efficiently, honestly and fairly' standard until 2019 supports concerns that it may take some time for there to be an authoritative determination of these issues. In relation to the meaning of 'fairly', AFCA's ongoing efforts to clarify 'fairness' are discussed below at [13.97], but this concerns a different (albeit related) context — namely, concerning external resolution of consumer disputes, rather than the obligation in s 912A(1)(a) of the *Corporations Act*. As discussed below, the ALRC considers that there may be value in aligning the tests in both contexts.

59 Paul Latimer, 'Providing Financial Services "Efficiently, Honestly and Fairly": Part 2' (2020) 37(6) *Company and Securities Law Journal* 382, 383.

60 *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661.

61 Ibid 672.

62 Ibid.

63 Anderson (n 47) 453.

Court.[64] A similar approach has been adopted in relation to other standards, such as the 'clear, concise and effective' standard in disclosure.[65]

13.59 However, in 2019, doubt was cast over the correctness of this view in *obiter* from two judges in *ASIC v Westpac Securities Administration*.[66] Notably, Allsop CJ considered that:

> The primary judge's discussion of the standard of conduct expected by the terms of s 912A(1)(a) … was based on ASIC's submissions and was not contested by Westpac. Whilst it is a helpful exposition, I would reserve for an occasion where the matter was fully argued the question whether the phrase is compendious and, if it is, its meaning and application.[67]

13.60 Justice O'Bryan was more forthright, writing that:

> Although not the subject of argument on this appeal, I have considerable reservations about the view that the words 'efficiently, honestly and fairly' as used in s 912A(1)(a) of the Act should be read compendiously in the manner suggested by Young J in *Story*.
>
> … it is not apparent why a licensee cannot comply with each of the three obligations, efficiently, honestly and fairly, applying the ordinary meaning of each word. …
>
> It seems to me that the concepts of efficiently, honestly and fairly are not inherently in conflict with each other and that the ordinary meaning of the words used in s 912A(1)(a) is to impose three concurrent obligations on the financial services licensee: to ensure that the financial services are provided efficiently, and are provided honestly, and are provided fairly.[68]

13.61 One view is that the resolution of this issue does not matter much. As Young J considered in *Story*,

> in the long run it does not seem to me to much matter whether one reads the words cumulatively or disjunctively, because unless a licence holder possesses the three attributes whether as one package or as three separate parcels [the provision will be contravened].[69]

13.62 However, arguably this issue of construction could make a practical difference. If the provision is compendious, then the obligation of 'fairness', for example, may need to be tempered, assuming there is (as Young J considered there might be) a

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64 *Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq)* (2017) 348 ALR 525 [191]; *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* (2012) 88 ACSR 206 [69]–[70].

65 See Australian Securities and Investments Commission, *Prospectuses: Effective Disclosure for Retail Investors* (Regulatory Guide 228, August 2019) [228.22].

66 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170.

67 Ibid [171].

68 Ibid [424]–[426].

69 *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661, 672.

conflict with the other prescribed norms in some circumstances. Anderson has also expressed the view that 'whether the three duties are compendious, and the standard of conduct they prescribe … are important questions with significant ramifications for AFS licensees'.[70]

13.63 However, regardless of whether there is any practical difference, the process of evaluation required by the compendious reading (for example, of whether something is fair in light of the dictates of honesty and efficiency) is inherently more complex than an assessment of whether conduct contravenes one of the articulated norms. Further, uncertainty itself may detract from the communicative power and function of the obligation. As Anderson has commented, because of the views expressed in *ASIC v Westpac Securities Administration*, 'a cloud of uncertainty now hangs over the future treatment of s 912A(1)(a)'.[71]

13.64 The ALRC considers that the separate articulation of the individual norms of 'efficiently, honestly and fairly' would provide greater expressive power, remove the existing uncertainty, and permit a simpler assessment of whether conduct had contravened the provision or not. Given the centrality of the obligation, a legislative solution, rather than a potentially delayed or inconclusive judicial determination, is desirable.

13.65 Although the matter may not be entirely free from doubt, the ALRC also considers that an amendment to separately articulate each of the norms would not involve a change in the underlying policy intent of the existing law. Notably, the Explanatory Memorandum to the National Consumer Credit Protection Bill 2009 (Cth) said in relation to the 'efficiently, honestly and fairly' obligation in s 47 that:

> The efficiency criterion cannot be used to justify conduct that is unfair or dishonest. For example, if a person consistently arranges for consumers to sign contract documents without any explanation that may be efficient but in all likelihood it would not meet the required standard of honesty or fairness, both as to the procedures adopted and the outcomes for consumers.[72]

13.66 In indicating that 'unfair' and 'dishonest' are not to be qualified by 'efficient' so as to justify conduct that would otherwise contravene those standards, this statement provides some support for the view that Parliament intended these obligations — at least in the *NCCP Act* — to stand alone, rather than to be read compendiously.

13.67 Given the significance of the obligation, the ALRC considers that clarifying the obligation would be a meaningful improvement that could facilitate greater compliance with, and understanding of, the law. The marginal costs involved in such a change are likely to be outweighed by these benefits, which would include limiting the need for future litigation on this issue.

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70 Anderson (n 47) 469.
71 Ibid 453.
72 Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth) [2.113].

Whether 'efficiently' should be replaced with another word

13.68 As Latimer has observed, the 'lay sense' of the term 'efficiency' refers to the 'economic concept of operational efficiency — where there is more output from the current input'.[73] Despite this, as O'Bryan J observed in *ASIC v Westpac Securities Administration*, the word as used in s 912A(1)(a) has been held by courts to impose on licensees a requirement to be 'competent, capable and having and using the requisite knowledge, skill and industry'.[74] As Anderson has noted, in contrast to the dictionary or lay meaning, 'the courts have settled on another interpretation of the word, as meaning "adequate in performance", "capable" and "competent"'.[75]

13.69 As Latimer has noted,[76] the expression 'efficiently, honestly and fairly' had its source in comments of the *Rae Report* in 1974, which had considered that:

> The stock exchanges should be doing their utmost to ensure that, when carrying out various functions in the public share market, their members are providing honest, skilled, unbiased and *efficient* service. The right to carry out the stock exchange function of advising the public investors should be available only to those who have demonstrated their ability to meet at least minimal standards of competence, integrity and financial responsibility.[77]

13.70 Because s 912A(1)(a) picks up this language, Anderson argues that the use of the word 'efficiently' is a vestige of the provision's past life as a duty imposed originally on securities dealers, who were required to execute trades promptly in order to keep the market 'fully and speedily informed'.[78]

13.71 As observed in **Chapter 4** of this Interim Report, words and phrases should, to the extent possible, be used in the sense of their ordinary meaning. Although the principles outlined in **Chapter 4** relate to defined terms, they reflect a concern to ensure the accessibility of the law. The current use of 'efficiency' is obscure and impedes accessibility. Accordingly, the ALRC proposes that an alternative term be used that intuitively corresponds with the meaning that has been attributed to the word 'efficiently' by the courts.

13.72 Latimer has suggested the use of the term 'competent', which he considered 'overcomes the problem of what is efficient, and picks up the tone of efficient in the sense of capable, meaning "adequately qualified or capable"'.[79] That term is used instead of 'efficiently' in Hong Kong's financial services licensing regime, which requires that — in determining whether a person is 'fit and proper' — the regulator

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73 Latimer (n 44) 368.
74 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 [426].
75 Anderson (n 47) 463.
76 Latimer (n 44) 365.
77 Parliament of Australia Senate Select Committee on Securities and Exchange, *Australian Securities Markets and Their Regulation* (1974) 15.6 (emphasis added).
78 Anderson (n 47) 463.
79 Latimer (n 44) 368.

have regard to the ability of the person to 'carry on the regulated activity competently, honestly and fairly'.[80]

13.73 In the ALRC's view, the most appropriate term is 'professionally', since this would align the obligation with the objects clause in s 760A of the *Corporations Act*, which provides that one of the objects of Chapter 7 is the promotion of 'fairness, honesty and *professionalism* by those who provide financial services'.[81] Notably, the proposed replacement would also align the obligation with the European Union's *Markets in Financial Instruments Directive*, which requires that, when providing investment services, an investment firm must 'act honestly, fairly and *professionally* in accordance with the best interests of its clients'.[82] The word 'professionally' is also appropriately synonymous with 'competent', with a dictionary definition that includes 'having or showing the skill of a professional, competent',[83] or 'as would be done by a professional; expert'.[84]

Whether 'fairly' should be particularised or clarified

13.74 In consultations for this Inquiry, some consultees expressed concerns about the 'imprecision/indefinability' of the concept of 'fairness' as used in the 'efficiently, honestly and fairly' obligation.[85] A similar view has been expressed by Hall, who wrote that the meaning of 'fairly' in this formulation is 'not obvious or clear' and that this 'uncertainty will likely continue due to the lack of detailed consideration of the word "fair", which may require many years to understand'.[86]

13.75 Concerns about the indeterminacy of standards such as 'fair' elsewhere in the law have also been aired.[87] For example, in the context of equitable obligations, Professor Birks QC FBA has commented that the concept of fairness is 'so unspecific that it simply conceals a private and intuitive evaluation'.[88] Similarly, Beach J has observed, in the context of statutory unconscionability, that reference to

> intellectual ideas of customary morality and societal values without further delineation and ready identification may be at too high a level of abstraction to be an objective touchstone.[89]

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80 *Securities and Futures Ordinance* (Hong Kong) cap 571 s 129(1)(c).
81 *Corporations Act 2001* (Cth) s 760A (emphasis added).
82 *Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU* [2014] OJ L 173/349 art 24(1).
83 *Australian Concise Oxford Dictionary* (Oxford University Press, 2nd ed, 1992) 'professionally'.
84 *Macquarie Dictionary* (Palgrave Macmillan Australia, 6th ed, 2013) 'professionally'.
85 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021) 4.
86 Hall (n 40) 229.
87 For a discussion of how indeterminate terms may be a source of legislative complexity, see **Chapter 3**.
88 Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1, 16–17.
89 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 [365].

13.76 If this critique is also made of 'fairness', there may be rule of law concerns, since it would mean that substantial discretion is reposed in judges to make moral evaluations, free from meaningful constraint, on matters about which reasonable people commonly disagree. As Dixon CJ has observed, '[i]ntuitive feelings for justice seem a poor substitute for a rule antecedently known, more particularly where all do not have the same intuitions'.[90]

13.77 Although 'fairly' in the 'efficiently, honestly and fairly' obligation has 'not received detailed judicial consideration',[91] in *ASIC v Westpac Securities Administration*, Allsop CJ observed that:

> The word 'fair' in its adjectival form, directed to conduct, includes a meaning of 'free from bias, dishonesty, or injustice; that which is legitimately sought, pursued, done, given etc; proper under the rules'.[92]

13.78 In the same case, O'Bryan J considered that there seemed to be 'no reason why it cannot carry its ordinary meaning which includes an absence of injustice, even-handedness and reasonableness'.[93]

13.79 One criticism of such descriptions is that they merely invoke synonyms that, as Anderson has suggested, 'are of little assistance' because they 'simply re-express the concept of fairness in terms of other values and societal norms'.[94] As Beach J wrote in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* ('*ASIC v AGM Markets'*) about the use of 'fairly' in s 912A(1)(a), 'no dictionary definition could be adequate for the task given the intrinsic circularity with such definitions'.[95]

13.80 Before going on to consider whether, or how, greater clarity could be given to the concept of 'fairness', it is worth observing that it is arguable that *some* degree of uncertainty may add to, rather than detract from, the utility of the obligation. First, the articulation of the obligation at a reasonably high level of abstraction ensures it is capable of application to diverse situations and cannot easily be gamed or avoided. As the Hon Justice C Maxwell AC, President of the Victorian Court of Appeal, has written extra-judicially about the similarly amorphous concept of conscience:

> it is a *virtue* of the equitable (and statutory) concept of conscience that it is *not* rule-like, that it *does* establish 'open-ended standards' and that it *does* prevent unfair advantage being taken of the rigidity of rules.[96]

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90 *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, 572.

91 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 [426].

92 Ibid [174].

93 Ibid [426].

94 Anderson (n 47) 453.

95 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 [520].

96 The Hon Justice C Maxwell, 'Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce' (Speech, Victoria Law Foundation Oration, 14 August 2019) 10 (emphasis in original).

13.81 Similarly, as Professors Paterson and Bant have observed:

> Open-textured standards allow greater scope for courts to respond to the circumstances of the cases before them in promoting the purposes of the legislation.[97]

13.82 Second, uncertainty may chasten poor behaviour by requiring regulated entities to more actively consider whether their conduct may potentially contravene the standard. Again, as Justice Maxwell has observed in relation to unconscionability, 'uncertainty about where the limits might be drawn if the matter went to Court, should encourage a precautionary approach'.[98] As Professor Harding has suggested, the open-ended nature of some equitable concepts can create

> conditions under which citizens are encouraged and expected to engage in moral deliberation and take responsibility for their own actions in accordance with law. [99]

13.83 Nonetheless, the ALRC acknowledges the concerns of stakeholders, and the views of commentators such as Hall, who has suggested that without clarification of the 'fairly' standard in s 912A(1)(a), 'Australian companies will have an extended period of uncertainty in understanding their legal obligations'.[100] Accordingly, it is worth considering *how* greater clarity may be achieved.

13.84 One means of injecting certainty may be the inclusion of a definition of 'unfair'. Notably, such an approach has been taken in the unfair contract terms regime in the *ASIC Act*, which defines 'unfair' for that purpose as follows:

> (1) A term of a contract referred to in subsection 12BF(1) is ***unfair*** if:
>
> (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
>
> (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
>
> (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
>
> (2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
>
> (b) the extent to which the term is transparent;
>
> (c) the contract as a whole. …[101]

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97 Jeannie Marie Paterson and Elise Bant, 'Misrepresentation, Misleading Conduct and Statute through the Lens of Form and Substance' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 403, 410.

98 Justice C Maxwell (n 96) 10.

99 Matthew Harding, 'Equity and the Rule of Law' (2016) 132 *Law Quarterly Review* 278, 295.

100 Hall (n 40) 222.

101 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BG.

13.85 However, in the context of the 'efficiently, honestly and fairly' obligation, attempting to define 'unfair' is unlikely to be consistent with the existing policy. This is because Parliament has clearly chosen to adopt the ordinary, unconfined meaning of the word, and, as Allsop CJ has observed, words such as fairly 'do not admit of comprehensive definition'.[102] In other words, an attempt at definition would not be consistent with existing policy because it would almost certainly constrain what was intended to be an open-ended obligation. Definition may also remove the potentially salutary effects of uncertainty discussed above.

13.86 A preferable means of providing additional clarity would be to outline non-exhaustive examples of conduct that may, or is likely to be, unfair. This is an approach that has received some judicial commendation. For example, Allsop CJ observed in relation to the 'efficiently, honestly and fairly' obligation in *ASIC v Westpac Securities Administration* that:

> Certainly a degree of articulation of instances or examples of conduct failing to satisfy the phrase will be helpful and of guidance, as will an articulation or description of the norms involved.[103]

13.87 Similarly, in *ASIC v AGM Markets*, Beach J was sceptical of the ability to define 'fairly', but seemed to suggest that the inclusion of 'negative conditions' (that is, specifying what is inconsistent with fairness) could be of assistance:

> Could you convincingly define 'fairly' by what it lacks? To say that fairly means free from bias, free from dishonesty, etc, is to stipulate necessary negative conditions. And to do so may give you some boundary conditions. But no positive conditions are stipulated. No content is given, let alone sufficient conditions. But to stipulate negative conditions may not be unhelpful.[104]

13.88 Such an approach is also taken by the *ASIC Act's* unfair contract terms regime, which outlines 'examples of the kinds of terms … that may be unfair'.[105]

13.89 The challenge lies in formulating suitable examples or indicia of unfairness. There is a need to strike a balance between clarity on the one hand and, on the other hand, over-prescriptiveness that runs the risk of promoting a 'tick a box approach' to compliance. Further, there is ample room for disagreement as to what 'fairness' actually entails. Nonetheless, a useful starting point is provided by Anderson, who has suggested that there are three 'possible dimensions of fairness' that 'warrant further consideration as prisms or heuristics' through which to consider the concept of fairness in the 'efficiently, honestly and fairly' obligation.[106]

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102 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 [172].
103 Ibid [172].
104 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 [521].
105 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BH.
106 Anderson (n 47) 458.

13.90 Anderson's first conception of fairness is that conduct is likely to be unfair if it involves 'the exploitation of another's vulnerability', as is comprehended by the law concerning unconscionable conduct.[107] This is supported by case law which has established that 'fairness' imposes a 'lower moral or ethical standard than unconscionability',[108] so that a party who had acted unconscionably, by exploiting another's vulnerability, would almost certainly have failed to act in a manner that was fair. This view, and its implications for simplification of statutory unconscionability provisions, is considered in greater detail later in this chapter.

13.91 The second conception is 'fairness as the suppression of individual interest'.[109] This appears to be the conception of fairness reflected in the *ASIC Act*'s unfair contract regime, as discussed above. This conception was also recognised by Professor Finn, who has observed that:

> one party's decision or action may bear so directly upon the interests of the other that basic fairness to that other may require that in some circumstances he should have regard to those interests in addition to his own, and if necessary, should desist from or modify the proposed course of action in consequence.[110]

13.92 Associate Professor Donald has noted that this conception is reflected in the existing cases concerning 'efficiently, honestly and fairly', which

> all involve situations in which the interests of the client have been adversely affected by the pursuit of the licensee's self-interest. This highlights that, in this context at least, the requirement to act fairly limits the autonomy of the party to act in its own self-interest.[111]

13.93 A recent example of such a conception of fairness in the case law is provided by Allsop CJ's reasons in *ASIC v Westpac Securities Administration*, where his Honour concluded that:

> It could hardly be seen to be fair, or to be providing financial product advice fairly, or efficiently, honestly and fairly, to set out for one's own interests to seek to influence a customer to make a decision on advice of a general character when such decision can only prudently be made having regard to information personal to the customer.[112]

13.94 Anderson's third conception of fairness involves 'reciprocity, in the sense of whether the terms of the impugned transaction are reasonable, and both parties receive "fair or agreed value"'.[113] On this conception, conduct that is misleading or

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107 Ibid 458–9.
108 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 [363].
109 Anderson (n 47) 459–60.
110 Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 87, 95.
111 Scott M Donald, 'Regulating for Fairness in the Australian Funds Management Industry' (2017) 35(7) *Company and Securities Law Journal* 406, 411.
112 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 [174].
113 Anderson (n 47) 460–1.

deceptive, or the making of false or misleading representations, would arguably be unfair, since it indicates that a party has not received the 'agreed value' of the transactions. The implications of this characterisation for simplification of more specific provisions prohibiting such conduct are discussed in greater detail below. Lastly, it is worth observing that this conception of fairness draws attention to the fact that, as Beach J observed in *ASIC v AGM Markets*, fairness 'is to be judged having regard to the interests of both parties'.[114]

13.95 The ALRC considers that these are useful heuristics through which to conceive of, and thereby clarify, at least some of the dimensions of fairness. Accordingly, a provision or note to accompany the 'efficiently, honestly and fairly' obligation could helpfully provide that examples of conduct that may contravene the requirement to act fairly include, but are not limited to:

- conduct that exploits another person's vulnerability, or is otherwise unconscionable;
- conduct that substantially and adversely affects the interests of another, undertaken in the pursuit of self-interest; and
- conduct that indicates a lack of reciprocity, including a lack of fair or agreed value, such as by the making of misleading or deceptive representations.

13.96 The ALRC would welcome the views of stakeholders as to the appropriateness of these proposed examples, and as to whether any additional examples could further enhance clarity, and therefore facilitate compliance with the obligation.

13.97 The ALRC also notes the jurisdiction of AFCA to determine certain consumer complaints. Notably, AFCA must affirm a decision or conduct where it is satisfied that it is 'fair and reasonable in all the circumstances', and must vary the decision or conduct where it is 'unfair or unreasonable, or both'.[115] AFCA is currently undertaking a 'Fairness Project' in partnership with the University of Melbourne, with the purpose of providing 'certainty about how AFCA assesses what is fair in a way that is clearly understood by all stakeholders'.[116] The results of this project should be considered for the purposes of providing clarity on the meaning of 'fair' in the 'efficiently, honestly and fairly' obligation. As part of Interim Reports B and C, the ALRC will consider opportunities to achieve greater alignment between conduct obligations imposed by the primary law and the tests ultimately applied in external dispute resolution, including by AFCA.

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114 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 [522].

115 *Corporations Act 2001* (Cth) ss 1055(2)–(5).

116 Australian Financial Complaints Authority, 'Fairness Project' <www.afca.org.au/about-afca/fairness/fairness-project>.

Other simplification opportunities

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)).

13.98 This proposal aims to repeal a number of prescriptive provisions which are redundant in light of the established meaning given to 'efficiently' in the 'efficiently, honestly and fairly' obligation. The removal of this redundancy can contribute to the rationalisation of the legislative regime.

13.99 As previously observed, the 'efficiently, honestly and fairly' obligation is of substantial breadth. The ALRC considers that the obligation may be leveraged to achieve simplification by removing a number of redundant provisions, which contain obligations that flow invariably from this broader standard.

13.100 The particular provisions that could be removed include the *Corporations Act* obligations to:

- have in place adequate arrangements for the management of conflicts of interest (s 912A(1)(aa));
- maintain the competence to provide the licensed financial services (s 912A(1)(e));
- ensure that a licensee's representatives are adequately trained and competent to provide the financial services (s 912A(1)(f)); and
- have adequate risk management systems (s 912A(1)(h)).

13.101 Equivalent provisions in the *NCCP Act* could also be repealed.[117]

13.102 These obligations are arguably redundant because they are already implied by the requirement to act 'efficiently' (meaning 'competently' or 'professionally', as discussed above). For example, Latimer has observed that:

> Failure to meet the licensee's obligation in s 912A(1)(f) to ensure that its representatives are adequately trained and are competent to provide financial services, which may also breach the obligation in s 912A(1)(ca) to comply with financial services law, may be evidence of not meeting the obligation to act

117 *National Consumer Credit Protection Act 2009* (Cth) ss 47(1)(b), (f), (g), (l)(iii).

> efficiently, honestly and fairly. Added to this is the usual licence condition to supervise representatives, to provide adequate initial and ongoing training for and supervision of representatives, and to have an adequate compliance system in place — failure to do so may be evidence of not providing financial services efficiently, honestly and fairly.[118]

13.103 Similarly, drawing on observations made by Treasury and in the Explanatory Memorandum for the Bill that introduced the obligation to manage conflicts, Battaglia has suggested that it was 'widely understood in the industry as being implied as part of the general duty to act "efficiently, honestly and fairly"' and that

> it can be stated that acting 'efficiently, honestly and fairly' would include the duty to act in a manner that 'manages' conflicts of interest, and to have in place arrangements to ensure that this objective is met.[119]

13.104 This is confirmed by ASIC's regulatory guidance on managing conflicts of interests, which observes:

> The conflicts management obligation … and the obligation to operate efficiently, honestly and fairly are interconnected. A licensee is unlikely to comply with the efficiently, honestly and fairly obligation if they have inadequate conflicts management procedures.[120]

13.105 It may be argued that removal of these provisions would introduce some uncertainty for regulated entities, and possibly make enforcing compliance more difficult for ASIC (because ASIC would need to prove non-compliance with a more principles-based provision, rather than relevant prescriptive provisions).[121] However, to the extent that such particularisation is useful to regulated entities, this could be provided by way of ASIC regulatory guidance. ASIC's regulatory guidance on licensing already provide some detail in this respect.[122] As for enforcement, the ALRC considers that it would be unlikely that an entity could satisfy a court that it was compliant with the 'efficiently, honestly and fairly' obligation if they were not meeting one of the aforementioned requirements currently particularised in s 912A(1). If an entity could satisfy a court of its compliance with the broader obligation in such circumstances, it may be queried why this should be of concern, given that this would indicate that the entity had satisfied the substantive outcomes that these more particular provisions are arguably designed to achieve (the provision of financial services 'efficiently, honestly and fairly').

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118 Latimer (n 44) 375.

119 Vince Battaglia, 'Dealing with Conflicts: The Equitable and Statutory Obligations of Financial Services Licensees' (2008) 26(8) *Company and Securities Law Journal* 483, 492–3.

120 Australian Securities and Investments Commission, *Licensing: Managing Conflicts of Interest* (Regulatory Guide 181, 2004) [RG 181.18].

121 Similarly, in considering whether to grant an AFS Licence under s 913B of the *Corporations Act*, the consideration required by sub-s (1)(b) would be undertaken in the absence of some particularisation currently provided by s 912A(1).

122 Australian Securities and Investments Commission, *AFS Licensing: Meeting the General Obligations* (Regulatory Guide 104, April 2020) [RG 104.59]–[RG 104.96]; Australian Securities and Investments Commission, *General Conduct Obligations* (Regulatory Guide 205, April 2020) [RG 205.73]–[RG 205.118].

13.106 As Anderson has suggested, 'efficiently, honestly and fairly' provides 'an opportunity to construct a principles-based approach to financial services regulation from the "rubble of technical requirements"'.[123] The ALRC invites the views of stakeholders on whether other provisions, in addition to those outlined above, could be removed on the basis that they are already captured by the 'efficiently, honestly and fairly' obligation.

13.107 Additional simplification opportunities potentially offered by greater reliance on the 'efficiently, honestly and fairly' obligation are discussed below in relation to prohibitions of unconscionable conduct, false or misleading representations, and misleading or deceptive conduct. However, some of those opportunities — where they involve removal of provisions in the *ASIC Act* that apply broadly, including to non-licensees — would necessitate an expansion in the application of the 'efficiently, honestly and fairly' obligation. As part of its exploration of opportunities to consolidate aspects of the *ASIC Act* and *Corporations Act* and to achieve a more principled legislative design, the ALRC will consider in Interim Reports B and C whether the 'efficiently, honestly and fairly' obligation and other obligations, should remain limited in their application to Credit Licensees and AFS Licensees, or should apply more broadly to those involved in the provision of financial products and services (as is the case for numerous obligations in Part 2 Div 2 of the *ASIC Act*).

Unconscionable conduct

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.

13.108 **Proposal A22** aims to rationalise legislative provisions proscribing unconscionable conduct by reducing the number of applicable provisions from three to one. Currently, three separate provisions — each subject to different threshold conditions — proscribe very similar conduct. This proliferation of provisions contributes to an unnecessarily complex regime.

13.109 Section 991A of the *Corporations Act*, and ss 12CA and 12CB of the *ASIC Act*, each proscribe unconscionable conduct. The *Corporations Act* proscription is limited in its application to AFS Licensees, and related to conduct 'in or in relation to the provision of a financial service' (as defined in s 766A) that is 'in all the circumstances, unconscionable'.[124] Notably, s 991A does not indicate whether or not 'unconscionable' carries only its general law meaning, or whether it may be broader,

123 Anderson (n 47) 469, quoting Pamela Hanrahan, 'Fairness and Financial Services: Revisiting the Enforcement Framework' (2017) 35 *Company and Securities Law Journal* 420, 433.

124 *Corporations Act 2001* (Cth) s 991A.

although the drafting is more consistent with the latter view (noting the symmetry of expression with s 12CB of the *ASIC Act*, as outlined below).

13.110 By comparison, the *ASIC Act* proscriptions are not limited in their application to AFS Licensees and are directed, first, at conduct that is 'unconscionable within the meaning of the unwritten law' (s 12CA), and second, at conduct that is 'in all the circumstances, unconscionable' (s 12CB), which is expressly said to be 'not limited by the unwritten law'. As Bant and Paterson observe in relation to analogous provisions in the *Australian Consumer Law*, the purpose of the former provision is to 'encapsulate the equitable doctrine but enable additional statutory consequences'.[125] The second provision goes further and is 'not confined by the doctrine of unconscionable dealing developed in equity'.[126] Section 12CC additionally sets out matters a court may have regard to in considering whether conduct is unconscionable under s 12CB.

13.111 An important distinction between the *Corporations Act* and *ASIC Act* proscriptions is that the latter operate in relation to a broader range of 'financial services', because of the expanded scope given to that term in the *ASIC Act* (which includes, for example, the provision of credit).[127]

13.112 It is also worth noting that the prefatory words that condition the application of each provision are expressed differently, although whether this makes much difference in practical terms is open to question. For example, s 991A of the *Corporations Act* applies 'in or in relation to the provision of a financial service', whereas s 12CA of the *ASIC Act* applies 'in trade or commerce … in relation to financial services', and s 12CB applies 'in trade or commerce in connection with … the supply or possible supply of financial services to a person' or 'the acquisition or possible acquisition of financial services from a person'. Sections 991A of the *Corporations Act* and s 12CA of the *ASIC Act* share the phrase 'in relation to', which has been recognised as being of wide import.[128] It may be argued, as Klotz has observed in relation to differently expressed threshold conditions for provisions relating to misleading or deceptive conduct, that such 'intricate definitions and drafting nuances' create 'pointless distinctions' which invite or require parties to 'dispute the application of pleaded provisions'.[129]

13.113 The ALRC considers that there are two potential paths for simplification of provisions proscribing unconscionable conduct. The first, and ALRC's preferred path, involves reducing the number of relevant provisions from three to one. This could be achieved by retaining only the broadest of the three provisions, namely s 12CB

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125 Elise Bant and Jeannie Marie Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15(1) *Journal of Equity* 63, 68.

126 Ibid.

127 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAB. For further discussion of the scope of 'financial service' and 'financial product' in the *ASIC Act*, see **Chapter 7**.

128 *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211 [59].

129 Emily Klotz, 'Misleading or Deceptive Conduct in the Provision of Financial Services: An Empirical and Theoretical Critique of the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth)' (2015) 33(7) *Company and Securities Law Journal* 451, 451.

of the *ASIC Act* (accompanied by s 12CC), which applies even in respect of non-licensed persons and has a broader application because of the expanded definition of 'financial service' (as compared to s 991A of the *Corporations Act*), and unlike s 12CA of the *ASIC Act*, is not limited to the meaning of 'unconscionable' at general law. As Gageler J observed in *Australian Securities and Investments Commission v Kobelt*, s 12CB of the *ASIC Act* 'does something more', and the

> words make clear that the statutory conception of unconscionable conduct is unconfined to conduct that is remediable on that basis by a court exercising jurisdiction in equity.[130]

13.114 Further, as Allsop CJ observed in *Paciocco v Australia and New Zealand Banking Group Ltd*:

> the operation of s 12CB is not limited by the unwritten law referred to in s 12CA. That is not to say, however, that the values and norms that underpin the equitable principle recognised within s 12CA do not have a part to play in the ascription of meaning to, and operation of, s 12CB, notwithstanding s 12CA(2).[131]

13.115 A second path, which would provide greater opportunities for simplification, but presents some potential drawbacks, would be to remove the unconscionable conduct provisions entirely, and instead rely on the 'efficiently, honestly and fairly' obligation to achieve the same, or similar, ends. As Latimer has noted, the 'policy issue raised is that the obligation to act efficiently, honestly and fairly parallels' other more specific obligations, meaning that it may now be asked whether 'some of the relevant sections [are] now redundant'.[132] Arguably, provisions concerning unconscionability are an instance of such redundancy.

13.116 There are strong grounds for considering that conduct that is unconscionable, within the meaning ascribed to that term at both general law and under the more expansive s 12CB of the *ASIC Act*, would always involve a contravention of the obligation to act 'fairly'. As Anderson has noted in relation to unconscionability:

> That such conduct would also be capable of demonstrating unfairness is unsurprising, given that unfairness has been held to impose a 'lower moral or ethical standard than unconscionability'.[133]

13.117 As Zarkovic has observed, courts have 'long held that for conduct to be regarded as unconscionable, the conduct must be, perhaps at a minimum, unfair'.[134] In other words, there is 'considerable overlap between the EHF ['efficiently, honestly

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130 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 [83].
131 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 [283].
132 Latimer (n 44) 385.
133 Anderson (n 47) 459, quoting *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 [363].
134 Jessica Zarkovic, 'Are the "Efficiently, Honestly and Fairly" and Unconscionable Conduct Civil Penalty Provisions Equally as Effective in Combating Unfair Practices by Licensees?' (2020) 48(3) *Australian Business Law Review* 272, 278.

and fairly'] Provisions and the unconscionable conduct provisions'.[135] Zarkovic also considered that:

> ASIC would more efficiently pursue predatory and unfair conduct through litigating under the EHF Provisions than under ss 12CB and 12CC of the *ASIC Act*. This is because the scope of the EHF Provisions captures a broader spectrum of conduct and behaviour, and is not limited to conduct that is against conscience or involving moral obloquy.[136]

13.118 This second path, if adopted, should be accompanied by implementation of **Proposal A20**, outlined above. Implementation of that proposal could involve amending the 'efficiently, honestly and fairly' obligation to provide that an example of failing to act 'fairly' includes conduct that exploits another person's vulnerability, or is otherwise unconscionable.

13.119 Ultimately, the ALRC has not recommended the adoption of the second path — even though it may facilitate greater simplification — for two key reasons. First, because of difficulties in transposing the proscriptions in the *ASIC Act* into the *Corporations Act*. For example, relying on the 'efficiently, honestly and fairly' obligation to do the work of the *ASIC Act's* unconscionable conduct provisions would require that the former obligation be expanded so as to apply to non-licensees (as the latter provisions do). Aligning the definitions of 'financial product' and 'financial service' as between the *ASIC Act* and *Corporations Act*, as discussed in **Chapter 7**, would also be a necessary precursor to this reform. Further, there may be a need to attach some additional remedies (such as the availability of an action for damages under s 12GF of the *ASIC Act*) to the 'efficiently, honestly and fairly' obligation. Second, as unconscionable conduct represents a very serious contravention of the law — of a higher order of moral wrongdoing than simply failing to be 'fair' — there may be expressive value in the availability of a provision by which that conduct may be specifically denounced or stigmatised.[137]

13.120 Lastly, it may also be observed that the second path would remove the symmetry that currently exists with the regulatory approach of the *Australian Consumer Law*, which includes analogous proscriptions, rather than a broader 'efficiently, honestly and fairly' type obligation. The introduction of such inconsistency in regulatory approach should generally be avoided, absent strong countervailing benefits.

135 Ibid.
136 Ibid 284.
137 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, 2020) [5.39]–[5.41].

Conduct or representations that are false, misleading, or deceptive

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.

13.121 **Proposal A23** would involve the consolidation of at least six separate legislative provisions — each of which addresses very similar conduct, relating to conduct that is false, misleading, or deceptive — into a single provision. This removes unnecessary overlap and redundancy in the law, and would therefore contribute to the achievement of a rationalised and simpler legislative framework which is easier to apply.

13.122 Numerous provisions in the *Corporations Act* and *ASIC Act* proscribe representations that are false or misleading, or other conduct that is misleading or deceptive. **Table 13.2** outlines those provisions.

Table 13.2: Misleading or deceptive conduct / false or misleading representation provisions

Act	*Section*	*Title of section*
Corporations Act	1041E	False or misleading statements
	1041F	Inducing persons to deal
	1041H	Misleading or deceptive conduct (civil liability only)
ASIC Act	12DA	Misleading or deceptive conduct
	12DB	False or misleading representations
	12DC	False or misleading representations in relation to financial products that involve interests in land
	12DF	Certain misleading conduct in relation to financial services

13.123 As observed in relation to the unconscionable conduct provisions, a key difference between the *Corporations Act* and *ASIC Act* provisions is that the latter apply more broadly, because of that Act's extended definitions for 'financial product' and 'financial service' (with those terms being used to determine the scope of each of the provisions outlined in **Table 13.2**).[138]

13.124 Many of the provisions are also expressed so as to apply differently. For example, s 1041H of the *Corporations Act* applies 'in this jurisdiction … in relation to a financial product or a financial service', whereas s 12DA of the *ASIC Act* applies 'in trade or commerce … in relation to conduct in relation to financial services', and s 12DB of the *ASIC Act* applies 'in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services'.

13.125 The proliferation of overlapping provisions, made subject to different and highly technical threshold conditions, has been the subject of critical commentary. Paterson and Bant describe the various statutory prohibitions (including analogous provisions in the *Australian Consumer Law*) as comprising a 'regime of byzantine complexity', and express concerns that 'the statutory regime may become unmanageably complex for the very parties it was intended to benefit'.[139] As previously noted, in his Honour's summary of *Wingecarribee*, Rares J referred to the misleading or deceptive conduct provisions of the *Corporations Act* and *ASIC Act* as:

> a plethora of pointlessly technical and befuddling statutory provisions scattered over many Acts in defined situations. The repealed, simple and comprehensive s 52 of the Trade Practices Act 1974 (Cth) … has been done away with by a morass of dense, difficult to understand legislation.[140]

13.126 His Honour expanded on this theme at greater length in the same judgment:

> Obviously, there are differences in what each of these Acts and definitions cover — but why? The cost to the community, business, the parties and their lawyers, and the time for courts to work out which law applies have no rational or legal justification.
>
> Since the end result of this legislative morass seems to be the same, it is difficult to discern why the public, their lawyers (if they can afford them) and the Courts must waste their time turning up and construing which of these statutes applies to the particular circumstance. … Why is there a difference? Why does a court have to waste its time wading through this legislative porridge to work out which one or ones of these provisions apply even though it is likely that the end result will be the same?[141]

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138 See further **Chapter 7** of this Interim Report.

139 Jeannie Marie Paterson and Elise Bant, 'In the Age of Statutes, Why Do We Still Turn to the Common Law Torts?: Lessons from the Statutory Prohibitions on Misleading Conduct in Australia' (2016) 23(2) *Torts Law Journal* 139, 153, 162.

140 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028, 5 (Summary).

141 Ibid 6 (Summary), [948].

13.127 In referring to s 52, his Honour was drawing attention to that provision in the now repealed *Trade Practices Act 1974* (Cth), which simply provided that a 'corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive' (which is now, with some minor amendments, contained in s 18 of the *Australian Consumer Law*).

13.128 The difficulties caused by the overlapping provisions have been analysed by Klotz, who has expressed the view that:

> Lengthy and intricate definitions and drafting nuances have created pointless distinctions, requiring parties to dispute the application of pleaded provisions. … The regime is difficult to navigate through and has not introduced substantial benefits for claimants.[142]

13.129 Klotz noted that:

> Parties must now spend considerable time preparing and presenting submissions in respect of technical threshold questions. While disputes regarding threshold questions are not of themselves problematic, time spent on these issues must be balanced against potential benefits for consumers, claimants and the courts that arise from the inclusion of such complex questions.[143]

13.130 A recent example of a court grappling with such issues (in that case, concerning ss 12DA and 12DB of the *ASIC Act*), is *Australian Securities and Investments Commission v TAL Life Limited (No 2)*, where Allsop CJ observed that the technical threshold conditions produced

> time-consuming complexity (not only for judges, but more importantly, for citizens who have to pay to have the legislation interpreted, almost deciphered). The interlocking and complex expression of quite simple human concepts leads on this occasion to a degree of complexity in analysis.[144]

13.131 Klotz has noted, however, that, once the threshold issues have been resolved, 'courts take the same approach in characterising conduct as misleading or deceptive'.[145] Per Klotz's analysis:

> cases decided throughout the late 1990s and early 2000s confirmed that the principles to be applied in relation to the *Corporations Act 2001* and ASIC Act are substantially the same as those that apply to claims made under the *Trade Practices Act 1974*.[146]

13.132 This is true also of provisions that are ostensibly about 'false or misleading representations', rather than 'misleading or deceptive conduct'. As Yates J recently

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142 Klotz (n 129) 451–2.
143 Ibid 456.
144 *Australian Securities and Investments Commission v TAL Life Limited (No 2)* (2021) 389 ALR 128 [169].
145 Klotz (n 129) 464.
146 Ibid 457.

observed in *Australian Securities and Investments Commission v MLC Nominees Pty Ltd*:

> Although the [statutory language refers to] 'misleading or deceptive conduct' and 'false or misleading representations', the cases establish that there is no material difference between these expressions in terms of their legal application.[147]

13.133 The ALRC considers that the concerns outlined above highlight the need for simplification of the law in this area. The frequency with which misleading or deceptive conduct issues come before the courts also indicates that simplification could make a meaningful difference in practice. As observed in **Chapter 3**, the most cited section of Chapter 7 of the *Corporations Act* in decided cases of the Federal Court is s 1041H on misleading or deceptive conduct. As with the unconscionable conduct provisions, there are two potential paths to achieve simplification in this area.

13.134 The first, and the ALRC's preferred option, is to consolidate the various proscriptions into a single provision that would achieve the same outcomes as are currently achieved by the myriad provisions canvassed above. Noting that the provisions concerning 'false or misleading representations' do not require an assessment that is materially different from that applying to the 'misleading or deceptive conduct' provisions, it may be that s 12DA of the *ASIC Act* (which, as already observed, applies more broadly than proscriptions in the *Corporations Act*), could alone — perhaps with some modification — suffice to achieve the same regulatory objectives. The ALRC invites the views of stakeholders on whether any drafting changes to that provision would be required in order to realise **Proposal A23**.

13.135 The second option would be to remove the relevant provisions entirely, and rely instead on the 'efficiently, honestly and fairly' obligation. As already observed, aligning the definitions for 'financial product' and 'financial service' across the *ASIC Act* and *Corporations Act* would facilitate this, as discussed in **Chapter 7**. Having resolved those issues of application, it is arguable that the making of representations that are false or misleading, or conduct which is misleading or deceptive, will involve a contravention of the obligation to act 'efficiently, honestly and fairly'. As Latimer has suggested, evidence 'of misleading or deceptive conduct under ASIC Act s 12DA … would indicate failure to meet the standard of not acting efficiently, honestly and fairly'.[148] Similarly the making of 'false or misleading statements relating to financial products and financial services, would also fail to meet the general obligation of acting efficiently, honestly and fairly'.[149]

13.136 However, the second option has similar drawbacks to those discussed above.[150] In particular, it would require an expansion in the application of the

147 *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* (2020) 147 ACSR 266 [47] (citations omitted).
148 Latimer (n 44) 376.
149 Ibid 381.
150 See discussion at [13.119]–[13.120].

'efficiently, honestly and fairly' obligation to non-licensees, and require the attachment (or re-attachment) of certain remedies (such as the availability of a civil action for loss or damage currently provided by s 1041I of the *Corporations Act*). Relatedly, in comparison to 'efficiently, honestly and fairly', some of the above provisions create criminal offences, which would make it very difficult for 'efficiently, honestly and fairly' to do the same work without changing underlying policy settings.

13.137 The ALRC also considers that there is scope for simplification of a number of other provisions — in addition to those outlined in **Table 13.2** — that proscribe the giving of defective disclosure documents, the communication of defective information, and the giving of false or misleading documents. However, the consolidation of these provisions will require further consideration of remedial and other issues (including offence provisions). The ALRC invites the views of stakeholders as to how consolidation of some, or all, of these provisions should best be achieved. The additional provisions in issue are outlined in **Table 13.3** below.

Table 13.3: Defective disclosure or information and false or misleading document provisions

Act	Section	Title of section
Corporations Act	952D	Offence of giving a disclosure document or statement knowing it to be defective
	952E	Giving a defective disclosure document or statement (whether or not known to be defective)
	952F	Offences of financial services licensee knowingly providing defective disclosure material to an authorised representative
	952G	Offences of financial services licensee providing disclosure material to an authorised representative (whether or not known to be defective)
	953B	Civil action for loss or damage
	1021D	Offence of preparer of defective disclosure document or statement giving the document or statement knowing it to be defective
	1021E	Preparer of defective disclosure document or statement giving the document or statement (whether or not known to be defective)
	1021F	Offence of regulated person (other than preparer) giving disclosure document or statement knowing it to be defective

Act	Section	Title of section
Corporations Act	1021FA	Paragraph 1012G(3)(a) obligation — offences relating to communication of information
	1021FB	Paragraph 1012G(3)(a) obligation — offences relating to information provided by product issuer for communication by another person
	1021NA	Offences relating to obligation to make product dashboard publicly available
	1021NB	Offences relating to obligation to make superannuation investment information publicly available
	1022B	Civil action for loss or damage
	1308	False or misleading documents

Best interests duty on providers of personal advice

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?

13.138 **Question A24** seeks feedback from stakeholders on whether the 'best interests' obligation on providers of personal advice to retail clients should be amended so that the currently prescriptive 'safe harbour' provisions (compliance with which leads to satisfaction of the obligation) are re-cast as indicative behaviours of compliance. Further, the ALRC invites views on whether two complementary definitions should be repealed. The ALRC considers that such amendments would promote more meaningful — rather than 'tick a box' — compliance, and help achieve a more principled and simpler legislative regime.

13.139 In 2012, the Commonwealth Parliament introduced a number of new provisions to the *Corporations Act* relating to personal advice, as part of the FOFA reforms.[151] Key amongst these provisions are obligations on advice providers to act in the best interests of clients (s 961B) and to prioritise the interests of clients where there is a conflict (s 961J).

151 *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth); *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth).

13.140 The ALRC notes that the Australian Government has announced the Quality of Advice Review to be undertaken in 2022, which may consider these provisions.[152] The ALRC intends that its analysis of these provisions from the perspective of legislative simplification might usefully inform the Quality of Advice Review. The ALRC will consider any outcomes of the Quality of Advice Review before making recommendations concerning these provisions.

13.141 For the purposes of analysis below, s 961B is set out in full:

> **961B Provider must act in the best interests of the client**
>
> (1) The provider must act in the best interests of the client in relation to the advice.
>
> (2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:
>
> (a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;
>
> (b) identified:
>
> (i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and
>
> (ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the client's relevant circumstances);
>
> (c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;
>
> (d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;
>
> (e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:
>
> (i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and
>
> (ii) assessed the information gathered in the investigation;
>
> (f) based all judgements in advising the client on the client's relevant circumstances;

152 Senator the Hon Jane Hume, 'Address to the 12th Annual Financial Services Council's Life Insurance Summit 2021' (Speech, 21 April 2021).

(g) taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

Note: The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought.

Advice given by Australian ADIs—best interests duty satisfied if certain steps are taken

(3) If:

(a) the provider is:

(i) an agent or employee of an Australian ADI; or

(ii) otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI; and

(b) the subject matter of the advice sought by the client relates only to the following:

(i) a basic banking product;

(ii) a general insurance product;

(iii) consumer credit insurance;

(iv) a combination of any of those products;

the provider satisfies the duty in subsection (1) in relation to the advice given in relation to the basic banking product and the general insurance product if the provider takes the steps mentioned in paragraphs (2)(a), (b) and (c).

General insurance products—best interests duty satisfied if certain steps are taken

(4) To the extent that the subject matter of the advice sought by the client is a general insurance product, the provider satisfies the duty in subsection (1) if the provider takes the steps mentioned in paragraphs (2)(a), (b) and (c).

Regulations

(5) The regulations may prescribe:

(a) a step, in addition to or substitution for the steps mentioned in subsection (2), that the provider must, in prescribed circumstances, prove that the provider has taken, to satisfy the duty in subsection (1); or

(b) that the provider is not required, in prescribed circumstances, to prove that the provider has taken a step mentioned in

subsection (2), to satisfy the duty in subsection (1); or

(c) circumstances in which the duty in subsection (1) does not apply.

13.142 A key feature of the obligation is the existence of a 'safe harbour' in sub-s (2). As Moshinsky J observed in *Australian Securities and Investments Commission v NSG Services Pty Ltd*, if 'the provider can prove that he or she has done each of the seven things in s 961B(2), he or she will have satisfied the best interests duty'.[153] This approach was reinforced by ASIC in its submission that

> in a 'real world' practical sense, s 961B(2) was likely to cover all the ways of showing that a person had complied with s 961B(1) and, in this way, a failure to satisfy one or more of the limbs of s 961B(2) is highly relevant to the Court's assessment of compliance with the best interests duty.[154]

13.143 However, sub-s (2) is also subject to the requirement in para (g) to take 'any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances'. Accordingly, compliance with ss 912B(2)(a)–(f) is no guarantee that there has been compliance with the obligation in s 961B(1). As Dr Liu and others have observed, 'the safe harbour arguably cannot eliminate the legal risk of non-compliance because of the open-ended nature of s 961B(2)(g)'.[155]

13.144 Liu and others have noted criticisms that 'the safe harbour clause provides an incentive for financial advisers to focus on the process over the substance or principles of their advice'.[156] Further, Latimer has suggested the safe-harbour encourages a 'tick a box' approach, whereas the 'open-endedness' of sub-s (1) 'removes a static and inflexible advice model (box ticking) that may fail to take full account of all of the client's relevant circumstances'.[157]

13.145 This view of the 'safe harbour' was supported by the Financial Services Royal Commission, which said in its Final Report that

> the safe harbour provision currently has the effect that, in practice, an adviser is required to make little or no independent inquiry into, or assessment of, products. By prescribing particular steps that must be taken, and allowing advisers to adopt a 'tick a box' approach to compliance, the safe harbour provision has the potential to undermine the broader obligation for advisers to act in the best interests of their clients.[158]

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153 *Australian Securities and Investments Commission v NSG Services Pty Ltd* (2017) 122 ACSR 47 [17].

154 Ibid [18].

155 Han-Wei Liu et al, 'In Whose Best Interests? Regulating Financial Advisers, the Royal Commission and the Dilemma of Reform' (2020) 42(1) *Sydney Law Review* 37, 49.

156 Ibid 44. Citing Gerard Craddock, 'The Ripoll Committee Recommendation for a Fiduciary Duty in the Broader Regulatory Context' (2012) (30(4) *Company and Securities Law Journal* 216.

157 Paul Latimer, 'Protecting the Best Interests of the Client' (2014) 29(1) *Australian Journal of Corporate Law* 8, 20.

158 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 2) 177.

13.146 The Financial Services Royal Commission considered that removal of the safe harbour 'would not be without merit'.[159] However, it concluded that, because there were already 'many changes affecting financial advisers' that would come into effect 'over the next few years', it may not be necessary or appropriate to remove the safe harbour 'at this stage'.[160] Instead, it was recommended that in 'three years' time', a review should be conducted by the Australian Government that would consider, among other things, whether the safe harbour should be retained. The Commission considered that (following the review) unless there was 'a clear justification for retaining that provision, it should be repealed'.[161]

13.147 Notably, it has not been considered necessary to include a safe harbour in analogous 'best interests' obligations in the *NCCP Act*, including in the mortgage broking context, and the *SIS Act*. In relation to the former, the legislation simply provides that licensees and credit representatives that provide credit assistance 'must act in the best interests of the consumer in relation to the credit assistance'.[162] The latter says only that the governing rules of registrable superannuation entities are taken to include a covenant to the effect that the trustees of the entity must 'perform the trustee's duties and exercise the trustee's powers in the best financial interests of the beneficiaries'.[163]

13.148 One rationale for retaining the safe harbour may be that it provides useful guidance for advice providers. The complete removal of such guidance, Liu and others have noted, 'may, as a matter of practice, make it problematic to set the expected behaviour norms for financial advisers'.[164] This is because advisers may 'find it difficult to anchor their behaviour against the undefined best interests duty'.[165] Courts may also benefit from the safe harbour when interpreting the best interests obligation.[166]

13.149 A useful means of providing clarity for providers about how to comply with the best interests obligation, without promoting a 'tick a box' approach to compliance, would be to re-cast the safe harbour as 'indicative behaviours of compliance'. That is, the provision should instead provide that, in considering whether there has been compliance with sub-s (1), a court should take into account whether or not the steps outlined in sub-s (2) have been undertaken, with those steps being indicators of compliance with the broader obligation.

13.150 Considerable complexity is added to the best interests obligation by the inclusion of bespoke safe harbours for Australian authorised deposit-taking institutions ('ADIs') giving advice on specified products (s 961B(3)), and for advice provided in relation to general insurance products (s 961B(4)).

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159 Ibid.
160 Ibid.
161 Ibid 178.
162 *National Consumer Credit Protection Act 2009* (Cth) ss 158LA, 158LE.
163 *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(c).
164 Liu et al (n 155) 56.
165 Ibid 61.
166 Ibid 57.

13.151 There may be scope for simplification by repealing some provisions that are related to, or overlap with, the best interests obligation. Namely, ss 961C and 961D contain definitions which are used only for the purposes of s 961B. They provide as follows:

> **961C When is something reasonably apparent?**
>
> Something is ***reasonably apparent*** if it would be apparent to a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, were that person exercising care and objectively assessing the information given to the provider by the client.
>
> **961D What is a reasonable investigation?**
>
> (1) A ***reasonable investigation*** into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered relevant to advice on the subject matter sought by the client does not require an investigation into every financial product available.
>
> (2) However, if the client requests the provider to consider a specified financial product, a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered relevant to advice on the subject matter sought by the client includes an investigation into that financial product.

13.152 As discussed in **Chapter 4**, to the extent practicable, words and phrases with an ordinary meaning should not be defined. Neither of these sections provide meaningful guidance for compliance with the best interests obligation.

13.153 Lastly, the ALRC invites the views of stakeholders on whether s 961J of the *Corporations Act* could be repealed on the basis that it is redundant in light of s 961B. Section 961J provides that, if a provider of advice knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of themselves (or a number of other specified persons, including associates), then the provider must give priority to the client's interests when giving the advice.

13.154 Section 961J appears to entirely overlap with the s 961B best interests obligation, and it is not clear what additional purpose it serves. Acting in the best interests of a client would arguably always require prioritising their interests over those of the provider, or anyone else. The Explanatory Memorandum for the Bill that introduced both provisions does not provide any rationale for the additional inclusion of 961J, but does observe that, while the priority provision 'requires that in the event of a conflict, an adviser must not prefer their own interests over those of the client, it does not require advisers to act in the client's best interest generally'.[167]

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167 Replacement Explanatory Memorandum, Corporations Amendment (Future of Financial Advice) Bill 2012 (Cth) [3.100].

13.155 If s 961J achieves no more than s 961B (including because it is subject to equivalent exemptions in relation to Australian ADIs and advice about general insurance products, in s 961J(2)–(3)), its existence serves only to add complexity. To the extent there is expressive value in making it clear that a customer's interests must be prioritised in the event of conflict, then this could be achieved by amending s 961B so as to parallel the obligation of a responsible entity of a registered scheme (under s 601FC(1)(c) of the *Corporations Act*) to 'act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests'.

Appendix A
List of Consultations and Events

Consultees

	Name	Consultee location
1	Law Council of Australia	Canberra
2	Law Division, Treasury	Canberra
3	Emeritus Professor Peta Spender, Australian National University	Canberra
4	Emeritus Professor Stephen Bottomley, Australian National University	Canberra
5	Stephen Mason, King & Wood Mallesons	Canberra
6	Markets Group, Treasury	Canberra
7	Office of Parliamentary Counsel (Cth)	Canberra
8	Emeritus Professor Kevin Davis AM, University of Melbourne	Melbourne
9	David Murray AO	Melbourne
10	Hon Kenneth Hayne AC QC	Melbourne
11	Financial Services Council	Sydney
12	Cate Heyworth-Smith QC, Barrister	Brisbane
13	Michael Hodge QC, Barrister	Brisbane
14	Melanie Hindman QC, Barrister	Brisbane
15	Matthew Brady QC, Barrister	Brisbane
16	Simon Cleary, Barrister	Brisbane
17	Steven Forrest, Barrister	Brisbane
18	Scott Seefeld, Barrister	Brisbane
19	Kate Slack, Barrister	Brisbane
20	Justin McDonnell, King & Wood Mallesons	Brisbane

	Name	Consultee location
21	John Kettle, McCullough Robertson	Brisbane
22	Jacqueline Wootton, Herbert Smith Freehills	Brisbane
23	Tim Wiedman, McCullough Robertson	Brisbane
24	Craig Wappett, Johnson Winter & Slattery	Brisbane
25	Peter Anderson, Corrs Chambers Westgarth	Brisbane
26	Brett Cook, Clayton Utz	Brisbane
27	Meredith Bennett, Ashurst	Brisbane
28	Michael Anastas, HWL Ebsworth	Brisbane
29	Ian Lockhart, MinterEllison	Brisbane
30	Laurence White, Barrister	Melbourne
31	Financial Counselling Australia	Melbourne
32	Professor Ian Harper AO, University of Melbourne	Melbourne
33	Professor Carsten Murawski, University of Melbourne	Melbourne
34	Professor Elise Bant, University of Western Australia	Perth
35	Jacinta Dharmananda, University of Western Australia	Perth
36	Kanaga Dharmananda SC, Barrister	Perth
37	Joe Longo, Herbert Smith Freehills	Perth
38	Andrew Shearwood, Dentons	Perth
39	Nicholas Creed, Allens	Perth
40	Barbara Gordon, University of Western Australia	Perth
41	Dr Radha Ivory, University of Queensland	Brisbane
42	Professor Nicole Gillespie, University of Queensland	Brisbane
43	Australian Securities and Investments Commission	Melbourne
44	Professor Bryan Horrigan, Monash University	Melbourne
45	Dr Ann Wardrop, La Trobe University	Melbourne
46	Dr Michael Duffy, Monash University	Melbourne
47	David Court, Holley Nethercote	Melbourne
48	Daniel Knight, K&L Gates	Melbourne

	Name	Consultee location
49	Harry New, Hall and Wilcox	Melbourne
50	Professor Louis de Koker, La Trobe University	Melbourne
51	Ruth Overington, Herbert Smith Freehills	Melbourne
52	Penny Nikoloudis, Allens	Melbourne
53	Dr Steve Kourabas, Monash University	Melbourne
54	David Kreltszheim, Cornwalls	Melbourne
55	Yechiel Belfer, Baker McKenzie	Melbourne
56	Dr David Wishart, La Trobe University	Melbourne
57	Professor Paul Latimer, Swinburne University of Technology	Melbourne
58	Professor Jeannie Paterson, University of Melbourne	Melbourne
59	Helen Bird, Swinburne University of Technology	Melbourne
60	Associate Professor Rosemary Teele Langford, University of Melbourne	Melbourne
61	Dr George Gilligan, University of Melbourne	Melbourne
62	Emeritus Professor Ian Ramsay, University of Melbourne	Melbourne
63	Professor Jean Du Plessis, Deakin University	Melbourne
64	Professor Jennifer Hill, Monash University	Melbourne
65	Dr Zehra Eroglu, Deakin University	Melbourne
66	Consumer Action Law Centre	Melbourne
67	Australian Financial Complaints Authority	Melbourne
68	Dr Beth Nosworthy, University of Adelaide	Adelaide
69	Professor Jennifer McKay, University of South Australia	Adelaide
70	Professor Roman Tomasic, University of South Australia	Adelaide
71	Associate Professor Sulette Lombard, University of South Australia	Adelaide
72	Associate Professor Vivienne Brand, Flinders University	Adelaide
73	Adam Cooper, Flinders Port Holdings	Adelaide
74	Jennifer Tobin, Epic Energy	Adelaide

	Name	Consultee location
75	Julia Dreosti, Lipman Karas	Adelaide
76	Kerry Morrow, Laity Morrow	Adelaide
77	Phillip Laity, Laity Morrow	Adelaide
78	Marcus Clayton, Adbri Ltd	Adelaide
79	Richard Beissel, Cowell Clarke Commercial Lawyers	Adelaide
80	Kristy Zander, Lipman Karas	Adelaide
81	Kit Legal	Adelaide
82	Association of Financial Advisers	Various
83	Insurance Council of Australia	Sydney
84	Hon Justice Ashley Black, Supreme Court of New South Wales	Sydney
85	Ian Govey AM	Sydney
86	Australian Finance Industry Association	Brisbane
87	Hon Justice Steven Rares, Federal Court of Australia	Sydney
88	Legal and Compliance Expert Group, Financial Services Council	Sydney
89	Hon Dr Robert Austin, Barrister	Sydney
90	Dr Andrew Schmulow, University of Wollongong	Sydney
91	Steven Rice, Herbert Smith Freehills	Sydney
92	Malcolm Stephens, Allens	Sydney
93	Dominic Tran, Ashurst	Sydney
94	Dr Ian Enright, Australian College of Insurance Studies	Sydney
95	Professor Jason Harris, University of Sydney	Sydney
96	Michelle Levy, Allens	Sydney
97	Professor Pamela Hanrahan, University of New South Wales	Sydney
98	Richard Batten, MinterEllison	Sydney
99	Associate Professor Scott Donald, University of New South Wales	Sydney

	Name	Consultee location
100	Vince Battaglia, Hall and Wilcox	Sydney
101	Australian Prudential Regulation Authority	Sydney
102	Hon Justice Kathleen Farrell, Federal Court of Australia	Sydney
103	Shannon Finch, Jones Day	Sydney
104	Customer Owned Banking Association	Sydney
105	Commonwealth Bank of Australia	Sydney
106	Australian Banking Association	Sydney
107	Hon Justice Julie Ward, Supreme Court of New South Wales	Sydney
108	ANZ	Sydney
109	Australian Institute of Company Directors	Sydney
110	Financial Rights Legal Centre	Melbourne
111	CPA Australia	Melbourne
112	Hon John Hewson AM	Sydney
113	Association of Superannuation Funds of Australia	Melbourne
114	National Insurance Brokers Association	Sydney
115	Avant Mutual	Sydney
116	Australian Restructuring Insolvency and Turnaround Association	Sydney
117	Professor Gail Pearson, University of Sydney	Sydney
118	Chief Justice Tom Bathurst AC, Supreme Court of New South Wales	Sydney
119	Nicola Howell, Queensland University of Technology	Brisbane
120	Chartered Accountants ANZ	Sydney
121	Institute of Public Accountants	Melbourne
122	Financial Planning Association	Sydney
123	SMSF Association	Adelaide
124	Stock Brokers and Financial Advisers Association	Sydney
125	Financial Services Institute of Australasia (FINSIA)	Sydney

	Name	Consultee location
126	Advisers Association	Sydney
127	Office of the Australian Small Business and Family Enterprise Ombudsman	Canberra
128	Australian Chamber of Commerce and Industry	Canberra
129	Advice Board Committee, Financial Services Council	Various
130	Parliamentary Counsel Office (New Zealand)	Auckland
131	Westpac	Sydney
132	Macquarie Group Ltd	Sydney
133	Professor Miranda Stewart, University of Melbourne	Melbourne
134	Superannuation Industry Stewardship Group, Australian Taxation Office	Melbourne
135	Industry Fund Services	Various
136	Office of Queensland Parliamentary Counsel	Brisbane
137	Australasian Legal Information Institute (AustLII)	Sydney

Events

Date	Host Organisation	Event Name
Australian Law Reform Commission events		
17 May 2021	Australian Law Reform Commission	The Regulatory Ecosystem for Financial Services in Australia
24 May 2021	Australian Law Reform Commission	Comparative Perspectives on Financial Services Regulation
20 July 2021	Australian Law Reform Commission	The Devilish Detail of Financial Services Laws — Launch of *Company and Securities Law Journal* Special Issue
Other events		
19 November 2020	Queensland University of Technology	2020 WA Lee Equity Lecture: 'Credit and Unconscionability – The Rise and Fall of Statutes' (Attended)
1 December 2020	University of New South Wales	Regulation and Culture/Conduct Norms — UNSW Centre for Law Markets and Regulation Research Symposium, Session 6 (Attended)
3 December 2020	Queensland University of Technology	Australian Consumer Law Roundtable Insolvency Academics Network Meeting Session 3: Debt and financial services (Presented)
8–9 February 2021	Corporate Law Teachers Association	Conference — Thirty Years of Corporate Law: Still Fit for Purpose? (Attended)
15–16 May 2021	Law Council of Australia	Corporations Workshop 2021 (Presented)
7–8 June 2021	Conexus Financial	Licensee Summit 2021 (Presented)
21 July 2021	Monash University, Commercial Bar Association of Victoria, and Victorian Bar	Reflections on the 20th Anniversary of the Corporations Act (Attended)

Date	Host Organisation	Event Name
Various	Law Council of Australia	Business Law Section, Corporations Committee meetings (Presented and attended)
26–28 August 2021	Banking and Financial Services Law Association	37th Annual Conference (Attended)
11 October 2021	Singapore Management University and University of Melbourne	Decentralisation and the Future of Corporations (Attended)
13 October 2021	Independent Compliance Committee Member Forum	Rewriting the Financial Services Laws: An ALRC Update (Presented)
18 November 2021	University of Queensland	2021 WA Lee Equity Lecture: 'Oh Equity, Equity, wherefore art thou, Equity? Thou art thyself, though not Fairness. What's Fairness?' (Presented)

Appendix B
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Securities and Futures Ordinance (Hong Kong) cap 571.

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Appendix C
Additional Figures and Tables

Appendix C.1: Terms defined in s 9 of the *Corporations Act* and used in only one other section

Defined term	Comments
aggregated turnover	• 'Aggregated turnover' is defined to have 'the same meaning as in the *Income Tax Assessment Act 1997*'. • The expression appears only once in s 1274(2AA)(e) of the *Corporations Act*, which in turn only has relevance for s 1274(2)(a)(iva). Section 1274 appears in Division 2 of Part 9.1 of the Act, and relates to registers kept by ASIC. • If the definition is necessary, navigability could be improved by locating it nearer to, or within, the provision that uses it. • Alternatively, a cross-reference using the words '(within the meaning of the *Income Tax Assessment Act 1997*)' could be inserted after the words 'aggregated turnover' in s 1274 to indicate that the term takes on the meaning in that Act. This technique is used elsewhere in the *Corporations Act*.
ancillary offence	• 'Ancillary offence' is used only once in s 916G(5)(c). That subsection has relevance only for an AFS Licensee to whom ASIC has given information about a person under s 916G(1). • The term is not defined in the *ASIC Act*, but used once in s 5 as part of the definition of 'contravention'. • Navigability in the *Corporations Act* could be improved by relocating the definition to s 916G. This may somewhat reduce navigability for a reader of the *ASIC Act*, who (aware of s 5 of the *ASIC Act*) would consult the *Corporations Act,* and instead of turning to the s 9 dictionary would need to locate the definition in s 916G. This could be countered by repeating the definition of 'ancillary offence' in s 5 of the *ASIC Act*.

Defined term	Comments
Australian carbon credit unit	• 'Australian carbon credit unit' is defined to have 'the same meaning as in the *Carbon Credits (Carbon Farming Initiative) Act 2011*'. • The expression appears only once in s 764A(1)(ka), which lists specific inclusions within the defined term 'financial product'. The expression is not defined in the *ASIC Act*, but is used in s 12BAA(7)(l) of the *ASIC Act* for that same purpose. The term is also used in s 12BAB(1)(g) of the *ASIC Act* in relation to the meaning of 'financial service'. • As discussed in **Chapter 7**, the ALRC proposes doing away with what are currently specific inclusions within the term 'financial product'. To the extent this definition is necessary even if specific inclusions were removed (for example, if the term were to be used in delegated legislation), it should be relocated or a cross-reference (using the form 'within the meaning of [Act]') could be inserted.
chargee	• 'Chargee' is used only once in s 51B, which defines the term 'secured party'. The term 'secured party' is defined in relation to 'security interest', which is defined in s 51A. • Section 51B also uses the undefined terms 'lienee' and 'pledgee' in relation to liens and pledges in the same way that it uses 'chargee' in relation to charges. This raises a question as to whether the definition of 'chargee' is necessary. • If a definition of 'chargee' is necessary, then navigability could be improved by either relocating the defined term 'chargee' near s 51B or incorporating its substance within s 51B.
close associate	• This defined term is used only once in s 588FDA(1)(b)(ii), as part of the expression 'close associate of a director'. Section 588FDA defines the term 'unreasonable director-related transaction'. • 'Close associate' is defined with respect to 'a director', as follows: '*close associate* of a director means: (a) a relative of the director; or (b) a relative of a spouse of the director'. • The limited benefit of the defined term in slightly reducing the length of s 588FDA(1)(b)(ii) is outweighed by the need for a reader to both identify that the term 'close associate' is defined and then locate its definition. The substance of the definition could instead be incorporated in the provision that uses it.
connected entity	• This defined term is used only once as part of the definition of 'examinable affairs' which is defined by s 9.

Defined term	Comments
current market bid price	• This defined term is used only once in s 649B. Both the defined term and s 649B are relatively short, and there appears to be little benefit in defining the term 'current market bid price' separately to its use in s 649B. • Navigability could be improved by incorporating the defined term within s 649B.
deductible gift recipient	• This defined term is used only once in s 45B, which defines the term 'small company limited by guarantee'.
eligible international emissions unit	• 'Eligible international emissions unit' is defined to have 'the same meaning as in the *Australian National Registry of Emissions Units Act 2011*'. • The expression appears only once in s 764A(1)(kb), which lists specific inclusions within the defined term 'financial product'. The expression is not defined in the *ASIC Act*, but is used in s 12BAA(7)(la) of the *ASIC Act* for that same purpose. The term is also used in s 12BAB(1)(g) of the *ASIC Act* in relation to the meaning of 'financial service'. • As discussed in **Chapter 7**, the ALRC proposes doing away with what are currently specific inclusions within the term 'financial product'. To the extent this definition is necessary even if specific inclusions were removed (for example, if the term were to be used in delegated legislation), it should be relocated or a cross-reference (using the form 'within the meaning of [Act]') could be inserted.
group executives	• This defined term is used twice in only one provision, s 300A(4)(b). Section 300A lists specific information that must be included in a listed company's annual directors' report. • There seems little need for this term to be defined in s 9, and navigability could be improved by relocating the definition to s 300A.
machine-copy	• This defined term is used only in the definition of 'reproduction' in s 9. The defined term 'reproduction' is itself only used a total of 10 times in s 1274 (relating to registers kept by ASIC) and s 1306 (relating to the admissibility of certain books kept by companies). • The definition of 'machine-copy' is relatively short and its substance could be incorporated in the definition of 'reproduction'. • Both 'machine-copy' and 'reproduction' appear to have been carried over from the *Corporations Act 1989*. Though the definition of 'machine-copy' has been amended, the definition of 'reproduction' uses potentially outdated language when it says 'machine-copy of the document or a print made from a negative of the document'. An ordinary meaning of both terms may be adequate, such that the definitions could be removed.

Defined term	Comments
old Division 11 of Part 11.2 transitionals	• This defined term is used only in s 601QA, which confers an exemption and modification power on ASIC for the purposes of Chapter 5C. • Navigability could be improved by locating it near to or incorporating it within s 601QA.
Part 7.7A civil penalty provision	• This defined term lists 15 provisions within Part 7.7A (best interests obligations for financial advice) that are civil penalty provisions. The defined term is used only once in s 1317G(1)(c), where it is used as part of the expression 'financial services civil penalty provision that is not a Part 7.7A civil penalty provision'. The term 'financial services civil penalty provision' is, in turn, defined in s 1317E(3). • Arguably, the defined term is unnecessary because it simply lists all of the civil penalty provisions currently contained in Part 7.7A. To the extent the list of provisions is helpful to a reader, however, navigability could be improved by relocating it nearer to s 1317G or incorporating its substance with s 1317E.
State Fair Trading Act	• This defined term contains a list of Acts passed by each of the States and Territories. The defined term is used only twice in s 1041K – once in the heading and once in s 1041K(2) – which describes the operation of Division 2 of Part 7.10. • Navigability could be improved by including the substance of the definition in s 1041K.
State or Territory authority	• This defined term is used only once in s 1317AAE(3). Its use there forms part of what is effectively an exception to s 1317AAE(1), breach of which is an offence or contravention of a civil penalty provision. • Given the potential importance of the term to a person's understanding of the offence and civil penalty provision in s 1317AAE(1), the existence and substance of the defined term should be clearer to a reader. This could be achieved by incorporating the definition with s 1317AAE.

Appendix C.2: Commonly used words that are defined inclusively in s 9 of the *Corporations Act*

Defined term	Comments
act includes thing.	• This phrase appears to have first been introduced into Commonwealth law for the purposes of s 142 of the *Securities Industry Act 1980* (Cth), which concerned continuing offences. • The definition was made an Act-wide definition in the *Corporations Act 1989* (Cth) by the *Corporations Legislation Amendment Act 1990* (Cth), which implemented the 1989 co-operative scheme.[1] • The *Corporations Act* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) are the only Commonwealth Acts that define 'act' as including 'thing' or 'a thing'. • In 32 instances, the term 'act' is used as part of the expression 'act or thing' in the *Corporations Act*. At other times when 'act' is used as a noun, however, it is used alone. • Section 1314 of the *Corporations Act*, which concerns continuing offences, also provides that 'act includes thing' for the purposes of that section. Section 4K of the *Crimes Act 1914* (Cth) also concerns continuing and multiple offences, using similar terms to s 1314. Rather than defining act, however, s 4K uses the expression 'act or thing'. • By way of example, no Act presently in force in Queensland or New South Wales uses an equivalent definition. The *Queensland Investment Corporation Act 1991* (Qld) contained an identical definition in s 4.8 when enacted, however that section was replaced by the *Queensland Investment Corporation Amendment Act 1994* (Qld) and the definition of 'act' was not replaced. • The defined term 'act' does not presently appear necessary as an Act-wide definition in the *Corporations Act* if its primary purpose is, as appears to be the case when it was first introduced, to be used solely in the continuing offences provision now contained in s 1314.

1 Explanatory Memorandum, Corporations Legislation Amendment Bill 1990 (Cth) [1]-[3].

Defined term	Comments
cause includes procure. ***procure*** includes cause.	• Only two Acts, the *Corporations Act* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), currently contain both definitions. • Both the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Retirement Savings Accounts Act 1997* (Cth) contain this definition of 'procure', but they do not also contain the definition of 'cause'. • The greatest significance of the defined term 'procure' in the *Corporations Act* would appear to be in s 79 which provides that 'a person is involved in a contravention if, and only if, the person … (a) has aided, abetted, counselled or procured the contravention'. Each of the other Acts outlined above has a similar provision.[2] The concept of 'involvement' or 'being involved' is used extensively in provisions throughout the *Corporations Act*. However, the term 'procure' is also used in several provisions independently of the term 'involved'. • For the purposes of Part 7.10 Div 3, s 1042F of the *Corporations Act* also expands the definition of the term 'procure': (1) For the purposes of this Division, but without limiting the meaning that the expression procure has apart from this section, if a person incites, induces, or encourages an act or omission by another person, the first-mentioned person is taken to procure the act or omission by the other person.

2 *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s 694-55; *Retirement Savings Accounts Act 1997* (Cth) s 21; *Superannuation Industry (Supervision) Act 1993* (Cth) s 17.

Defined term	Comments
event includes any happening, circumstance or state of affairs.	• This definition of 'event' appears to have been first introduced in s 52 of the *Securities Industry Act 1980* (Cth) for the purposes of that section, which placed an obligation on a licence holder under that Act to give notice of certain events that constituted a contravention of, or failure to comply with, a condition or restriction on a licence. It is not clear why the definition was required. • The definition of 'event' was included in the Act-wide s 9 dictionary of the *Corporations Act 1989* (Cth) and retained in the current *Corporations Act*. • The term 'event' is used in several contexts in the *Corporations Act*, including in provisions that require notice to be given to ASIC on the happening of certain events (for example, s 908BQ). In some places, including (for example) provisions such as s 994B which was introduced in 2019, the expression 'event or circumstance' is used. • Only one other currently in-force Commonwealth Act, the *James Hardie (Investigations and Proceeding) Act 2004* (Cth), defines the term 'event'. Section 3 of that Act states that '*event* includes any happening, circumstance, state of affairs, matter or issue.'
information includes complaint.	• Only two Acts, the *Corporations Act* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), currently contain this definition. • The same definition was previously contained in s 9 of the *Corporations Act 1989* (Cth) and s 6 of the *Close Corporations Act 1989* (Cth).

Appendix C.3: Select terms defined relationally in s 9 of the *Corporations Act*

Definition	Comments
assets, in relation to a financial services licensee, means all the licensee's assets (whether or not used in connection with the licensee's Australian financial services licence*)*.	• This definition appears to have been carried over from the *Securities Industry Act 1980* (Cth) and *Futures Industry Act 1986* (Cth) when that legislation was consolidated in the *Corporations Act 1989* (Cth). The definition has been retained in the current *Corporations Act* but may now be relevant in only one provision. Accordingly, the substance of the definition could now instead be included in that one provision (s 988E), and the Act-wide definition could be removed. • The *Futures Industry Act 1986* (Cth) included a very similar definition of 'assets' that related to the assets of a futures broker and was expressed to apply Act-wide (s 4). The definition appears to have been used for two purposes: first, to clarify that licence conditions could be made in relation to all of the broker's assets (s 69B); and secondly, to require that a broker must keep records relating to all of the broker's assets (s 90). • In the current *Corporations Act*, the provision permitting ASIC to make AFS licence conditions makes no specific reference to assets, such that the definition of 'assets' does not affect the operation of that provision (s 914A, see also reg 7.6.04). The only reference to the assets of an AFS Licensee appears to be in s 988E(d), which requires the licensee to keep records of 'all the assets and liabilities (including contingent liabilities) of the licensee'. • It would be simpler to re-word s 988E(d) to read 'all the assets (whether or not used in connection with the licensee's Australian financial services licence) and liabilities (including contingent liabilities) of the licensee'. The definition of 'assets' could then be removed from s 9 of the *Corporations Act*.
for, in relation to a fee or tax, includes in respect of.	• See the more detailed discussion in **Chapter 5**.

Definition	Comments
have, in relation to information, includes be in possession of the information.	• This definition was carried over to the *Corporations Act* from the *Corporations Act 1989* (Cth). The Explanatory Memorandum to the Corporations Bill 1988 (Cth) states that the definition 'avoids doubt in relation to information, by including possession of information in the concept of having information'.[3] • Presumably, this may have been intended to encompass *physical* possession of information. It is not entirely clear, however, whether such doubt would arise and whether it is necessary for such a commonly used and understood word to be defined.
hold, in relation to a person, in relation to a document that is, or purports to be, a copy of a licence means have in the person's possession.	• This definition was carried over to the *Corporations Act* from the *Corporations Act 1989* (Cth). The Explanatory Memorandum to the Corporations Bill 1988 (Cth) states that the definition 'makes clear that a person holds a document that is a copy of a licence if the person has that document in their possession'.[4] • The definition may therefore be intended to distinguish between when a person is required to 'hold' a licence in the sense of being granted a licence, as against holding a physical copy of a document that is a licence. It is not clear if this distinction is necessary for the purposes of the *Corporations Act*. The main relevance of holding a document that is a licence is to demonstrate that the holder (or possessor) of it is in fact authorised to do things for which a licence is required. • The word 'hold' does not seem to be used in the sense of 'holding a document' that is a licence in the *Corporations Act*. Rather, it is largely used in the sense that a person must have been granted a licence in order to conduct the relevant activities (for example, s 911A: 'Subject to this section, a person who carries on a financial services business must hold an Australian financial services licence …'). • In any case, the ordinary meaning of the term 'hold' would be sufficient to include both senses of the term, and the context in which it is used sufficient to indicate the sense in which it is being used. • Furthermore, it is difficult to envisage a circumstance, in the context of the *Corporations Act* and the types of licence to which it relates, in which an operative provision is likely to depend on a person having a copy of a licence in that person's possession. • Accordingly, this definition could likely be removed from the *Corporations Act*.

3 Explanatory Memorandum, Corporations Bill 1988 (Cth) 155.
4 Ibid.

Definition	Comments
of in relation to financial products, means, in the case of interests in a managed investment scheme, made available by.	• See the more detailed discussion in **Chapter 5**.
on, in relation to a financial market, includes at or by means of.	• The predecessor *Corporations Act 1989* (Cth) contained a similar definition in s 9: '"*on*", in relation to a stock market or futures market, includes at or by means of'. The words 'stock market or futures market' have evidently been amended to 'financial market' to reflect a change in terminology. • The purpose of the definition would appear to be avoiding any doubt that may arise from the context in which the expression 'on a financial market' is used. • The expression 'on a financial market' is used 29 times in the current *Corporations Act*, typically preceded by one or other of the words 'traded' or 'quoted', or 'trading in financial products'. It is also used once in the expression 'entered into, or acquired, on a financial market'. This is one example in which the inclusion of 'by means of' may have use. • The definition appears to perform some purpose, though it is still not clear that the definition is essential, as the term could be interpreted appropriately in context. • If the definition is necessary, and if it only has significance when used as part of the expression 'on a financial market', then the defined term should be amended to 'on a financial market'. This would remove any need for a reader to undertake the interpretive task, in potentially irrelevant contexts, of determining whether 'on' has been used 'in relation to' a financial market.

Appendix C.4: Sections in which the word 'for' is used 'in relation to' a fee

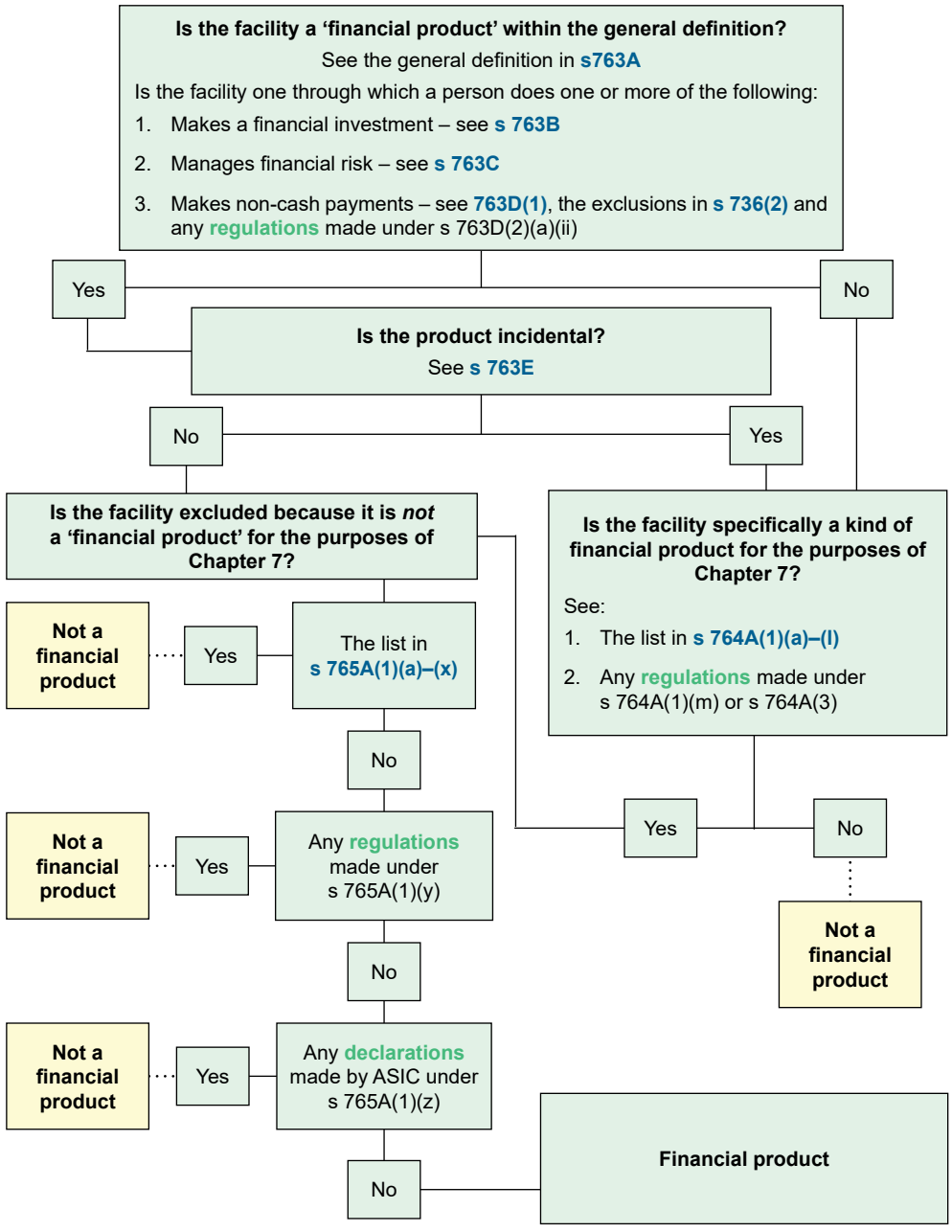
	Corporations Act section	Example text of section relevant to a 'fee'
1.	348D	'company's liability for late lodgement fees'
2.	433	'make provision out of that property for the reasonable fees and expenses of the auditor' 'a claim for fees and expenses'
3.	556	'fees for services'
4.	601FS	'fees for the performance of its functions'
5.	601RAE	'fees that may be charged by companies for the provision of traditional trustee company services'
6.	601SBA	'to charge fees for acting in relation to the estate'
7.	601SBB	'a reasonable fee for providing an account'
8.	601TAA	'schedule of the fees that it generally charges for the provision of traditional trustee company services'
9.	601TAB	'fees that it will charge for the provision of the service'
10.	601TBA	'a licensed trustee company may charge fees for the provision of traditional trustee company services'
11.	601TBB	'fees that may be charged by a licensed trustee company for the provision of a particular traditional trustee company service'
12.	601TBC	'charging a fee permitted by subsection 601SBB(3) for the provision of an account'
13.	601TBE	'fees charged by the trustee company, in accordance with this Part, for the performance of the function'
14.	601TCB	'a reasonable fee for work'
15.	601TDD	'fee for part-years'
16.	601TDE	'fee for part-years'
17.	601TDF	'a reasonable fee for work'
18.	601TDJ	'a reasonable fee for work'
19.	672D	'fee paid to the person for complying with a direction'
20.	672DA	'fee for the inspection'
21.	925F	'commission or other fee for which the client would, but for this section, have been liable'
22.	964A	'a reasonable fee for a service'
23.	964F	'fee for providing financial product advice'
24.	1017F	'debiting the deposit product for fees or charges'
25.	1354	'a fee is payable under section 1351 for the lodgment of a document'

Appendix C.5: Legislative definitions of 'small business' and similar concepts

Act and section	Defined term or concept	Summary
Corporations Act, s 45A(2)	small proprietary company	• Provides that a company is a small proprietary company for a financial year if at least two of three criteria are satisfied. • The criteria relate to consolidated revenue (less than $25 million or other prescribed amount), gross assets (less than $12.5 million or other prescribed amount) and number of employees (fewer than 50). • Part-time employees are included in the employee count as an appropriate fraction of a full-time equivalent (s 45A(5)).
Corporations Act, s761G(12)	small business	• For the purposes of s 761G (definition of wholesale and retail client), 'small business' means a business employing fewer than 20 people, or fewer than 100 people if a manufacturing business.
ASIC Act, s12BC(2)	small business	• For the purposes of defining the term 'consumer', s 12BC uses the same definition as s 761G of the *Corporations Act* (above).
ASIC Act, s 12BF(4)	small business contract	• Section 12BF applies protections against unfair terms to 'small business contracts' that relate to financial products and services • To meet the definition of 'small business contract', one party to the contract must employ fewer than 20 persons (excluding casual employees: s 12(BF(5)).
Australian Consumer Law, s 23(4)	small business contract	• Section 23 of the *Australian Consumer Law* applies similar protections to s 12BF of the *ASIC Act*, but for goods, services, and interests in land (rather than financial products and services). • The definition of 'small business contract' is relevantly the same as in s12BF(4) of the *ASIC Act.*

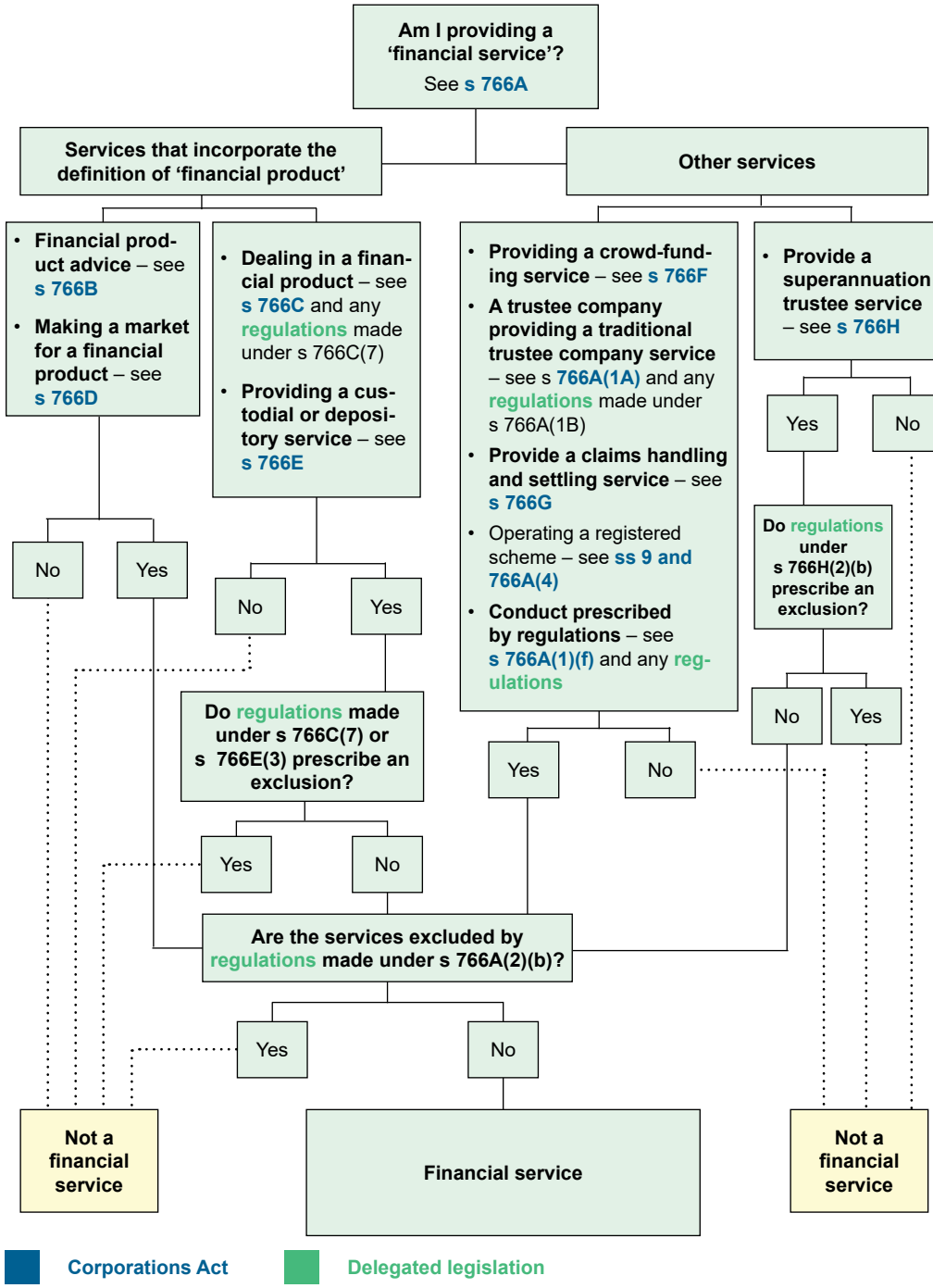
Act and section	Defined term or concept	Summary
Fair Work Act 2009 (Cth), s 23	small business employer	• A 'small business employer' is a business with fewer than 15 employees (counting all employees, except 'casual employees' that are not 'regular casual employees', as those terms are defined). • This definition applies for the purposes of employment regulation.
ITA Act 1997, s 328–110	small business entity	• A 'small business entity' is a business with aggregated annual turnover of less than $10 million. • This definition applies for the purposes of certain concessions in taxation laws.
Australian Small Business and Family Enterprise Ombudsman Act 2015 (Cth), s 5	small business	• Defines a 'small business' as one that has fewer than 100 employees and revenue of less than $5 million. • Part-time employees are included in the employee count as an appropriate fraction of a full-time equivalent (s 5(3)).

Appendix C.6: The current definition of financial product



Return to in-text discussion at 7.94

Appendix C.7: The current definition of financial service



Return to in-text discussion at 7.94

Appendix C.8: Summary of exemptions contained in s 911A(2) of the *Corporations Act*

Section 911A(2) of the *Corporations Act* Paragraph	Exemption summary
(a)	Acting as a representative of an AFS Licensee who holds a licence that covers the provision of the service or is exempt from the requirement of doing so.
(b) and (ba)	A product provider who issues, varies, or disposes of a financial product pursuant to an intermediary authorisation or the service is the entry into of an intermediary authorisation.
(c)	A product issuer who issues the original product and the service is the variation or disposal of products at the request of the person to whom it is provided, rather than through an intermediary.
(d)	Persons where the financial services are provided incidental to their operation of a licensed market or clearing and settlement facility.
(ea)–(ec)	Persons providing general advice in newspapers or periodicals of which the person is the proprietor or publisher, or providing general advice in information services or recordings, where the sole or principal purpose is not the provision of financial advice.
(ed)–(eg)	Corporations whose financial products are being issued or sold under an eligible employee share scheme, or an entity that the corporation controls, where the service is: • the provision of general advice in connection to the scheme; • dealing in the financial product as long as an appropriately licensed person arranges any purchase or disposal of the financial product; • provided through a custodial or depository service in connection to the scheme; or • dealing in an interest in a contribution plan in relation to the scheme.

Section 911A(2) of the *Corporations Act* Paragraph	Exemption summary
(eh)–(ej)	Any of the following services provided by operators of notified foreign passports funds or persons acting on their behalf: • acquisition of a financial product as an investment of the assets of the fund; • disposal of a financial product that was acquired as an investment of the assets of the fund; or • issuing, acquisition, or disposal of a derivative or foreign exchange contract for the purposes of managing the financial consequences to the fund.
(ek)–(en)	Persons providing claims handling and settling services in the specific circumstances.
(f)	Persons acting in the specified capacities or circumstances generally associated with bankruptcy or death such as an official receiver, trustee, administrator of a body corporate and others.
(g)–(ga)	APRA-regulated entities or services (including a superannuation trustee service) provided only to wholesale clients.
(h)	Persons regulated by overseas regulatory authority where the provision of the service by that person is covered by an exemption specified by ASIC, and the service is only provided to wholesale clients.
(i)–(j)	Persons providing services only to related bodies corporate of the person, or in the person's capacity as trustee of a self-managed superannuation fund.
(k)–(l)	Provision of the service is covered by an exemption prescribed in regulations or by an exemption specified by ASIC in writing and published in the Gazette.

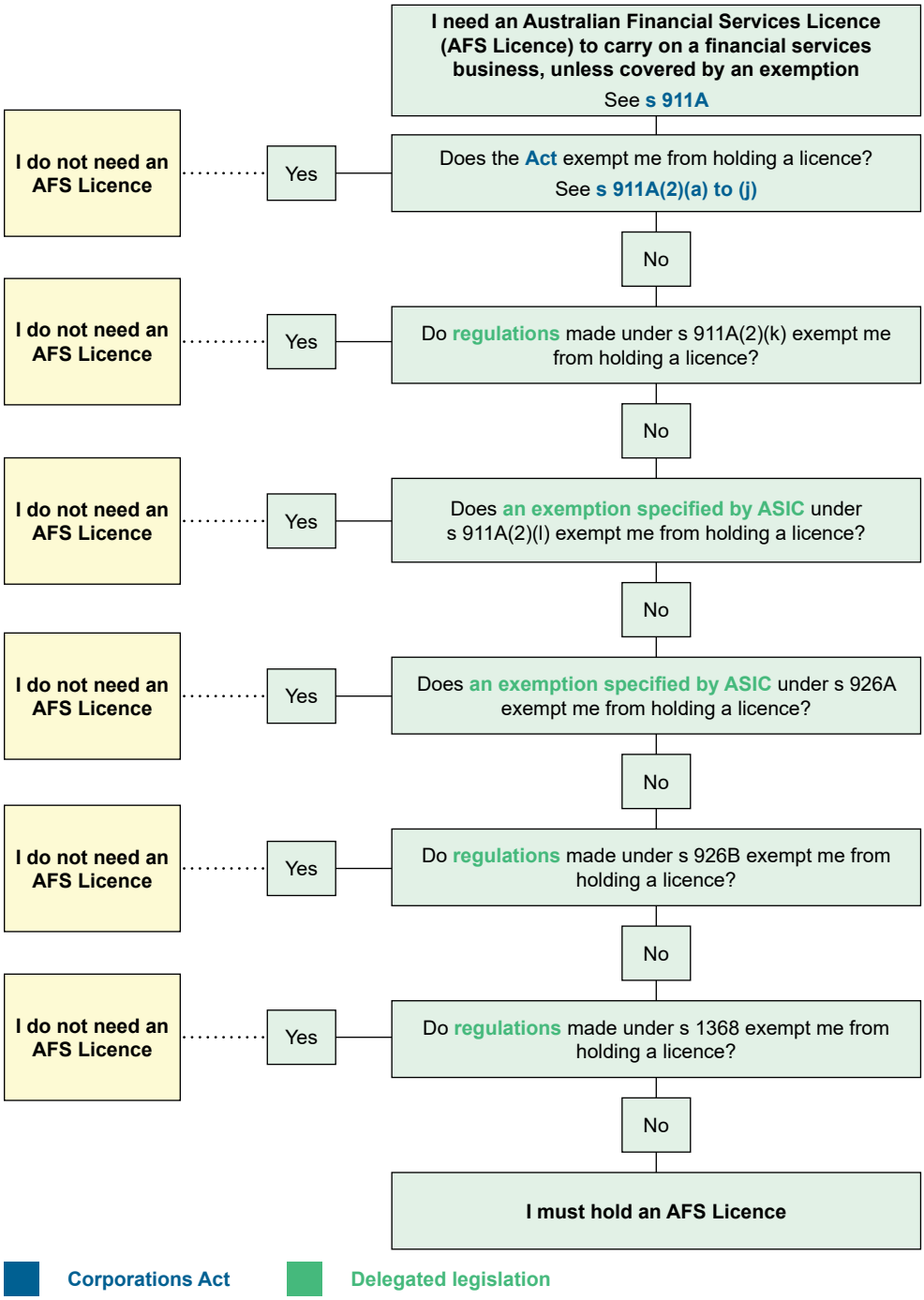
Appendix C.9: Summary of exemptions made pursuant to s 911A(2)(k)

Regulation 7.6.01(1) of the *Corporations Regulations* **Paragraph**	**Exemption Summary**
(b)–(da)	Dealing in a financial product as a trustee of a pooled superannuation trustee service or providing a superannuation trustee service in certain specified circumstances.
(e)–(ea)	Provision of a financial service where the service is only in relation to information regarding the ability to provide financial services (referrals).
(f)–(g)	Provision of financial services in certain circumstances by persons not in the jurisdiction.
(h)–(hc)	Dealing in a financial product that consists of paying benefits in relation to superannuation products or RSA products, or dealing that consists only of an employer-sponsor arranging for the issue of a superannuation product to an employee.
(k)	Provision of financial services under a master-custodian relationship.
(l)–(lb)	Provision of financial services in relation to non-cash payments facilities in limited circumstances.
(lc)	Australia Post presentment and payment facility known as POSTbillpay or billmanager.
(m)	Dealing in derivatives and dealing in foreign exchange contracts in certain circumstances where dealing is entered into on the person's own behalf.
(ma)–(mb)	Certain financial services: • relating to dealing in: derivatives over carbon units, Australian carbon credit units or eligible international emissions units; a carbon unit, an Australian carbon credit unit or an eligible international emissions unit; foreign exchange contracts for carbon units, Australian carbon credit units or eligible international emissions units; or • that a person is engaged by the Clean Energy Regulator to provide to the Clean Energy Regulator, or on behalf of the Clean Energy Regulator, that relate to the conduct of an auction of carbon units under the *Clean Energy Act 2011.*

Regulation 7.6.01(1) of the *Corporations Regulations* Paragraph	**Exemption Summary**
(n)–(na)	Provision of financial services by persons not in the jurisdiction in certain circumstances.
(o)	Provision of general advice by product issuers in the media with certain disclosure requirements.
(oa)	Provision of financial product advice to a wholesale client by an actuary in the ordinary course of an actuarial business where certain criteria are met.
(p)	Provision of financial services in relation to workers compensation.
(pa)	Provision of financial services to a wholesale client in relation to certain insurance by public authorities.
(q)	Provision of financial services that are only a variation or disposal of a financial product by the person who also issued the original product where the service occurs under the terms of the financial product.
(r)	Dealing (or arranging for a dealing) in a debenture, a legal or equitable right or interest in a debenture, or an option to acquire such a debenture by the issuer.
(s)	Provision of general advice to AFS Licensee by product issuer or a related entity.
(t)	Advising in relation to, or dealing in, medical indemnity insurance.
(ta)	Provision of financial product advice in relation to a friendly society funeral product by a funeral services entity in the ordinary course of business.
(u)	Provision of advice consisting of an opinion on matters other than financial products included in a document issued in connection with a takeover bid or an offer of financial product with certain disclosure requirements.
(v)	Provision of financial services where a nominee holds a financial product (or a beneficial interest in a financial product) on trust for a participant authorised by an AFS Licensee to provide a custodial or depository service under certain circumstances.
(w)	Provision of financial services to wholesale clients by the Export Finance and Insurance Corporation.

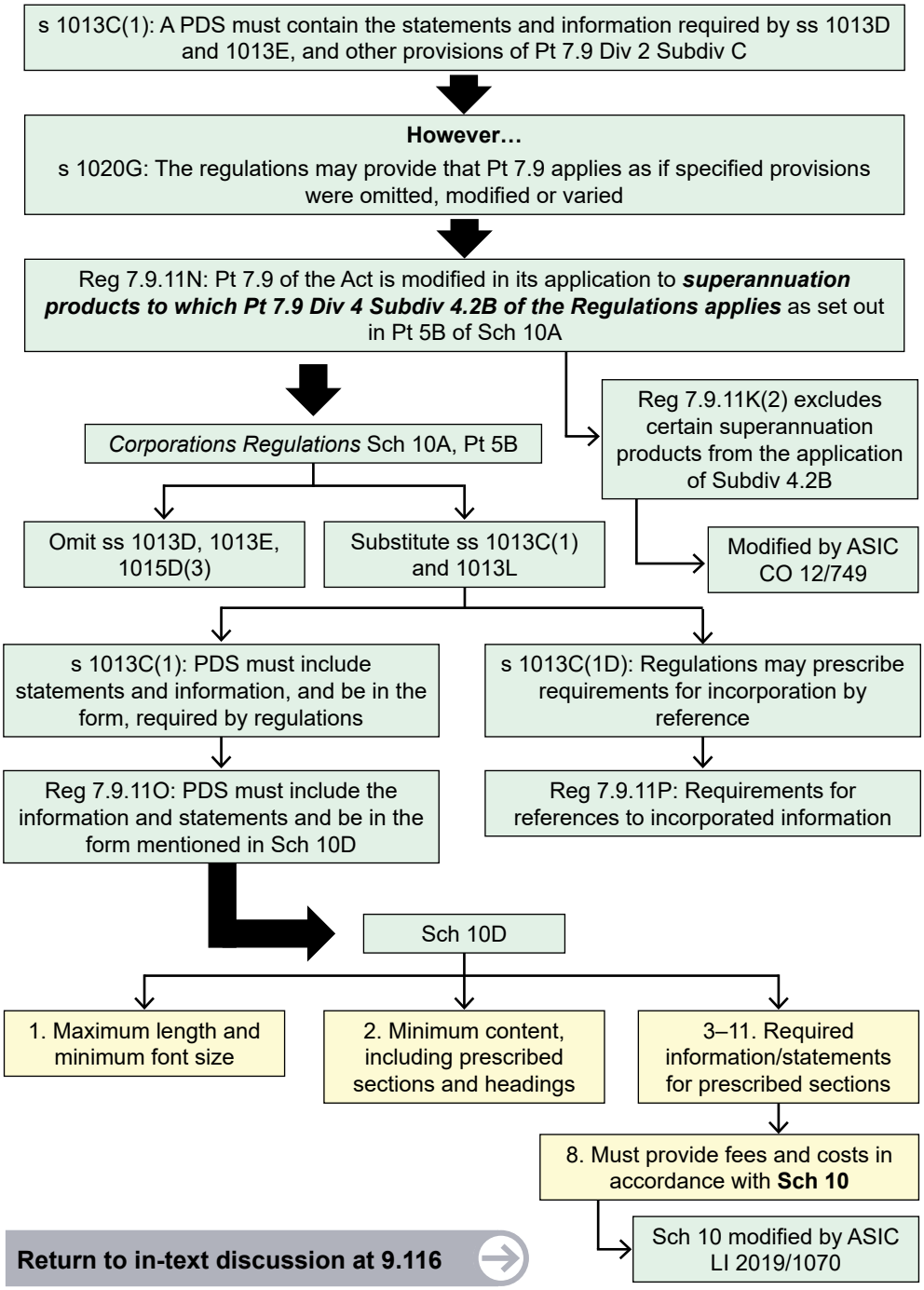
Regulation 7.6.01(1) of the *Corporations Regulations* **Paragraph**	**Exemption Summary**
(x)	Provision of a service in relation to an insolvency litigation funding scheme mentioned in 5C.11.01.
(y)	Provision of a service in relation to a litigation funding arrangement mentioned in 5C.11.01.
(z)	Provision of a financial service by a person who is the operator of a qualified gas trading exchange or a participant in relation to a qualifying gas trading exchange in relation to a qualifying gas exchange product traded on the qualifying gas trading exchange.

Appendix C.10: Applying the current obligation to hold an AFS Licence



Return to in-text discussion at 8.43

Appendix C.11: Framework for imposition of Shorter PDS requirements for superannuation products



Return to in-text discussion at 9.116

Appendix C.12: Overview of key questions relating to exclusions and exemptions from Chapter 7 of the *Corporations Act*

Current Chapter 7 of the *Corporations Act*	Proposed model	Comments
What is trying to be achieved?		
• Managing the perimeters of regulation by *excluding* certain products and services or *exempting* people from obligations contained in the Act, and by ensuring the flexibility to tailor certain provisions to particular circumstances.	• Managing the perimeters of regulation by *excluding* certain products and services or *exempting* people from obligations contained in the Act, and by ensuring the flexibility to tailor certain provisions to particular circumstances.	• Both the current law and proposed model have the same goal.
How can this be achieved?		
• Exemption and notional amendment powers that can be exercised in relation to a class of persons, products or services, or in relation to individual persons, products or services. • Tailoring of the law generally takes the form of 'notional amendments' — which notionally omit, substitute or vary the text of the Act — or conditional exemptions that impose alternative obligations on the exempted person.	• Exclusions and exemptions from Chapter 7 of the *Corporations Act* or its constituent provisions. • Rules contained in a thematically consolidated legislative instrument — these could contain the prescriptive detail that is necessary to accommodate the wide variety of regulated products, services and industry participants.	• Conditional exemptions and notional amendments produce multiple alternative regulatory regimes that operate in parallel with, or in substitution to, the Act. • Notional amendments mean that a reader cannot rely on the text of the Act as an authoritative statement of the law without consulting delegated legislation to confirm that the Act has not been notionally amended. • The proposed model aims to accommodate flexibility in tailoring the law to particular circumstances without the need for notional amendments or conditional exemptions.

Current Chapter 7 of the *Corporations Act*	**Proposed model**	**Comments**
Where can it done?		
• The following sources of law can all contain exclusions, exemptions, or notional amendments: ○ the Act; ○ regulations; ○ potentially innumerable ASIC legislative instruments; and ○ administrative instruments (for individual relief).	• The Act for 'key' obligations. • A single legislative instrument for exclusions and exemptions. • Rules contained in a small number of thematically consolidated legislative instruments for detail necessary to operationalise the Act. • Administrative instruments (for individual relief).	• The current approach creates complexity and impedes navigability by requiring a reader of the Act to consult several 'layers' of the legislative hierarchy to identify each of key obligations, detailed obligations, and exemptions. • The proposed model aims to improve transparency and navigability by locating each of key obligations, detailed obligations, and exemptions, in one level of the legislative hierarchy.

Current Chapter 7 of the *Corporations Act*	Proposed model	Comments
When can it be done? ***Why*** can it be done?		
• Exemption and notional amendment powers are wide and discretionary. • The Act does not place express limits on those powers, or set out matters to which regard must be had when exercising the powers. • There is no constraint on *when* these powers can be exercised — whether in the ordinary course of lawmaking or in an emergency. • ASIC has issued regulatory guidance about how, when and why it may exercise its discretionary powers. • The *Legislation Act 2003* (Cth) imposes requirements for consultation and explanatory statements that contain reasons for the exercise of a power.	• A single power to grant exclusions and exemptions could be included in the Act, exercisable in relation to particular provisions. • A rule-making power could be included in the Act — dedicated provisions would set out the subject matter in relation to which rules may be made, and could circumscribe the exercise of the power in various ways. • 'Emergency' exemption or rule-making powers could allow for prompt responses (without consultation) to unforeseen circumstances where necessary, to be in force for a limited period only.	• In addition to the problems of complexity and navigability, the current wide and discretionary delegations of legislative authority arguably present challenges to the rule of law. • Exemption and notional amendment powers are thought to be exercised for a variety of reasons — these include to provide relief from or amend the application of the law where it is unsuitable or its effect unforeseen, to accommodate market developments, and to respond to emergencies. • Sometimes, exemptions and notional amendments can have the effect of changing the policy of the legislation as opposed to providing mere 'relief' from unforeseen regulatory impacts — the line between these two categories is not clear, and subject to debate. • The proposed model envisages that 'rules' would be made primarily in circumstances when notional amendments and conditional exemptions are currently made.

Current Chapter 7 of the *Corporations Act*	**Proposed model**	**Comments**
By ***whom*** can it be done?		
• The Minister, by way of regulations — formally made by the Governor-General-in-Council — and through ministerial legislative instruments • ASIC	• The proposed model is flexible — both the power to create exclusions and exemptions and the power to create rules could be exercised by one, the other, or both of the Minister or ASIC. • Consistency and coherence favours each power being exercised by only one authority.	• Presently, regulations, ASIC, and ministerial legislative instruments can potentially address the same subject matter.

Appendix C.13: Provisions enabling exemptions or notional amendments to Chapter 7 of the *Corporations Act*

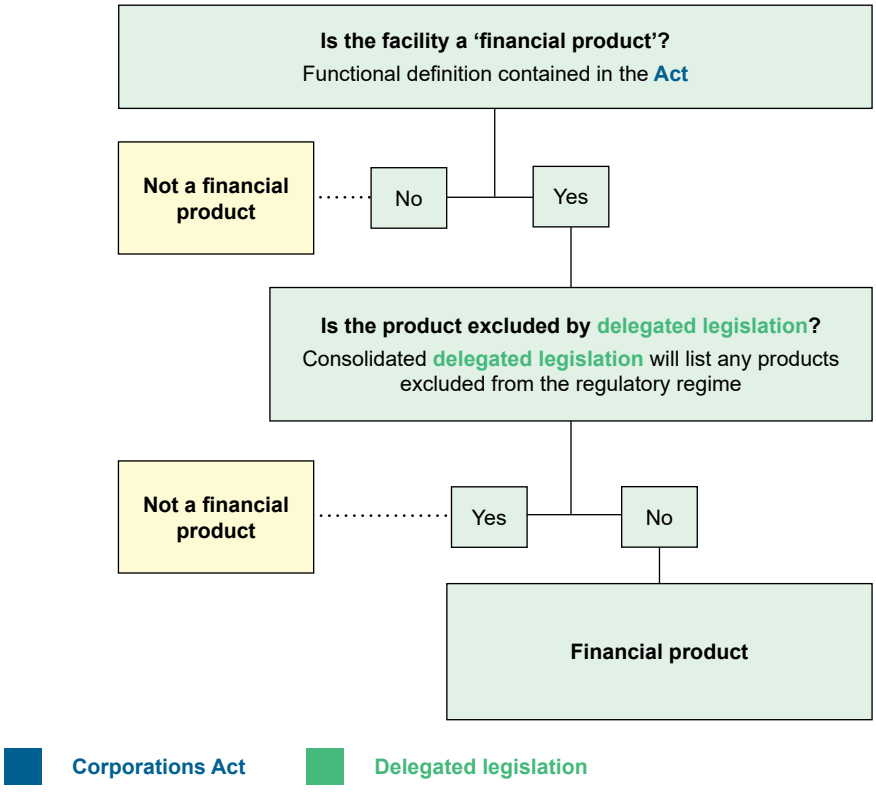
	Subject matter	Section	Exemptions, notional amendments, or both	By whom or how	Potentially affected provisions
1.	Meaning of retail client and wholesale client (s 761G)	761G(10)	Notional amendments	Regulations	Section 761G(7)(a)
2.	Responsibility for the conduct of agents, employees etc (s 769B)	769B(9)	Notional amendments	Regulations	Section 769B
3.	Licensing of financial markets (Part 7.2)	791C	Exemptions	Minister	Part 7.2
4.	Change of country by foreign licensee (s 792H)	792H(2)	Notional amendments	Regulations	Section 792H(2) and Part 7.2 Div 4 Subdiv A
5.	Market licensees (Part 7.2)	798D	Both	ASIC	Section 205G and any provisions of Chapter 6, 6A, 6B, 6C, 6CA or 7, or regulations made for the purposes of any of those provisions
6.	Supervision of financial markets (Part 7.2A)	798L	Both	Regulations	Part 7.2A
7.	Supervision of financial markets (Part 7.2A)	798M	Exemptions	Minister	Part 7.2A
8.	Clearing and settlement facility licensing (Part 7.3)	820C	Exemptions	Minister	Part 7.3
9.	Change of country by foreign licensee (s 821F)	821F(2)	Notional amendments	Regulations	Section 821F(2) and Part 7.3 Div 3 Subdiv A
10.	Limits on involvement with markets and CSF licensees (Part 7.4)	854B	Both	Regulations	Part 7.4 and Part 10.2

	Subject matter	Section	Exemptions, notional amendments, or both	By whom or how	Potentially affected provisions
11.	Markets that become members of the Securities Exchanges Guarantee Corporation (s 891B)	891B(5)	Notional amendments	Regulations	Part 7.5 Div 4 and Div 5
12.	Compensation regimes for financial markets (Part 7.5)	893A	Both	Regulations	Part 7.2, Part 7.5 and Part 10.2
13.	Compensation regimes for financial markets (Part 7.5)	893B	Exemptions	Minister	Part 7.5
14.	Derivative transaction and trade repositories (Part 7.5A)	907D	Exemptions	ASIC	Part 7.5A, regulations made for the purposes of Part 7.5A, the Derivative Transaction Rules and the Derivative Trade Repository Rules
15.	Derivative transaction and trade repositories (Part 7.5A)	907E	Both	Regulations	Part 7.5A, regulations made for the purposes of Part 7.5A, the Derivative Transaction Rules, and the Derivative Trade Repository Rules
16.	Financial benchmarks (Part 7.5B)	908EB	Exemptions	ASIC or Regulations	Part 7.5B, regulations made for the purposes of Part 7.5B, and the Financial Benchmark Rules
17.	Obligation to hold an AFS Licence (s 911A)	911A(2)(k)	Exemptions	Regulations	Section 911A(1)
18.	Obligation to hold an AFS Licence (s 911A)	911A(2)(l)	Exemptions	ASIC	Section 911A(1)

	Subject matter	Section	Exemptions, notional amendments, or both	By whom or how	Potentially affected provisions
19.	Functions of the standards body for financial advisers (s 921U)	921U	Notional amendments	Standards body declared under s 921X	Part 7.6, in relation to periods of time specified under s 921U(2)(a)(iv)
20.	AFS Licensing (Part 7.6)	926A	Both	ASIC	Part 7.6 except Div 4 and Div 8
21.	AFS Licensing (Part 7.6)	926B	Both	Regulations	Part 7.6 and Part 10.2
22.	Situations in which a FSG is not required (s 941C)	941C(8)	Exemptions	Regulations	Section 941C
23.	Combining a Financial Services Guide and a Product Disclosure Statement in a single document (s 942DA)	942DA(2)	Notional amendments	Regulations	Section 942DA
24.	Financial services disclosure (Part 7.7)	951B	Both	ASIC	Part 7.7 and Part 10.2
25.	Financial services disclosure (Part 7.7)	951C	Both	Regulations	Part 7.7 and Part 10.2
26.	Dealing with Clients' money other than loans (s 981A)	981A(4)	Both	Regulations	Part 7.8 Div 2 Subdiv A
27.	Dealing with other property of clients (s 984A)	984A(2)	Both	Regulations	Part 7.8 Div 3
28.	Appointment of auditor by an AFS Licensee (s 990B)	990B(8)	Notional amendments	Regulations	Part 7.8 Div 6 Subdiv D
29.	Financial services conduct obligations (Part 7.8)	992B	Both	ASIC	Part 7.8 and Part 10.2
30.	Financial services conduct obligations (Part 7.8)	992C	Both	Regulations	Part 7.8 and Part 10.2
31.	Design and distribution obligations (Part 7.8A)	994L	Both	ASIC	Part 7.8A

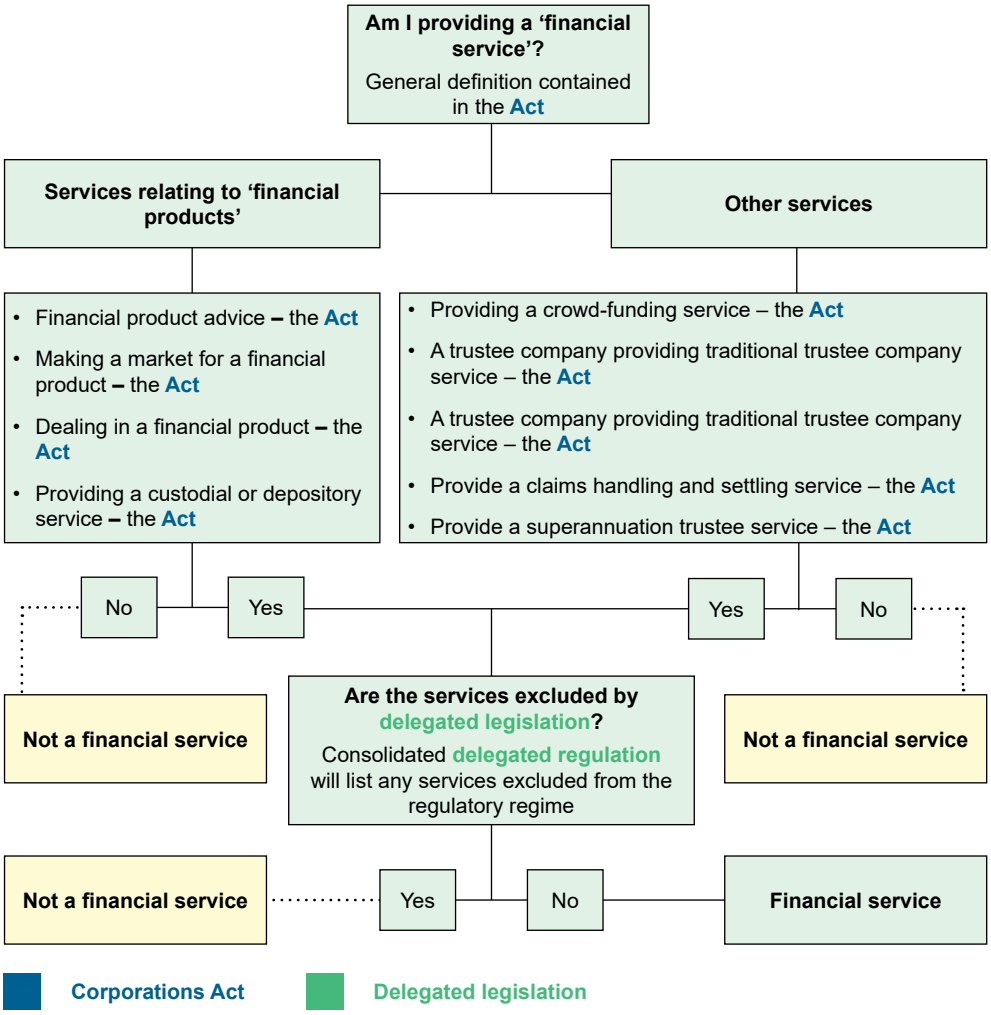
	Subject matter	Section	Exemptions, notional amendments, or both	By whom or how	Potentially affected provisions
32.	Arrangements under which a person can instruct another person to acquire a financial product (s 1012IA)	1012IA(8)	Notional amendments	Regulations	Part 7.9
33.	Confirming transactions (s 1017F)	1017F(9)	Notional amendments	Regulations	Sections 1017F(2), (5), (6), (7) and (8)
34.	Financial product disclosure (Part 7.9)	1020F	Both	ASIC	Part 7.9 and Part 10.2
35.	Financial product disclosure (Part 7.9)	1020G	Both	Regulations	Part 7.9 and Part 10.2
36.	Market misconduct provisions (Part 7.10)	1045A	Both	Regulations	Part 7.10 and Part 10.2
37.	Transfer of securities (s 1073E)	1073E(2)	Notional amendments	ASIC	Regulations made for the purposes of Part 7.11 Div 3
38.	Title and transfer (Part 7.11)	1075A	Both	ASIC	Part 7.11 and Part 10.2
39.	Books required to be kept by Chapter 7 (s 1101GA)	1101GA(2)	Notional amendments	Regulations	Part 9.3 in relation to 'Chapter 7 books' as defined in s 1101GA(1)
	Provisions contained outside Chapter 7 of the *Corporations Act* but applicable to Chapter 7				
40.	Exemptions and modifications in relation to the Asia Region Funds Passport provisions (Chapter 8A)	1217B	Both	Regulations	All provisions of the 'Corporations legislation' as defined in s 9 (but only in relation to passport funds)
41.	Coronavirus known as COVID-19 (Part 9.11) (Note: Pursuant to s 1362A(6), this power can no longer be exercised)	1362A	Both	Minister	All provisions of the *Corporations Act*
42.	Exemptions from Chapter 6D or 7 (Part 9.12)	1368	Exemptions	Regulations	Chapter 6D and Chapter 7

Appendix C.14: Applying the proposed definition of 'financial product'



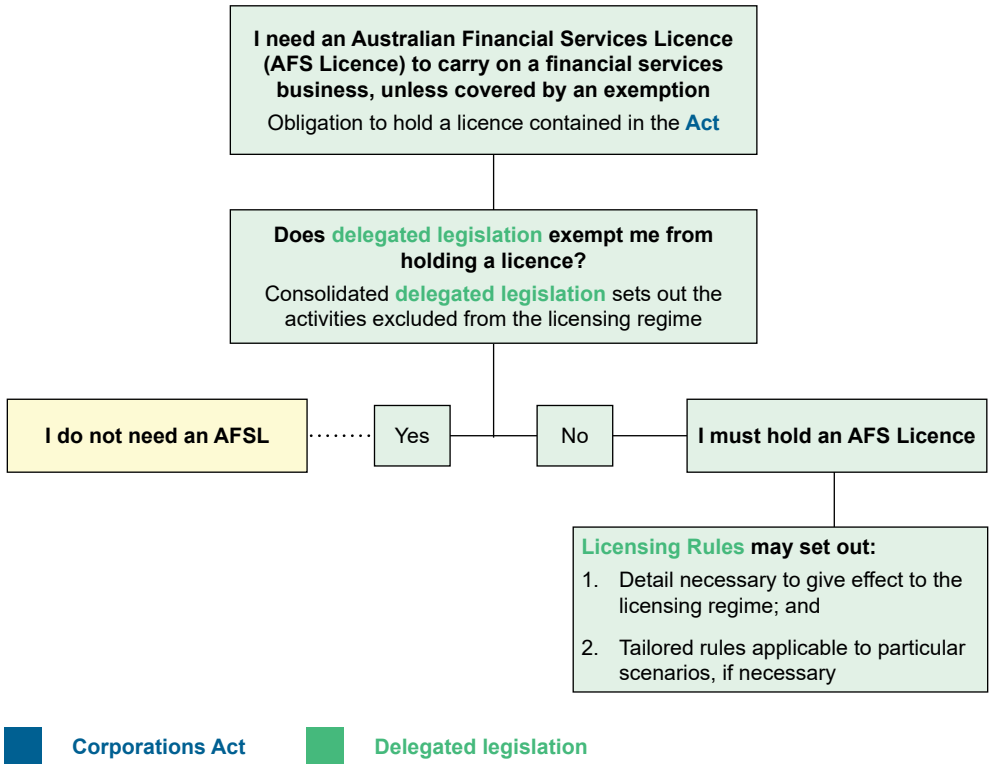
Return to in-text discussion at 10.113

Appendix C.15: Applying the proposed definition of 'financial service'



Return to in-text discussion at 10.113

Appendix C.16: Applying the obligation to hold an AFS Licence



Return to in-text discussion at 10.116

Appendix D
Data Methodology

Contents

D.1 As part of this Inquiry, the ALRC has generated a significant body of data to provide unique insights into the legal framework for corporations and financial services legislation. An overview of the ALRC's initial data analysis, with a particular focus on the use of definitions in legislation, is presented in **Chapter 3** of this Interim Report. This Appendix provides a high level overview of the methodology that underpins the data creation and analysis.[1] The datasets referred to in the methodology are available on the Inquiry webpage.[2]

Legislation

D.2 The ALRC has built a number of databases of legislative texts, including texts published in plaintext, HTML, and XML. The ALRC built the databases by webscraping legislation websites in Australia, the UK, and New Zealand.[3]

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1 In this Appendix, when the ALRC is described as having done a particular task (such as 'webscraping'), that generally means that the ALRC wrote a computer program in the 'R' programming language that did the specified task.

2 Australian Law Reform Commission, 'Data Analysis' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/>.

3 These websites perform a critical function by making legislation publicly available to researchers

These databases have been analysed by ALRC computer programs written in the 'R' programming language. The ALRC refers to data obtained through computational analysis of legislation as 'legislative data'. Each of the seven key legislative databases is described in more detail in the following sections.

Principal Commonwealth Acts in force

Federal Register of Legislation HTML

HTML refers to Hyper Text Markup Language. HTML is the language in which webpages are written. HTML is comprised of character data and markup. The markup can indicate information about the character data, including formatting such as font size, italics, and bolding.

The HTML of Acts published on the Federal Register of Legislation is rich in useful markup that can be analysed computationally. For example, structural elements of legislation (eg chapters, parts, schedules, sections, subsections etc) are generally marked-up, so it is possible for the computer to identify what text is associated with each element's markup. Likewise, terms that are defined are marked-up as such, as are bold and italicised terms — the formatting used for both defined terms and tagged concepts. The markup also allowed the ALRC to exclude certain text, such as the endnotes and tables of contents, when collecting legislative data.

who use webscraping tools. Not all government websites operate under the same open-access standards as the Commonwealth Federal Register of Legislation, Legislation.gov.uk, and Legislation.govt.nz. The operators of these websites, including OPC, are acknowledged for their commitment to open data.

The data on Commonwealth legislation is nevertheless imperfect, because not all Acts are consistently marked-up. For example, some defined terms are not marked-up at all in some Acts that have not been subject to a compilation in the last 15 years (ie the Act has not been amended in the past 15 years), or both the defined term and its definition are separately marked-up. This means the ALRC has likely undercounted defined terms in Acts not subject to amendment or passage in the last 15 years, or particular types of Acts such as those containing treaties and intergovernmental agreements. These types of legislation do not appear to use the OPC template because the text of the treaty or agreement was merely transposed from the original text rather than drafted by OPC. Acts containing consequential amendments and transitional arrangements also do not always markup defined terms. Legislative instruments do not generally use the OPC template, and their HTML therefore has less useful markup.

D.3 The ALRC webscraped the Federal Register of Legislation's Principal in force Acts database (1,220 Acts) as at 30 June 2021.[4] The ALRC obtained the following information in relation to each Act:

- Legislation name
- Federal Register of Legislation unique identification number
- Administrator
- Date of registration
- Date of assent[5]
- Start date[6]
- End date[7]
- Date of repeal[8]
- Legislation number/year
- Summary
- Legislation pages
- Number of volumes
- Number of amendments to legislation
- Number of instruments modifying legislation
- Number of instruments enabled by legislation
- Number of related Bills

4 Federal Register of Legislation, 'Principal Acts in Force' <www.legislation.gov.au/Browse/ByTitle/Acts/InForce/0/0/Principal>.
5 Only applicable to Acts of Parliament as made.
6 Only applicable to compilations.
7 Only applicable to compilations.
8 Only applicable to legislation as made. Compilations have an 'End Date'.

D.4 The ALRC analysed the HTML for each Act and obtained data on linguistic properties, structural elements, definitions, cross-references, conditional statements, and references to a range of concepts. In preparation for analysis, the ALRC removed the endnotes and table of contents in every Act.

Linguistic properties

D.5 In preparation for linguistic analysis the ALRC removed subsection, paragraph, subparagraph, and sub-subparagraph numbers and lettering that appear at the beginning of lines in legislation (eg (1), (d), (iv), (A)). These are not meaningful linguistic features of a legislative text, and would significantly over-inflate word counts.

D.6 The ALRC conducted a readability analysis on the Acts. The program used the textstat_readability() function in the quanteda.textstats package in the R programming language. The ALRC used Flesch Kincaid as the method for calculating readability. This uses the following equation:

$$0.39 \times ASL + 11.8 \times \frac{n_{sy}}{n_w} - 15.59$$

Where ASL is Average Sentence Length (number of words / number of sentences), n_{sy} is number of syllables, and n_w is number of words.[9]

D.7 After the readability analysis, the ALRC 'tokenised' the text. This means splitting the text of the legislation into 'tokens'. The ALRC aimed to create tokens in a way that was broadly consistent with words as produced by Microsoft Word.[10]

D.8 This methodology produced word counts very close to those created in Microsoft Word. For example, the ALRC identified 80,067 tokens in *A New Tax System (Family Assistance and Related Measures) Act 2000* (Cth), while Microsoft Word counted 80,056 words. Likewise, a count of the *Administrative Appeals Tribunal Act 1975* (Cth) was just 130 words lower than that produced by Microsoft Word (out of 32,730 words).[11]

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9 See also the 'New' Flesch Reading Ease Formula in J Peter Kincaid et al, 'Derivation Of New Readability Formulas (Automated Readability Index, Fog Count And Flesch Reading Ease Formula) For Navy Enlisted Personnel' (Institute for Simulation and Training, 1975) 14.

10 The ALRC used the tokens() function of the Quanteda package in the R programming language. The tokens() function uses regular expressions to split a text. The ALRC used the 'fasterword' setting, and removed only certain punctuation (colons, semicolons, commas, periods, and quotation marks).

11 The Microsoft Word methodology is just one among many. Notepad++, common software for plaintext documents, produces word counts different to those in Word.

D.9 To obtain word counts, the ALRC counted the number of tokens in each piece of legislation.

D.10 For other linguistic analyses discussed below, and in addition to the above preparation of the text, the ALRC removed stopwords, numbers, and alphanumeric words (eg 601AKC). Stopwords are words such as 'if', 'this', 'my', 'cannot, 'before', and 'should'. These are not considered relevant to understanding the linguistic properties of a text.[12] The ALRC also converted all tokens to lowercase, so that words were not duplicated based on their capitalisation (that is, so that 'credit' and 'Credit' are understood as the same word by the program).

D.11 The ALRC then obtained the entropy for each piece of legislation. This was based on the tokenised text produced as explained above. The ALRC used the equation from Dr McLaughlin and others:

$$H(D) = -\sum_{w \in W_D} p_w \log_2(p|w),$$

where D is a document, H(D) is the Shannon entropy of document D, W_D is the set of unique words occurring in document D, and $_{pw}$ is the probability of encountering one of these words at a random point in the text—that is, the frequency of that word as a percentage of the total word count.[13]

D.12 The ALRC obtained the average length of tokens in each piece of legislation, with all non-substantive tokens removed (eg numbers). The ALRC did so by dividing the number of tokens into the total number of characters in these tokens. This served as the average word substantive word length.

D.13 The ALRC obtained the number of unique substantive words in each piece of legislation. The ALRC also counted the number of unique word stems for substantive words. This was done by 'stemming' tokens. Stemming means that 'syntactically-similar words, such as plurals, verbal variations, etc. are considered similar; the purpose of this procedure is to obtain the stem or radix of each word, which emphasize its semantics'.[14]

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12 This methodology is consistent with the approach taken by a number of scholars. As Katz and Bommarito note, stopwords 'serve primarily grammatical purposes and do not represent concepts. Thus, their presence in the distribution can artificially skew the results': Daniel M Katz and Michael J. Bommarito II, 'Measuring the Complexity of the Law: The United States Code' (2014) 22 *Artificial Intelligence Law* 337, 357. See also David J Carter, James Brown and Adel Rahmani, 'Reading the High Court at a Distance: Topic Modelling the Legal Subject Matter and Judicial Activity of the High Court of Australia' 39(4) *UNSW Law Journal* 1300, 1311.

13 Patrick A McLaughlin et al, 'Is Dodd-Frank the Biggest Law Ever?' (2021) 7(1) *Journal of Financial Regulation* 149, 170.

14 Vishal Gupta and Gurpreet s Lehal, 'A Survey of Text Mining Techniques and Applications' (2009) 1(1) *Journal of Emerging Technologies in Web Intelligence* 60, 63.

Structural data

D.14 The ALRC obtained data on the number of structural elements in each piece of legislation. This was done by counting the number of tags (types of HTML markup) that had certain attributes. These tags are based on the heading or sentence style of the element, which appear to have carried across from the OPC drafting template. The ALRC undertook this analysis to identify chapters, schedules, parts, divisions, subdivisions, sections, subsections, paragraphs, subparagraphs, and sub-subparagraphs. Whilst many Acts use tags in a consistent way, some Acts use heading styles inconsistently which leads to a miscounting of structural elements. For example, the *Corporations Regulations* contain one schedule that contains a chapter, which in turn contains parts. To computationally analyse this, the ALRC's program relied on the HTML to treat the schedule as Level 1, the chapter as Level 2 (ie functionally a part), and the parts as Level 3 (functionally a division). This means a manual count of 'parts' will differ somewhat from the computational analysis, which looks at how each element was marked-up in the HTML. This, however, is a rare occurrence. Importantly, the *Corporations Act* uses chapters, parts, and divisions in a consistent hierarchy, and does not markup any elements in a way different from their function.

D.15 For elements above sections, the ALRC identified that the HTML occasionally contained empty tags marked as, for example, chapters. The ALRC removed these empty tags. Likewise, duplicated chapters were removed based on their full name. The ALRC then derived a number of datapoints from the above data, such as the total number of elements that are above sections, and the average number of subsections per section.

D.16 The ALRC also obtained some data on structural elements that may indicate an Act primarily contains amendments. Some Principal Acts have the primary purpose of making amendments but are classified as 'Principal' by the Federal Register of Legislation because they contain transitional provisions. To do so, the ALRC counted certain HTML tag attributes that appear associated with amendments, and which broadly align to amending schedules and amending parts (which contain amendments), and items (which are equivalent to sections but contain amendments to sections in other Acts). Not all Acts with amendments use this markup, but it may offer a way to refine the analysis to exclude primarily amending Acts from analyses when appropriate in future.

Definitions

D.17 The definitions data is an approximation that relies heavily on the quality of the underlying markup and on the assumption that any term that is

defined or tagged is used in its defined or tagged sense on each occasion that it appears. In various ways, the program therefore overcounts and undercounts the number of defined terms and the uses of defined terms.

D.18 The ALRC obtained various data on the number and use of defined terms and tagged concepts. The HTML for most Commonwealth Acts includes markup that indicates a defined term (eg 'financial product'), and the ALRC also used the HTML formatting for bold and italicised terms as another indicator of defined terms and tagged concepts (eg financial product). The use of this HTML is particularly imperfect.[15]

D.19 The ALRC excluded defined terms longer than 100 words from being searched for their use because it was generally clear that more than the term had been marked-up. Terms shorter than this that are mistakenly marked-up as defined are unlikely to appear multiple times in the Act, and therefore unlikely to affect the results. The analysis of uses of defined terms and tagged concepts also assumes that definitions of all terms are relevant across the whole Act. However, in reality, a defined term may only be defined in relation to a particular circumstance or in a particular provision of the Act. The program was not able to take this into account, and so counted all uses of the term across the whole Act. The ALRC therefore refers to 'uses of potentially defined terms'.

D.20 To identify the number of defined terms, the ALRC extracted the text that appeared between HTML markup indicating defined terms and created a list of the terms. The ALRC then counted the number of rows in this list. To identify bold and italicised concepts, which generally include defined terms in addition to tagged concepts, the ALRC extracted the text that appeared between HTML markup that indicated the formatting of such terms. A list was also created and the rows counted.

D.21 To identify the number of unique defined terms, the ALRC removed duplicates from the list. For example, person or financial service might appear in several provisions. Analysis to identify unique defined (and bold and italicised) terms counted these only once.

D.22 To count the number of potential uses of defined (or bold and italicised) terms, the program took the list of defined (and bold and italicised) terms created above for each piece of legislation and sorted them by length. The program then went through the text of the Act and created a compound token

15 For example, in the *Sewerage Agreements Act 1973* (Cth) whole definitions are marked-up, rather than just the defined terms. In addition, the definition markup appears to have been somewhat randomly used in the *Water Act 2007* (Cth).

(eg financial_product) for every use of a term in the list. This meant that each term could only be tagged once through the creation of a compound token. This eliminated overcounting where one defined term appeared in another defined term (eg 'financial product' appearing in 'financial product advice').

D.23 Separate analyses were conducted for defined terms, and bold and italicised terms. The ALRC also counted how many separate tokens appeared in the list of uses of potentially defined (or bold and italicised) terms. For example, while 'financial_product_advice' counted as one use of a defined term, it counted as three potentially defined words.

D.24 The ALRC took the total number of words that were potentially defined (or affected) by a bold and italicised term and divided this by the total word count of the Act, and multiplied it by 100. This gave an approximation of how many words per hundred were potentially affected by a defined term or tagged concept.

Word searches

D.25 The ALRC undertook a range of word searches, often with additional computational analysis, to identify the presence of certain concepts or legislative features. This approach to analysing legislation has been developed by a number of scholars.[16] A full list of the searched terms and exactly how they were searched can be found in the ALRC's data dictionary for the Commonwealth Acts dataset.[17]

General limitations of the dataset

D.26 The database of Principal Commonwealth Acts in force, and the derivative data created by the ALRC, has a number of limitations. The most notable is the quality of the HTML markup. The other significant limitation is the classification of Acts by the Federal Register of Legislation. In force Commonwealth Acts are classified as either Principal or Amending on the Federal Register. This is important because amendments are incorporated into the text of Act 'compilations'. For example, the *Corporations Act* is a compilation of the original 'as made' Act with all amendments that have been made to it since 2001. The Acts amending the *Corporations Act* therefore should not be counted in the Principal Acts data. But some Amending Acts

16 See, for example, Wolfgang Alschner et al, *Semantic Analysis of Canadian Regulations* (2018); Omar Al-Ubaydli and Patrick A McLaughlin, 'RegData: A Numerical Database on Industry-Specific Regulations for All US Industries and Federal Regulations, 1997–2012' (Mercatus Working Paper, George Mason University, November 2014).

17 Australian Law Reform Commission, 'Legislative Data' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/legislative-data>.

are included in the Principal Acts database because the Federal Register classifies any Act with application, savings, or transitional provisions as Principal. The consequence of this limitation is that the total size of the statute book is slightly overestimated, which means that relative comparisons of Acts can be somewhat less useful. Nonetheless, when the ALRC created a 'Limited Act' dataset, which excluded Acts with 'reform', 'consequential', 'amendment', or 'repeal' in the name, this only reduced the size of the statute book from 20.8 million words to 18 million words. This Limited Act dataset also excluded a range of other Acts such as treaties, appropriation, and supply Acts.

Commonwealth Acts as made

D.27 The ALRC webscraped the Federal Register of Legislation's 'as made' Acts database on and shortly after 30 June 2021, including both Principal and Amending Acts.[18] This included scraping the HTML of all 13,146 Commonwealth Acts passed by the Parliament since 1901. In addition to producing a text file containing the HTML and plaintext of the Act, the ALRC also obtained the following information from each Act:

- Administrator (eg Treasury)
- Registration date, date of assent, commencement date, end date (if applicable), and repeal date (if applicable)
- Number and year (eg Act No. 32 of 2020 as made)
- Description of the Act
- Number of Act pages and volumes
- Number of amendments (if applicable)
- Number of instruments modifying the Act (if applicable)
- Number of instruments enabled by the Act (if applicable)
- Number of Bills related to the Act (if applicable)
- Number of pieces of legislation amended by the Act (if applicable)

D.28 All of these datapoints were consolidated into an Excel that is available on the ALRC website. The ALRC has not yet data mined the text of these Acts to any significant extent. However, this database is likely to be useful in exploring legislative complexity, as discussed in **Background Paper FSL2**.

18 Federal Register of Legislation, 'Acts as Made' <https://www.legislation.gov.au/Browse/ByTitle/Acts/Asmade/0/0/All>. The figures are best understood as being accurate as at the first week of July 2021.

Historical data on key inquiry legislation

D.29 The ALRC also obtained data on historical compilations of Acts that are of particular importance to this Inquiry, offering time series data on each piece of legislation. Compilations incorporate amendments that have been made to the original 'as made' version of the legislation (ie the version originally enacted by Parliament). The legislative data on each compilation is identical to that created for the 'Principal Commonwealth Acts in force' dataset. The only difference is the addition of analysis of the use of defined terms that are defined in the *Corporations Act* and that are used in the *Corporations Regulations.* The ALRC therefore includes additional columns in the Historical Legislative Datasets for the use of all defined terms from the *Corporations Act* and *Corporations Regulations* in the *Corporations Regulations*.

D.30 The ALRC created datasets for the legislation listed below. The ALRC webscraped the 'Series' page of each piece of legislation as at 30 June 2021 and obtained every compilation as at that date, as well as other datapoints from the 'Series' page such as those set out at paragraph [D.3]:

- *Australian Securities and Investments Commission Act*: This dataset includes the 'as made' versions of the 1989 and 2001 Acts,[19] as well as 67 compilations. One compilation was excluded due to significant data quality issues.
- *Australian Securities and Investments Commission Regulations 2001* (Cth): This dataset includes the 'as made' version and 36 compilations. One compilation was excluded due to significant data quality issues.
- *Competition and Consumer Act 2010* (Cth): This dataset includes the 'as made' version of the *Trade Practices Act 1974* (Cth) and every compilation of the *Competition and Consumer Act 2010* (Cth) (88 compilations).
- *Corporations Act*: This dataset includes the 'as made' versions of the 1989 and 2001 Acts, as well as 92 compilations. Six compilations were excluded due to significant data quality issues.
- *Corporations Regulations 2001* (Cth): This dataset does not include the 'as made' version, which was only published in PDF. However, it contains the first compilation on 15 July 2001. It also contains 150 other compilations. Nine compilations were excluded due to significant data quality issues.

19 The 1989 Act was passed by Parliament as the *Australian Securities Commission Act 1989* (Cth) but renamed in 1998.

- *National Consumer Credit Protection Act 2009* (Cth): This dataset includes the 'as made' version of the Act and 25 compilations. One compilation was excluded due to significant data quality issues.
- *National Consumer Credit Protection Regulations 2010* (Cth): This dataset includes the 'as made' version of the regulation and every compilation (35 compilations).

D.31 The Federal Register of Legislation IDs (eg 'C2004A00486') of excluded legislation are listed in the Excel dataset for Historical Legislative Data on the ALRC website.[20]

Provision-level datasets

D.32 The ALRC obtained data on every chapter, part, and section of the *Corporations Act* and *Corporations Regulations* as at particular points in time, including:

- *Corporations Act*: 28 June 2001 (C2004A00818), 11 March 2002 (C2004C03060), 1 March 2007 (C2007C00201), 20 March 2012 (C2012C00447), 5 March 2017 (C2017C00129), and 5 April 2021 (C2021C00214). The 28 June 2001 version is the Act 'as made'. The 11 March 2002 version is the first version after the commencement of most of the *FSR Act*. The other versions were chosen in approximately 5-year increments from the 11 March 2002 version.
- *Corporations Regulations*: 28 June 2001 (C2004A00818).

D.33 These provision-level analyses are resource-intensive, and the ALRC therefore focused principally on the *Corporations Act*. However, further versions of the *Corporations Regulations* and other Acts will be analysed in future.

Preparing the legislative text for analysis

D.34 The ALRC effectively split the HTML of each legislative text into multiple HTML texts, using the markup for structural elements and the text of the provision title. The legislation was split by chapter, schedule, part, division, subdivision, and section. Splitting the text in this way was necessary so that the text of, for example, subdivision headings that appear immediately after a section but before another section did not appear as part of a section text. For part-level data, the legislation was only split by chapter, schedule, and part, and for chapter-level data it was only split by chapter and schedule. The

20 Australian Law Reform Commission (n 17).

ALRC excluded the table of contents and endnotes, and made some minor manual fixes to the HTML.

D.35 Because the ALRC split each text by HTML markup and by the title of the provision, certain provisions that were marked-up inconsistently were excluded.

Analysing each provision

D.36 Having split the legislative text, the ALRC then looped through each of the provisions and obtained legislative data identical to that obtained for Commonwealth Acts and combined this into a single dataset in which each row represented a single provision. Two additional types of data were obtained in relation to provisions that were not obtained in relation to Commonwealth Acts.

D.37 First, the ALRC included analysis of the use of defined terms that appear in the *Corporations Act* and that are used in the *Corporations Regulations.* The ALRC therefore included additional columns for use of defined terms that appear in the *Corporations Act* and which are used in the *Corporations Regulations*.

D.38 Second, the ALRC conducted a number of other word searches specific to the *Corporations Act* and *Corporations Regulations*.[21] For example, the ALRC identified the use of 'financial product', 'retail client', and 'financial product advice' by provision. This allows identification of not only the number of times these terms are used but also the chapters/schedules, parts, and sections in which they appear. The analysis excluded some instances in which these terms were not used in their defined sense. For example, in searching for 'financial service', results for 'financial services licence' and 'financial services licensee' were removed. This more sophisticated approach to identifying the use of important defined terms when they are used in their defined sense could be developed further, and may have general applicability to other concepts in legislation.

21 The ALRC's data dictionary for Commonwealth provision-level data includes a full list of terms searched and how they were searched: see ibid.

Legislative instruments

D.39 The ALRC obtained legislative data on the following legislative instruments in force on the Federal Register of Legislation as at 30 June 2021:

- Corporations Act instruments: Every instrument registered on the 'Enables' page for the *Corporations Act* on the Federal Register of Legislation. The ALRC excluded the *Corporations Regulations* from this analysis.
- ASIC legislative instruments: The ALRC webscraped every in force legislative instrument with 'ASIC' in its title.

D.40 The ALRC webscraped the 'Series' page for every legislative instrument, as well as the HTML of each instrument. The ALRC obtained the following information on each instrument:

- Enabling Act
- Legislation number/year
- Instrument type
- Summary
- Administrator
- Sunsetting exemption
- Sunset date
- Date of registration
- Start date
- Date of gazettal
- Date of repeal
- End date
- Repealed by
- First tabling chamber
- First tabling date
- Second tabling chamber
- Second tabling date
- Legislation Pages

D.41 Legislative data on legislative instruments is more limited because of the lack of useful HTML markup in such instruments. In addition, the ALRC could not exclude tables of contents and endnotes because these are not marked-up as such, unlike for Acts and regulations.

D.42 The ALRC obtained linguistic data on each legislative instrument identical to that obtained in relation to Commonwealth Acts. The ALRC also obtained data on the number of bold and italicised terms (eg financial product) as a potential indicator of the number of defined terms. However, many legislative instruments, particularly ASIC 'Class Orders' (pre-2015), do not use bolding and italicisation to identify defined terms. The ALRC therefore also counted the number of references to 'means', 'has the meaning', and 'has the same meaning' as a further potential indicator of the number of

defined terms. Lastly, the ALRC conducted word searches identical to those conducted for Commonwealth Acts.[22]

New Zealand and United Kingdom legislation

D.43 Using official New Zealand and UK legislation websites,[23] the ALRC webscraped the XML versions for the following Acts and regulations:[24]

- *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (NZ): This includes the legislation as made and 26 amended versions of the legislation published since its enactment.
- *Financial Reporting Act 2013* (NZ): This includes the legislation as made and seven amended versions of the legislation published since its enactment.
- *Financial Markets Supervisors Act 2011* (NZ): The Act was originally named the *Securities Trustees and Statutory Supervisors Act 2011* (NZ), but was renamed in December 2014. This includes the legislation as made and five amended versions of the legislation published since its enactment.
- *Financial Markets Conduct Act 2013* (NZ): This includes the legislation as made and 20 amended versions of the legislation published since its enactment.
- *Financial Markets Conduct Regulations 2014* (NZ): This includes the legislation as made and 22 amended versions of the legislation published since its enactment.
- *Financial Markets Authority Act 2011* (NZ): This includes the legislation as made and 14 amended versions of the legislation published since its enactment.
- *Financial Market Infrastructures Act 2021* (NZ): This includes the legislation as made.
- *Companies Act 1993* (NZ): This includes the legislation as made and 66 amended versions of the legislation published since its enactment.
- *Companies Act 1993 Regulations 1994* (NZ): This includes the legislation as made and seven amended versions of the legislation published since its enactment.

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22 A full list can be found in the ALRC's data dictionary for legislative instruments: see ibid.

23 Parliamentary Counsel Office/Te Tari Tohutohu Pāremata (NZ), 'New Zealand Legislation' <catalogue.data.govt.nz/dataset/new-zealand-legislation>; The National Archives (UK) <www.legislation.gov.uk>.

24 For a discussion of 'XML', see **Chapter 6** and Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021).

- *Financial Services and Markets Act 2000* (UK): This includes the legislation as made and 248 amended versions of the legislation published since its enactment.

D.44 Versions of New Zealand legislation in XML are available through data.govt.nz.[25] Versions of UK legislation in XML are available by adding '/data.xml' to any UK legislation URL.[26] This produces the legislation in UK Legislative Markup (UKLM), a particular 'vocabulary' for XML. The ALRC downloaded UK legislation in the Akoma Ntoso version of the XML. This can be obtained by adding '/data.akn' to any UK legislation URL.[27]

Preparing the legislative text for analysis

D.45 The ALRC analysed only meaningful text in UK and New Zealand legislation, similar to the methodology for Commonwealth Acts.[28]

D.46 **Linguistic data:** The ALRC obtained data on the linguistic structure of the analysed New Zealand and UK legislation. The methodology was identical to that for Commonwealth Acts.

D.47 **Structural data:** The ALRC was able to analyse the XML, which is hierarchical in structure, to count the number of structural elements.

D.48 **Cross-references:** Both UK and New Zealand legislation use hyperlinking for at least some cross-references. New Zealand hyperlinks and marks-up cross-references in XML, while the UK hyperlinks and marks-up cross-references that appear in notes added by the National Archives. However, the UK does not markup cross-references that appear in the text of the provisions.

D.49 **Definitions:** The XML for both UK and New Zealand legislation markup defined terms (eg 'financial product'). This is significantly higher quality data than in Australia because the structured XML imposes rules about how this markup can be used. The ALRC used these terms to conduct the same analysis on the number and use of defined terms as was conducted for Commonwealth Acts.

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25 Parliamentary Counsel Office/Te Tari Tohutohu Pāremata (NZ) (n 23).

26 See, eg, The National Archives (UK), '*Financial Services and Markets Act 2000* (UK) (UKLM Version of XML)' <www.legislation.gov.uk/ukpga/2000/8/data.xml>.

27 See, eg, The National Archives (UK), '*Financial Services and Markets Act 2000* (UK) (Akoma Ntoso Version of XML)' <www.legislation.gov.uk/ukpga/2000/8/data.akn>.

28 This excluded tables of contents and, for the UK, notes added to the legislation by the National Archives. The ALRC also removed subsection, paragraph, subparagraph, and sub-subparagraph numbers and lettering that appear at the beginning of lines in legislation (eg (1), (d), (iv), (A)).

D.50 **Word searches:** The ALRC undertook word searches broadly similar to those for Commonwealth Acts. A full list can be found in the ALRC's data dictionary for foreign legislative data.[29]

N-grams and exploratory analysis of legislative texts

D.51 In addition to the data analysis conducted above, the ALRC undertook some exploratory data analysis using n-grams. An n-gram is a group of words joined together, such as by an underscore (_). A bigram is comprised of two words, such as 'financial_product'. The 'n' value can be set to any number, such as three (a trigram). The ALRC created various n-grams for all the words in the Act and counted the number of appearances of each n-gram. This allowed the ALRC to identify key terms and phrases.

Cases

NSW Caselaw

D.52 The ALRC obtained the HTML of every case published on the NSW Caselaw website by the following NSW courts between 1 January 2001 and 2 July 2021:

- Supreme Court: 34,700 judgments;
- Court of Appeal: 8,601 judgments;
- Court of Criminal Appeal: 7,978 judgments; and
- District Court: 7,099 judgments.[30]

D.53 The HTML for these judgements allows separate analyses to be conducted for the coversheet, which includes information about legislation cited, and the body of the judgment.

Identifying sections cited

D.54 The ALRC sought to identify the number of judgments that cited each section of the *Corporations Act*. The ALRC created a list of the sections in the *Corporations Act* as at 30 June 2021. The ALRC then looped through every judgment's coversheet and extracted text from 'Corporations Act 2001' to the end of citation (eg 'Corporations Act 2001 pt 7.8, ss 761A, 764A').

D.55 Using this extract, the program then deleted chapter, division, and subdivision references. The program then removed a range of content so

29 Australian Law Reform Commission (n 17).
30 NSW Government, 'NSW Caselaw' <www.caselaw.nsw.gov.au/>.

only section numbers remained. The end result was a list of judgments, an extract of which appears in **Table D.1**.

Table D.1: Extract of results from citation search

docname	from	to	pre	keyword	post	pattern
[2001] FCA 1846 - Citations.txt	2	2	/i	198F	/p	^198F$
[2002] FCA 1005 - Citations.txt	20	20	/i ;	9	93 68	^9$
[2002] FCA 1005 - Citations.txt	23	23	93 68	601EB	601EE 761A	^601EB$

D.56 The ALRC saved this to an Excel spreadsheet, and then removed duplicate judgments for each citation. This meant that what was counted was the number of judgments that cited each section, rather than the number of times that each section was cited in all judgments.

Act citations

D.57 The ALRC identified the number of judgments that cite Commonwealth Acts that were in force on 30 June 2021. The ALRC looped through each judgment and searched the entire HTML text for the name of each Commonwealth Act and the *Corporations Regulations*. It produced an output similar to that in **Table D.1**, but with Act names rather than section numbers. The ALRC saved this to an Excel spreadsheet, and then removed duplicate judgments for each Act citation. This meant that what was counted was the number of judgments that cited each Act, rather than the number of times each Act was cited in all judgments.

Federal Court of Australia

D.58 The ALRC obtained the HTML of every case published on the Federal Court ('FCA') website between 1 January 2001 and 30 July 2021.[31] This included:

a. Full Court: 4,514 judgments; and

b. Single judge: 37,752 judgments.

31 Federal Court of Australia, 'Judgments Search' <www.fedcourt.gov.au/digital-law-library/judgments/search>.

D.59 The HTML for FCA judgments allows separate analyses to be conducted for the coversheet, which includes information about legislation cited, and the body of the judgment.

D.60 The ALRC used the same approach for FCA judgments as was used for NSW judgments.

High Court of Australia

D.61 The ALRC obtained the HTML of the 'catchwords' for each of the 1,285 High Court judgments published on the High Court website between 1 January 2001 and 30 June 2021.[32] The ALRC also obtained the PDF of each judgment.

D.62 The structure of the High Court catchwords makes it easy to computationally identify sections cited in the judgment. For example, the catchwords for *Angas Law Services Pty Ltd (in liq) v Carabelas* [2005] HCA 23 includes:

> **Corporations Act 2001 (Cth)** – ss 182, 183, 184.

D.63 The ALRC's program looped through the catchwords for each judgment and extracted the line or lines relating to the *Corporations Act*. The program then searched for in force sections of the *Corporations Act* among these citations. This provided the number of High Court judgments citing a particular section of the Act.

D.64 The ALRC looped through the full text of each judgment in PDF format for the name of each Commonwealth Act and the *Corporations Regulations*. This followed the methodology summarised above.

ASIC Gazettes

D.65 The ALRC analysed all ASIC Gazettes made since July 2001 to the end of 2020 to identify the most common sections under which individual relief instruments are made. The Gazettes are compiled and accessible on the ASIC website in non-text searchable PDF. Each Gazette was downloaded and converted to a text file using the optical character recognition ('OCR') function in R's Tesseract package. A search for each of the main *Corporations Act* sections under which a grant of relief can be made was performed across all of the text files. The ALRC identified that the relevant section under which an individual relief instrument was made was cited twice per instrument,

32 High Court of Australia, 'High Court Judgments Database' <eresources.hcourt.gov.au/browse?col=0>.

and as a result, the ALRC has halved the number of citations per section to estimate the number of individual relief instruments made under each section.

D.66 The OCR process was imperfect, and incorrectly converted some section numbers. This means that the ALRC's count of individual relief instruments made under each section of the *Corporations Act* is likely an undercount. It is highly unlikely that the OCR converted a non-section string of characters into a string that matches a section number for which the ALRC searched. The count is therefore unlikely to overcount the number of individual relief instruments citing each section.

Defined terms analysis

D.67 In addition to the analysis of the defined terms identified using the HTML on Federal Register of Legislation, the ALRC conducted a manual analysis of the defined terms in the *Corporations Act*.

D.68 The defined terms were manually identified from the selected bolded and italicised concepts included in: sections titled 'Dictionary', 'Definitions' or 'Meaning of'; sections including the phrase 'In this Chapter', 'In this Division', 'In this subdivision', 'In this Part', 'In this section', 'In this subsection', 'In this Schedule', or 'In this clause'; and, other miscellaneous definitions which were included across multiple sections.

D.69 There is a small difference between the number of defined terms identified using this approach and the approach based on webscraping defined terms marked-up as definitions in the HTML. This is due to the inconsistency with which definitions are tagged as such in the HTML. Neither approach is necessarily comprehensive. However, together, the datasets provide a picture of the use and location of definitions in the *Corporations Act.*

D.70 The sections in which the identified definitions appeared were separated into individual text files, and where multiple definitions were included in one section, each definition was subdivided into independent text files. The word search approach explained at [D.25] was then used to identify whether relevant phrases were present in each definition. In particular, computational analysis was used to identify whether the defined terms included any of the following words: 'includes'; 'has the meaning'; 'has the same meaning'; 'does not include'; 'unless the contrary intention appears', among other phrases.

For a full list of the phrases searched for, see the *Corporations Act* 'Defined Terms' dataset on the ALRC website.[33]

33 Australian Law Reform Commission (n 17).

Appendix E
Prototype Legislation

Contents

Explanatory notes

This Appendix contains a sample of prototype legislation that illustrates how several proposals and questions discussed in this Interim Report could be implemented. The ALRC encourages interested stakeholders to review an expanded version of the prototype legislation on the ALRC website: **www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-FSL-Prototype-Legislation.pdf**

The prototype legislation contains illustrative provisions of the *Corporations Act* and two hypothetical legislative instruments:

- the *Corporations (Exclusions and Exemptions from Chapter 7) Implementation Order 2021* ('*Implementation Order*'); and
- the *Financial Services Rules (Financial Product Disclosure) 2021* ('*Disclosure Rules*').

The prototype legislation is indicative only and is not intended to be a complete representation of the law. Instead, it contains a selection of provisions to illustrate the potential for simplification. Several provisions (for example, ss 766B–766H of the *Corporations Act* relating to the definition of 'financial service') have been excluded solely to reduce the length of the prototype legislation for illustrative purposes.

The substance of the prototype legislation is intended to closely reproduce the current law within its existing policy settings (unless otherwise acknowledged here or elsewhere in this Interim Report). To the extent possible, the prototype provisions adopt the existing numbering of provisions in the *Corporations Act* (for example, s 911A). In other places (such as the prototype Part 7.8B) new numbers have been selected for purely illustrative purposes. The numbering system adopted for the *Implementation Order* and the *Disclosure Rules* incorporates dashes within section numbers, and gaps between numbers (for example, s 6-1 is followed by s 6-5). This system allows for flexibility and future amendments, consistent with a similar

numbering style adopted in the *ITA Act 1997*. Some changes have been made to the form of expression where necessary to illustrate the proposed legislative architecture, to accord with modern drafting practices, or where it may be possible to simplify the current law's expression.

In some places, square brackets have been used to indicate:

- provisions that are subject to other proposals in this Interim Report (for example, the defined term 'financial product advice' discussed in **Chapter 11**); and
- cross-references to provisions of the current legislation that have not been incorporated into the prototype legislation.

The expanded version of the prototype legislation (published on the ALRC website) contains a concordance table that identifies provisions currently contained in the *Corporations Act*, *Corporations Regulations*, or other legislative instruments to which provisions in the prototype legislation correspond.

The location of definitions (Question A2 and Recommendation 7)

Consistent with the discussion in **Chapter 6** of this Interim Report, the definitions in prototype s 9 of the *Corporations Act* are contained within a single dictionary (or glossary), rather than spread throughout the *Corporations Act*, to improve navigability. Re-locating the definition of 'arrangement' to s 9 opens up the possibility of rationalising the similarly defined terms 'agreement', 'relevant agreement', and 'arrangement' (discussed in **Chapter 6**) so as to adopt a single expression and meaning that could apply Act-wide. Locating the definition of 'facility' in prototype s 9 is illustrative only. As discussed in **Chapter 4** of this Interim Report, 'facility' is used in its ordinary (undefined) sense in provisions outside Part 7.9 Div 3 of the *Corporations Act*. Applying the definition Act-wide may therefore have implications which, for present purposes, have not been fully explored.

A uniform definition of 'financial product' and 'financial service' (Proposals A3, A4(a)–(d) and A5)

Prototype ss 763A and 766A of the *Corporations Act* illustrate the proposed uniform definitions of 'financial product' and 'financial service' discussed in Chapter 7 of this Interim Report.

Application provisions, exclusions, and exemptions (Proposals A4(e)–(f) and A10)

The prototype legislation illustrates how, in a revised legislative architecture, application provisions could be used to establish the scope of specific provisions and fields of regulation. For example, prototype ss 765A and 766J of the *Corporations Act* enable delegated legislation to specify that particular provisions do not apply to particular financial products or services. Sample exclusions and exemptions from particular disclosure and licensing obligations are contained in the *Implementation Order*.

Incorporating 'credit' within the uniform definition of 'financial product' (Proposal A6)

Prototype s 763A(1)(iv) of the *Corporations Act* demonstrates how 'credit' might be incorporated within the uniform definition of 'financial product'. Section 2-5 of the *Implementation Order* illustrates how the current policy of excluding 'credit' from parts of Chapter 7 of the *Corporations Act* might be maintained. Prototype s 2-5 does not replicate regs 7.1.06(2) and (2A) of the *Corporations Regulations*, which effectively create exceptions to the more general exclusion of 'credit'. These will be considered in more detail in subsequent Interim Reports, including Interim Report C.

Managing complexity through rules (Question A11)

Prototype s 1098 of the *Corporations Act* and the *Disclosure Rules* illustrate how the model described by **Question A11** could be implemented in relation to financial product disclosure.

As discussed in **Chapter 10**, the following elements of the prototype legislation illustrate one way of locating material in a principled manner across the legislative hierarchy: sections of the *Corporations Act* relating to disclosure (Part 7.8B), corresponding implementation orders (Part 8B of the *Implementation Order*), and the *Disclosure Rules*.

Prototype legislation

Corporations Act 2001

Chapter 1—Introductory

Part 1.2—Interpretation

Division 1—General

9 Dictionary

In this Act:

arrangement means a contract, agreement, understanding, scheme or other arrangement (as existing from time to time):

(a) whether formal or informal, or partly formal and partly informal; and

(b) whether written or oral, or partly written and partly oral; and

(c) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights.

Australian financial services licence means a licence under section 913B that authorises a person who carries on a financial services business to provide financial services.

carry on has a meaning affected by Division 3 of Part 1.2 and section 761C.

carried on in this jurisdiction, in relation to a financial services business, has a meaning affected by section 911D.

credit is provided by one person (the ***credit provider***) to another (the ***debtor***), and is obtained by the debtor from the credit provider, if under an arrangement:

(a) payment of a debt owed by the debtor to the credit provider is deferred; or

(b) the debtor incurs a deferred debt to the credit provider.

dealing in a financial product has the meaning given by section 766C.

facility includes:

(a) intangible property; or

(b) an arrangement or a term of an arrangement (including a term that is implied by law or that is required by law to be included); or

(c) a combination of 2 or more things each of which is covered by paragraph (a) or (b).

Note: For cases where 2 or more arrangements may be taken to constitute a single arrangement, see subsection 763A(2).

financial product has the meaning given by section 763A.

financial service has the meaning given by section 766A.

financial services licensee means a person who holds an Australian financial services licence.

financial services business means a business of providing financial services.

financial services rules means rules made under section 1098.

implementation order means an order made under section 1097 or a provision of such an order.

Product Disclosure Statement means a Product Disclosure Statement required by Division 2 of Part 7.8B.

scoped provisions has the meaning given by sections 765A and 766J.

Short-Form Product Disclosure Statement, or ***Short-Form PDS***, means a Short-form Product Disclosure Statement that section 1002A permits to be given instead of a Product Disclosure Statement.

Supplementary Product Disclosure Statement has the meaning given by section 1004.

Chapter 7—Financial services and markets

Part 7.1—Preliminary

Division 3—Scope of this Chapter: financial products

763A Definition of *financial product*

(1) In this Act, ***financial product*** means a facility by means of which, or by the acquisition of which:

(a) a person does one or more of the following:

(i) makes a financial investment;

(ii) manages financial risk;

(iii) makes non-cash payments;

(iv) obtains credit; or

(b) people commonly do one or more of the things mentioned in paragraph (a), even if a particular person acquires the facility for some other purpose.

Note 1: Examples of making a financial investment are:

(a) a person paying money to a company for the issue to the person of shares in the company (the company uses the money to generate dividends for the person and the shares are a financial product); or

(b) a person contributing money to acquire interests in a registered scheme from the responsible entity of the scheme (the scheme uses the money to generate financial or other benefits for the person and the interests in the scheme are a financial product).

Note 2: Examples of actions that do *not* constitute making a financial investment are:

(a) a person purchasing real property or bullion (while the property or bullion may generate a return for the person, it is not a return generated by the use of the purchase money by another person); or

(b) a person giving money to a financial services licensee who is to use it to purchase shares for the person (while the purchase of the shares will be a financial

investment made by the person, the mere act of giving the money to the licensee will not of itself constitute making a financial investment).

Note 3: Examples of managing financial risk are:
(a) taking out insurance; or
(b) hedging a liability by acquiring a futures contract or entering into a currency swap.

Note 4: An example of an action that does *not* constitute managing a financial risk is employing a security firm (while that is a way of managing the risk that thefts will happen, it is not a way of managing the financial consequences if thefts do occur).

Note 5: Examples of making non-cash payments are:
(a) making payments by means of a facility for direct debit of a deposit account; or
(b) making payments by means of a facility for the use of cheques; or
(c) making payments by means of a smart card or other purchased payment facility within the meaning of the *Payment Systems (Regulation) Act 1998*; or
(d) making payments by means of traveller's cheques (whether denominated in Australian or foreign currency).

(2) In determining what does or does not constitute a financial product, 2 or more arrangements may be treated as together constituting a single arrangement if it is reasonable to assume that the parties to the arrangements regard them as constituting a single scheme.

(3) A financial product does not cease to be a financial product merely because:
(a) it is acquired by a person other than the one to whom it was originally issued; and
(b) that person, in acquiring it, is not making a financial investment or managing a financial risk.

763B How this Act applies to composite products

If a facility (the ***composite product***) has 2 or more components that, considered separately, include:
(a) at least one financial product; and
(b) at least one component that is not a financial product;
then this Act, in applying to a component that is a financial product, applies to the composite product only to the extent that it consists of such a component.

Note: So, for example, Part 7.8B does not require disclosures to be made in relation to a component that is not a financial product.

765A Narrowing the scope of provisions applying to financial products

(1) Implementation orders may, to the extent they specify, exclude the application of provisions of this Chapter:
(a) to financial products; or
(b) to persons making non-cash payments.

(2) Provisions whose application is affected by an implementation order in force under subsection (1) are ***scoped provisions***.

(3) Implementation orders may amend scoped provisions to include or amend notes referring to, and describing the effect of, implementation orders that affect the application of those scoped provisions.

(4) In so far as the operation of scoped provisions is affected by, or affects, the operation of other provisions of this Act, an implementation order in force under subsection (1) in relation to those scoped provisions has a corresponding effect on those other provisions.

(5) Subsection (4) affects the application of an instrument made under or for the purposes of a provision of this Act to the same extent, and in the same way, as that subsection affects the application of the provision itself.

(6) This section has effect despite anything else in this Act.

Division 4—Scope of this Chapter: financial services

766A Definition of *financial service*

(1) For the purposes of this Act, a person provides a ***financial service*** if the person:
- (a) [provides financial product advice] (see section 766B); or
- (b) deals in a financial product (see section 766C); or
- (c) makes a market for a financial product (see section 766D); or
- (d) operates a registered scheme; or
- (e) provides a custodial or depository service (see section 766E); or
- (f) provides a crowd-funding service (see section 766F); or
- (g) provides a claims handling and settlement service (see section 766G); or
- (h) provides a superannuation trustee service (see section 766H); or
- (j) is a trustee company and provides a traditional trustee company service.

Note: See also subsection (4). Trustee companies may also provide other kinds of service mentioned in this subsection.

(2) However, to avoid doubt, conduct done in the course of work of a kind ordinarily done by clerks or cashiers is not providing a financial service.

(3) The same conduct may constitute providing 2 or more different financial services.

Note: For example, conduct may constitute providing a superannuation trustee service and also dealing in a financial product that is a superannuation product.

(4) Implementation orders may, in relation to a traditional trustee company service of a particular class, specify the person or persons to whom a service of that class is taken for the purposes of this Act to be provided. This subsection does not limit (and is not limited by) subsection 766J(2).

Note: A traditional trustee company service is provided to a person as a retail client unless an implementation order provides otherwise (see subsection 761G(6A)).

766J Narrowing the scope of provisions applying to financial services

(1) Implementation orders may, to the extent they specify, exclude the application of provisions of this Chapter:

(a) to financial services; or

(b) in so far as the provisions refer to a particular kind of financial service—to financial services of that kind.

Note: The following are examples of specific kinds of financial services to which provisions refer:

(a) financial product advice;

(b) persons dealing in financial products;

(c) persons making a market for financial products;

(d) persons providing custodial or depository services;

(e) persons providing superannuation trustee services.

(2) Implementation orders may set out, for the purposes of specified provisions of this Chapter:

(a) circumstances in which persons facilitating provision of a financial service (for example, by publishing information) are taken also to provide that service; or

(b) circumstances in which persons are taken to provide a financial service instead of the persons who would otherwise be taken to provide it.

(3) Provisions whose application is affected by implementation orders in force under subsection (1) or (2) are ***scoped provisions***.

(4) Implementation orders may amend scoped provisions to include or amend notes referring to, and describing the effect of, implementation orders that affect the application of those scoped provisions.

(5) In so far as the operation of scoped provisions is affected by, or affects, the operation of other provisions of this Act, an implementation order in force under subsection (1) or (2) in relation to those scoped provisions has a corresponding effect on those other provisions.

(6) Subsection (5) affects the application of an instrument made under or for the purposes of a provision of this Act to the same extent, and in the same way, as that subsection affects the application of the provision itself.

(7) This section has effect despite anything else in this Act.

Part 7.6—Licensing of providers of financial services

Division 2—Requirement to be licensed or authorised

911A Need for an Australian financial services licence

(1) A person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering provision of the financial services.

Note 1: Also, a person must not provide a financial service contrary to a banning order or disqualification order under Division 8.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) However, a person is exempt from the requirement to hold an Australian financial services licence for a financial service the person provides if:

(a) the person provides the service as representative of a second person, and the second person:

(i) carries on a financial services business; and

(ii) holds an Australian financial services licence that covers provision of the service, or is exempt under paragraph (b) from the requirement to hold an Australian financial services licence for the service; or

Note: A representative must still comply with section 911B.

(b) the person is exempt from the requirement to hold an Australian financial services licence for the financial service because of an implementation order made for the purposes of this paragraph.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

(3) Subsection (2) does not exempt a person for:

(a) the operation of a registered scheme; or

(b) a traditional trustee company service.

(4) An implementation order made for the purposes of paragraph (2)(b) may exempt a person subject to specified conditions.

(5) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

Part 7.8B—Product disclosure for financial products other than securities

Division 1—Application of this Part

995A Application to financial products

(1) This Part applies to all financial products, except as provided in this section or in implementation orders in force for the purposes of subsection 765A(1) in relation to provisions of this Part.

Note: There are currently no implementation orders containing further exclusions from this Part.

(2) This Part does *not* apply to:

(a) securities; or

Note: Chapters 6CA and 6D provide for disclosure in relation to securities.

(b) debentures, stocks or bonds issued or proposed to be issued by a government; or

Note: These financial products are not ***securities*** within the meaning of section 761A.

(c) a financial product offered for issue or sale under a contribution plan.

(3) This Part does *not* apply to a financial product unless:

(a) it is or was issued, or will be issued, in the course of a business of issuing financial products; or

(b) paragraph (a) is not satisfied but the financial product is:

(i) a managed investment product; or

(ii) a foreign passport fund product; or

(iii) a superannuation product.

(4) Despite subsections (2) and (3), this Part applies to a financial product if it is transferable and:

(a) it is a derivative; or

(b) it would be a derivative but for the effect of paragraph 761D(3)(c), and that paragraph excludes it from being a derivative only because it is a legal or equitable right or interest in:

(i) a share in, or a debenture of, a body; or

(ii) an interest in a registered scheme; or

(iii) an interest in a managed investment scheme that is neither a registered scheme, nor a scheme (whether or not operated in this jurisdiction) that does not need to be registered because subsection 601ED(1) is not satisfied; or

(iv) an interest in a notified foreign passport fund.

Division 2—Product Disclosure Statements

998 Product Disclosure Statement relating to issue of financial product

(1) A person (the ***PDS provider***) must give another person a Product Disclosure Statement for a financial product if:
   (a) the PDS provider offers to issue the financial product to the other person; and
   (b) the issue would be to the other person as a retail client; and
   (c) the offer is received in this jurisdiction.

(2) A person (the ***PDS provider***) must give another person a Product Disclosure Statement for a financial product if:
   (a) the PDS provider offers to arrange for the issue of the financial product to the other person; and
   (b) the PDS provider is covered by subsection (6); and
   (c) the issue would be to the other person as a retail client; and
   (d) the offer is received in this jurisdiction.

(3) A person (the ***PDS provider***) must give another person a Product Disclosure Statement for a financial product if:
   (a) the PDS provider issues the financial product to the other person; and
   (b) the issue is to the other person as a retail client; and
   (c) there are reasonable grounds to believe that the other person has not already been given a Product Disclosure Statement for the product; and
   (d) the issue is made in this jurisdiction.

(4) A Product Disclosure Statement required by subsection (1), (2) or (3) must be given at or before the time when the PDS provider makes the offer, or issues the financial product, to the other person.

   Note: If a Product Disclosure Statement is given when the offer is made, it will not need to be given again when the product is issued to the person (see subsection 1008(2)) unless the Product Disclosure Statement that was given is no longer up to date.

(5) A person (the ***PDS provider***) must give another person a Product Disclosure Statement for a financial product if:
   (a) the other person makes an offer to the PDS provider to acquire the financial product; and
   (b) the other person would acquire the financial product by way of issue of the product (rather than transfer of the product to the person); and
   (c) the financial product would be issued to the other person as a retail client; and
   (d) the offer is received in this jurisdiction.

   The Product Disclosure Statement must be given before the other person becomes bound by a legal obligation to acquire the financial product pursuant to the offer.

(6) This subsection covers the following:
   (a) a financial services licensee;

(b) an authorised representative of a financial services licensee;

(c) a person who:

(i) is exempt from the requirement to hold an Australian financial services licence because of an implementation order made for the purposes of paragraph 911A(2)(b); and

(ii) is specified in an implementation order made for the purposes of this subparagraph;

(d) a person who is required to hold an Australian financial services licence but who does not hold such a licence.

999 Product Disclosure Statement relating to sale transaction analogous to issuing financial product

(1) A person (the ***PDS provider***) must give another person a Product Disclosure Statement for a financial product if:

(a) the PDS provider offers to sell the financial product to the other person; and

(b) the financial product would be sold to the other person as a retail client; and

(c) the offer is received in this jurisdiction; and

(d) subsection (3), (4) or (5) applies.

The Product Disclosure Statement must be given at or before the time when the PDS provider makes the offer.

(2) A person (the ***PDS provider***) must give another person a Product Disclosure Statement for a financial product if:

(a) the other person makes an offer to the PDS provider to acquire the financial product by way of transfer of the product to the person; and

(b) a sale of the product to the other person pursuant to the offer would be a sale to the other person as a retail client; and

(c) the offer is received in this jurisdiction; and

(d) subsection (3), (4) or (5) applies.

The Product Disclosure Statement must be given before the other person becomes bound by a legal obligation to acquire the financial product pursuant to the offer.

Sale amounting to indirect issue

(3) This subsection applies if:

(a) the offer is made within 12 months after the issue of the financial product; and

(b) the product was issued to a person (the ***first holder***) without a Product Disclosure Statement for the product being prepared; and

(c) at least one of the following applies:

(i) the issuer issued the product, or the first holder acquired the product, with the purpose of the first holder selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product;

(ii) there are reasonable grounds for concluding that the product was issued or acquired with that purpose (whether or not there were or may have been other purposes for the issue or acquisition);

(iii) the financial product, or any financial product of the same kind that was issued at the same time, is subsequently sold, or offered for sale, within 12 months after issue, unless it is proved that the circumstances of the issue and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding that the product was issued or acquired with that purpose.

Off-market sale by controller

(4) This subsection applies if the proposed seller controls the issuer of the financial product and:

(a) the product is not able to be traded on any licensed market; or

(b) the product is able to be traded on a licensed market but the offer is not made in the ordinary course of trading on a licensed market.

Note: See section 50AA for when a person controls a body.

Sale amounting to indirect off-market sale by controller

(5) This subsection applies if:

(a) the offer is made within 12 months after the sale (the ***earlier sale***) of the financial product by a person (the ***controller***) who controlled the issuer of the product at the time of the earlier sale; and

Note: See section 50AA for when a person controls a body.

(b) either:

(i) at the time of the earlier sale, the product was not able to be traded on any licensed market; or

(ii) the product was able to be traded on a licensed market at that time, but the earlier sale did not occur in the ordinary course of trading on a licensed market; and

(c) a Product Disclosure Statement was not prepared by, or on behalf of, the controller before the earlier sale; and

(d) at least one of the following applies:

(i) the controller, or the person (the ***earlier buyer***) to whom the product was sold, entered into the earlier sale with the purpose of the earlier buyer selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product;

(ii) there are reasonable grounds for concluding that the controller or the earlier buyer entered into the earlier sale with that purpose (whether or not there were or may have been other purposes for the sale or acquisition);

(iii) the financial product, or any financial product of the same kind that was sold by the controller at the same time as the earlier sale, is subsequently sold, or offered for sale, within 12 months after issue, unless it is proved that the circumstances of the earlier sale and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding as mentioned in subparagraph (ii).

1000 Product Disclosure Statement relating to personal advice recommending a particular financial product

(1) A person (the ***PDS provider***) must give another person a Product Disclosure Statement for a financial product if:

(a) the PDS provider provides financial product advice to the other person that consists of, or includes, a recommendation that the person acquire the financial product; and

(b) the other person would acquire the financial product by way of:

(i) issue of the product to the person (rather than transfer of the product to the person); or

(ii) transfer of the product to the person pursuant to a sale resulting from an offer that gives rise to a requirement under section 999; and

(c) the financial product advice is provided to the other person as a retail client; and

(d) the financial product advice is personal advice to the other person; and

(e) the PDS provider is:

(i) the issuer of the financial product; or

(ii) if subparagraph (b)(ii) of this subsection applies—the seller; or

(iii) a person covered by subsection 998(6); and

(f) the recommendation referred to in paragraph (a) of this subsection is received in this jurisdiction.

(2) The Product Disclosure Statement must be given at or before the time when the PDS provider provides the advice.

1001 Civil penalty for contravening section 998, 999 or 1000

A person contravenes this section if the person contravenes section 998, 999 or 1000.

Note: This subsection is a civil penalty provision (see section 1317E).

1002 Product Disclosure Statement before person elects to be covered by group financial product

(1) If a financial product:

(a) is issued to a person; and

(b) covers, or is designed to cover, a group of persons; and

(c) may cover a particular person (the ***new group member***) if the person elects to be covered by the financial product;

the issuer must take reasonable steps to ensure that a Product Disclosure Statement for the financial product is given to the new group member before the new group member makes an election to be covered by the financial product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) For the purposes of this section, a financial product covers a person if benefits are, or may be, provided under the financial product directly to:

(a) the person; or

(b) a relative of the person; or

(c) a person nominated by the person.

1002A Short-Form Product Disclosure Statement

(1) If section 998, 999, 1000 or 1002 requires a Product Disclosure Statement for a financial product to be given to a person (the ***client***), a Short-Form PDS for the product may be given instead, unless the financial product is:

(a) a general insurance product; or

(b) a managed investment product in relation to an Australian passport fund; or

(c) a foreign passport fund product.

(2) However, if the client asks for the Product Disclosure Statement for the product, then:

(a) the person required by section 998, 999 or 1000 to give one; or

(b) the issuer referred to in section 1002;

as the case may be, must give the Product Disclosure Statement to the client.

1003 Information must be up to date

The information in a Product Disclosure Statement or Short-Form Product Disclosure Statement must be up to date as at the time when it is given.

Note: A Supplementary Product Disclosure Statement containing updated information may be given with a Product Disclosure Statement that has become out of date. The updated information is taken to be included in the Product Disclosure Statement (see subsection 1004(2)).

1004 Supplementary Product Disclosure Statements

(1) A ***Supplementary Product Disclosure Statement*** is a document by which a person who has prepared a Product Disclosure Statement (the ***PDS***) can:

(a) correct a misleading or deceptive statement in the PDS; or

(b) correct an omission of information the PDS is required to contain; or

(c) update or add to the information contained in the PDS; or

(d) change a statement of a kind prescribed by financial services rules for the purposes of this paragraph.

Note: Financial services rules may provide for a Replacement Product Disclosure Statement to be prepared instead of a Supplementary Product Disclosure Statement.

(2) If:

(a) a Product Disclosure Statement (the ***PDS***) is given to a person; and

(b) at the same time, or later, a Supplementary Product Disclosure Statement (the ***SPDS***) that supplements the PDS is given to the person;

the PDS is taken, from when the SPDS is given to the person, to include the information and statements contained in the SPDS.

(3) If:

(a) apart from this section, a person would be required to give another person (the ***client***) a Product Disclosure Statement (the ***new PDS***) relating to a financial product; and

(b) the client has, because of some previous conduct, already received a Product Disclosure Statement (the ***earlier PDS***) relating to the financial product; and

(c) the earlier PDS contains some, but not all, of the information that the new PDS is required to contain;

the person may, instead of giving the client the new PDS, give the client a Supplementary Product Disclosure Statement that contains the additional information.

1007 Financial services rules to prescribe form, content and other matters relating to Product Disclosure Statements

(1) Financial services rules are to prescribe, in relation to:

(a) Product Disclosure Statements; and

(b) Supplementary Product Disclosure Statements; and

(c) Replacement Product Disclosure Statements; and

(d) Short-Form Product Disclosure Statements; and

(e) Supplementary Short-Form Product Disclosure Statements;

the following matters:

(f) who must prepare them;

(g) the manner and form in which they must be prepared;

(h) their content;

(i) without limiting paragraph (h), guidelines that must be complied with when any of those Statements makes a claim that labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of an investment;

(j) whether, when, and with whose consent, they must be lodged with ASIC;

(k) how they are to be given;

(l) what information about events relating to them must be given to ASIC, and how that information is to be given;

(m) what documents relating to them must be kept, who must keep those documents and for how long, and what access to those documents must be given;

(n) when Replacement Product Disclosure Statements may or must be used instead of Supplementary Product Disclosure Statements;

(o) any other matters that are necessary or convenient to ensure compliance with this Part and with implementation orders made for the purposes of this Part.

(2) A person must comply with financial services rules in force for the purposes of this section.

1007A Statement must be given in accordance with this Act and financial services rules

A Product Disclosure Statement, Supplementary Product Disclosure Statement, Replacement Product Disclosure Statement, Short-Form Product Disclosure Statement or Supplementary Short-Form Product Disclosure Statement must be given in accordance with this Act and the financial services rules.

1008 Exemptions

(1) This section has effect despite sections 998, 999 and 1000.

Up to date Product Disclosure Statement already received

(2) The PDS provider need not give the other person a Product Disclosure Statement for the financial product if:

(a) the other person has already received a Product Disclosure Statement containing all the information that the first-mentioned Product Disclosure Statement would be required to contain; or

(b) the PDS provider believes on reasonable grounds that paragraph (a) applies.

Exemptions in implementation orders

(3) The PDS provider need not give the other person a Product Disclosure Statement for the financial product if the PDS provider is exempt from doing so because of an implementation order made for the purposes of this subsection.

(4) An implementation order made for the purposes of subsection (3) may exempt the PDS provider subject to specified conditions, which may include conditions to be fulfilled after the time at or before which, but for the exemption, the Product Disclosure Statement would be required to be given.

(5) If:

(a) an implementation order made for the purposes of subsection (3) exempts the PDS provider subject to a condition to be fulfilled after the time at or before which, but for the exemption, the Product Disclosure Statement would be required to be given; and

(b) the condition is not fulfilled by the time, or within the period, specified in the condition;

the exemption is taken never to have applied to the giving of that Product Disclosure Statement.

Part 7.11A—Implementation orders and financial services rules

Division 1—Implementation orders

1097 Power to make

[The rule-maker] may, by legislative instrument, make orders prescribing matters required or permitted by a provision of this Chapter (or of regulations made for the purposes of a provision of this Chapter) to be prescribed by implementation orders.

Division 2—Financial services rules

1098 Power to make

(1) ASIC may, by legislative instrument, make rules prescribing matters required or permitted by a provision of this Chapter (or of regulations made for the purposes of a provision of this Chapter) to be prescribed by financial services rules.

(2) Without limiting subsection (1), the financial services rules may prescribe penalties, not exceeding 50 penalty units for an individual or 500 penalty units for a body corporate, for contraventions of the rules.

Note: See also sections 1311B and 1311C in relation to the penalty applicable to an offence.

(3) Before making financial services rules, ASIC must have regard to the following matters:

(a) the complexity of the financial products and financial services to which the proposed rules relate;
(b) the risk of consumer detriment to be addressed;
(c) which participants in the financial services industry will be affected;
(d) the need for competitive neutrality;
(e) existing laws, implementation orders and financial services rules affecting those or similar financial products and financial services;
(f) the likely regulatory impact of making the proposed rules;

and may have regard to any other matters that ASIC considers relevant.

1099 Minister's consent

(1) ASIC must not make financial services rules except:

(a) with the consent in writing of the Minister; or
(b) in accordance with this section.

Emergency rules without consent of the Minister

(2) ASIC may make financial services rules without the Minister's consent if ASIC is of the opinion that it is necessary to do so in the public interest:

(a) to protect against a substantial risk of consumer detriment that cannot otherwise be addressed in a timely manner; or

(b) to respond in a timely manner to unforeseen events so as to support the functioning of financial markets and the provision of financial products and financial services.

(3) If ASIC makes financial services rules under subsection (2) without the Minister's consent:

(a) ASIC must as soon as practicable, and in any event within 24 hours, give the Minister a notice in writing setting out the content of the rules and the reasons for making the rules without the Minister's consent; and

(b) the Minister may by writing direct ASIC to repeal or amend the rules as set out in the direction; and

(c) ASIC must comply with a direction by the Minister under paragraph (b) of this subsection; and

(d) the rules cease to have effect at the end of 12 months starting on the day they commence, unless earlier repealed.

(4) ASIC may make financial services rules without the Minister's consent if the rules are necessary to comply with a direction by the Minister under paragraph (3)(b).

(5) A consent or direction by the Minister under this section is not a legislative instrument.

Corporations (Exclusions and Exemptions from Chapter 7) Implementation Order 2021

Part 1—Introduction

Division 1—Preliminary

1-1 Name

This instrument is the *Corporations (Exclusions and Exemptions from Chapter 7) Implementation Order 2021*.

1-2 Authority

This instrument is made under section 1097 of the *Corporations Act 2001*.

Division 2—Definitions

1-5 Dictionary

Note: A number of expressions used in this instrument are defined in section 9 of the Act.

In this instrument:

Act means the *Corporations Act 2001*.

credit facility means a facility by means of which, or by the acquisition of which:

(a) a person obtains credit; or

(b) people commonly obtain credit, even if a particular person acquires the facility for some other purpose.

funeral services entity means an entity of one of the following kinds:

(a) a body corporate;

(b) a partnership;

(c) an unincorporated body;

(d) an individual;

(e) for a trust that has only one trustee—a trustee;

(f) for a trust that has more than one trustee—the trustees together;

that carries on in this jurisdiction a business of supplying:

(g) services for the care and preparation of human bodies for burial or cremation; and

(h) services for the arrangement, supervision or conduct of a funeral, burial or cremation; and

(i) products in connection with the services mentioned in paragraphs (g) and (h).

information service means:

(a) a broadcasting service; or

(b) an interactive or broadcast videotext or teletext service or a similar service; or
(c) an online database service or a similar service; or
(d) a broadcasting service within the meaning of the *Broadcasting Services Act 1992*;
(e) a datacasting service within the meaning of the *Broadcasting Services Act 1992*;
(f) a service provided by the Internet.

non-cash payment facility means a facility through which, or through the acquisition of which:
(a) a person makes non-cash payments; or
(b) people commonly make non-cash payments, even if a particular person acquires the facility for some other purpose.

self managed superannuation fund has the meaning given by section 17A of the *Superannuation Industry (Supervision) Act 1993*.

Part 2—Exclusions from Chapter 7 of the Act

Division 1—Financial products

2-1 Enabling provision

This Division is made for the purposes of subsection 765A(1) of the Act.

2-5 Financial products to which Chapter 7 (except Parts 7.8A and 7.9A) does not apply

Note 1: See Part 8A of this instrument for exclusions from Part 7.8A (Design and distribution requirements relating to financial products for retail clients) of the Act.

Note 2: See Part 9A of this instrument for exclusions from Part 7.9A (Product intervention orders) of the Act.

(1) Chapter 7 (except Parts 7.8A and 7.9A) of the Act does not apply to a financial product to the extent that it is any of the following:
(a) an excluded security;
(b) an undertaking by a body corporate to pay money to a related body corporate;
(c) health insurance provided as part of a health insurance business (as defined in Division 121 of the *Private Health Insurance Act 2007*);
(ca) insurance provided as part of a health-related business (as defined by section 131-15 of the *Private Health Insurance Act 2007*) that is conducted through a health benefits fund (as defined by section 131-10 of that Act);
(d) insurance provided by the Commonwealth;
(e) State insurance, Northern Territory insurance or Australian Capital Territory insurance, including insurance entered into by:
(i) a State, the Northern Territory or the Australian Capital Territory; and
(ii) some other insurer;
as joint insurers;

(f) insurance entered into by the Export Finance and Insurance Corporation, other than a short-term insurance contract within the meaning of the *Export Finance and Insurance Corporation Act 1991*;

(g) reinsurance;

(ha) a credit facility (other than a margin lending facility);

(hb) any form of financial accommodation that is neither a credit facility nor a margin lending facility;

(hc) a hire purchase agreement;

(hd) a contract, arrangement or understanding for the hire, lease or rental of goods or services, other than one under which:

(i) full payment is made before or when the goods or services are provided; and

(ii) in the case of the hire, lease or rental of goods—an amount at least equal to the value of the goods is paid as a deposit in relation to the return of the goods;

(he) a facility under which any of the following is provided:

(i) an article known as a credit card or charge card;

(ii) an article, other than a credit card or a charge card, intended to be used to obtain cash, goods or services;

(iii) an article, other than a credit card or a charge card, commonly issued to customers or prospective customers for the purpose of their obtaining goods or services;

(hf) a facility (other than a margin lending facility) under which a person incurs a liability in respect of redeemable preference shares;

(hg) a facility under which:

(i) assistance in obtaining credit is provided; or

(ii) a person draws, accepts, indorses or otherwise deals in a negotiable instrument (including a bill of exchange or a promissory note); or

(iii) the trustee of the estate of a deceased person makes an advance to a beneficiary or prospective beneficiary of the estate;

(hh) a lease over real or personal property;

(hi) a letter of credit;

(hj) a non-cash payment facility, if payments made using the facility will all be debited to a facility covered by any of paragraphs (ha) to (hi);

(hk) a mortgage that is not a financial product covered by paragraph 763A(1)(a) of the Act;

(hl) a guarantee;

(i) a facility:

(i) that is an approved RTGS system within the meaning of the *Payment Systems and Netting Act 1998*; or

(ii) that is for the transmission and reconciliation of non-cash payments, and the establishment of final positions, for settlement through an approved RTGS system within the meaning of the *Payment Systems and Netting Act 1998*;

(j) a facility that is a designated payment system for the purposes of the *Payment Systems (Regulation) Act 1998*;

(k) a facility for the exchange and settlement of non-cash payments between providers of non-cash payment facilities;

(la) a financial market;

(lb) a clearing and settlement facility;

(lc) a facility that is a payment system operated as part of a clearing and settlement facility;

(ld) a facility that is a derivative trade repository;

(m) a contract to exchange one currency (whether Australian or not) for another that is to be settled immediately;

(n) so much of an arrangement as is not a derivative because of paragraph 761D(3)(a) of the Act;

(p) an arrangement that is not a derivative because of subsection 761D(4) of the Act;

(q) an interest in an exempt public sector superannuation scheme within the meaning of the *Superannuation Industry (Supervision) Act 1993*;

(r) any of the following:

(i) an interest in something that is *not* a managed investment scheme because of paragraph (c), (e), (f), (k), (l) or (m) of the definition of ***managed investment scheme*** in section 9 of the Act;

(ii) a legal or equitable right or interest in an interest covered by subparagraph (i);

(iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);

(s) any of the following:

(i) an interest in a managed investment scheme (whether or not operated in this jurisdiction) for which none of paragraphs 601ED(1)(a), (b) and (c) of the Act is satisfied and that is neither a registered scheme nor a notified foreign passport fund;

(ii) a legal or equitable right or interest in an interest covered by subparagraph (i);

(iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);

(t) a deposit-taking facility that is, or is used for, State banking;

(u) a benefit provided, by an association of employees that is registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009*, for a member of the association or a dependant of a member;

(va) a contract of insurance issued by an employer to an employee of the employer;

(vb) a life policy or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is not a contract of insurance and is issued by an employer to an employee of the employer;

(w) a funeral benefit;

(x) physical equipment, or physical infrastructure, by which something else is provided that is a financial product to which Chapter 7 (except Parts 7.8A and 7.9A) of the Act applies.

(2) Chapter 7 of the Act (except Parts 7.8A and 7.9A) does not apply to a financial product to the extent that it is:

(a) an arrangement (a ***surety bond***):

(i) that a person (***person 1***) enters into with another person (***person 2***) in order to meet a requirement of another arrangement between person 1 and a person (***person 3***) other than person 2; and

(ii) under which person 2 undertakes to make a payment to, or perform an obligation for the benefit of, person 3 in specified circumstances; and

(iii) under which person 1 is liable to person 2 for any payments made, or liabilities, costs or expenses incurred, by person 2 in making the payment, or performing the obligation, referred to subparagraph (ii); or

(b) an arrangement between 2 persons (***person 1*** and ***person 2***) made in these circumstances:

(i) person 1 leases or rents something from person 2;

(ii) under the arrangement, person 1 makes a payment to person 2 to reduce the amount that person 1 would otherwise have to pay to person 2 under the leasing or rental agreement;

(iii) the payment relates to the event of an accident or other eventuality affecting the thing that is being leased or rented; or

Example: Collision damage waiver insurance for a rental car.

(c) a cheque drawn by a financial institution on itself or on another financial institution; or

(e) insurance under an overseas student health insurance contract within the meaning of regulation 48 of the *National Health Regulations 1954*; or

(f) a facility that consists of the rights of the holder of a debenture against a trustee under a trust deed entered into under:

(i) section 283AA of the Act; or

(ii) Chapter 2L or Division 4 of Part 7.12 of the old Corporations Law; or

(g) a money order issued as such by or for Australia Post; or

(h) a non-cash payment facility:

(i) for which the issuer is both a body corporate and an ADI (within the meaning of the *Banking Act 1959*), or is an operator of a payment system; and

(ii) under which, as instructed by the client, the issuer makes money available (or causes it to be made available) to a person nominated by the client, and does so within 2 business days after receiving the client's instruction, or within the time reasonably required to complete the transaction subject to any constraints imposed by law; and

(iii) under which the funds are transferred by electronic means for collection by, or for the credit of, the payer or another person; and

(iv) in relation to which the issuer and the payer do not have a standing arrangement to transfer funds as mentioned in subparagraph (iii); or

Note: Examples are telegraphic transfers and international money transfers offered by banks and remittance dealers.

(j) a carbon abatement contract within the meaning of the *Carbon Credits (Carbon Farming Initiative) Act 2011*; or

(k) a non-cash payment facility that meets the following conditions:
  (i) the facility is issued as part of a scheme (a ***loyalty program***) whose sole or dominant purpose is to promote the purchase of goods from, or the use of services of, the issuer of the facility or another person;
  (ii) a person who uses or holds the facility is allocated credits (however described) as a result of the purchase of goods from, or the use of services of, the issuer or other person;
  (iii) the credits allocated under the facility can be used to make payment or part payment for goods or services or to obtain some other benefit;
  (iv) the facility is not a component of another financial product; or

(l) a facility through which, or through the acquisition of which, a person can make a non-cash payment of a toll for the use of a road, but no other kind of non-cash payment.

Division 2—Financial services

2-50 Enabling provision

This Division is made for the purposes of subsection 766J(1) of the Act.

2-55 Financial services to which Chapter 7 does not apply

(1) Chapter 7 of the Act does not apply to a financial service that consists of:
  (a) a person operating a registered scheme, if the person is taken to operate the scheme only because of either or both of the following:
    (i) the person acting as an agent or employee of another person;
    (ii) the person taking steps to wind up the scheme; or
  (b) a person providing:
    (i) in the course of conducting a service (the ***exempt service***) covered by subsection (2), (3), (4) or (5) of this section; and
    (ii) as an integral part of the exempt service;
  a financial service that is reasonably necessary to provide in order to conduct the exempt service; or
  (c) a person providing a financial service that consists only of advising another person in relation to the manner in which:
    (i) voting rights attaching to securities; or
    (ii) voting rights attaching to interests in managed investment schemes;
  may or should be exercised, if the advice:
    (iii) is not intended to influence, and could not reasonably be regarded as intended to influence, any decision in relation to financial products other than a decision about voting; and
    (iv) does not relate to a vote that relates to a dealing in financial products.

  Note: A service that includes advice which is intended to influence the decision to acquire securities in another company would not be covered by this paragraph.

(2) For subparagraph (1)(b)(i), a person conducts a service covered by this subsection if the person:

(a) provides advice in relation to the preparation or auditing of financial reports or audit reports; or

(b) provides advice on a risk that another person might be subject to and identifies (without reference to a particular brand or product issuer) financial products, or classes of financial product, that will mitigate that risk, other than advice for inclusion in an exempt document or statement; or

(c) provides advice on the acquisition or disposal, administration, due diligence, establishment, structuring or valuation of an incorporated or unincorporated entity, if the advice:

(i) is given to a person who is, or is likely to become, an officer or manager of the entity, a trustee of the entity, a director of a trustee of the entity, or an associate of the entity as defined by Division 2 of Part 1.2 of the Act; and

(ii) to the extent that it is financial product advice—is confined to advice on a decision about:

(A) securities of a body corporate, or related body corporate, that carries on or may carry on the business of the entity; or

(B) interests in a trust (other than a superannuation fund, a managed investment scheme that is registered or required to be registered under Part 5C.1 of the Act, or a notified foreign passport fund), the trustee of which carries on or may carry on the business of the entity in the capacity of trustee; and

(iii) does not relate to other financial products that the body corporate or the trustee of the trust may acquire or dispose of; and

(iv) is not advice for inclusion in anything covered by paragraph 2-75(1)(a) or (b) of this instrument; or

(d) provides advice on financial products that are:

(i) securities in a company (other than securities that are to be offered under a disclosure document under Chapter 6D of the Act); or

(ii) interests in a trust (other than a superannuation fund, a managed investment scheme that is registered or required to be registered under Part 5C.1 of the Act, or a notified foreign passport fund);

if the company or trust is not carrying on a business and has not, at any time, carried on a business; or

(e) provides advice in relation to the transfer of financial products between associates; or

(f) arranges for another person to deal in interests in a self managed superannuation fund in the circumstances referred to in paragraphs (5)(b) and (c) of this section; or

(g) arranges for another person to deal in a financial product, by preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person; or

(h) provides advice about the provision of financial products as security, other than where the security is provided for the acquisition of other financial products.

(3) For subparagraph (1)(b)(i), a person conducts a service covered by this subsection if the person:
  (a) is registered as an auditor under Part 9.2 of the Act; and
  (b) performs any of the functions of a cover pool monitor mentioned in subsection 30(4) of the *Banking Act 1959*.

(4) For subparagraph (1)(b)(i), a person conducts a service covered by this subsection if:
  (a) the person provides advice to another person on taxation issues including advice in relation to the taxation implications of financial products; and
  (b) the person will not receive a benefit (other than from the person advised or an associate of the person advised) as a result of the person advised acquiring a financial product mentioned in the advice, or a financial product that falls within a class of financial products mentioned in the advice; and
  (c) either the advice does not constitute financial product advice to a retail client, or the advice includes, or is accompanied by, a written statement that:
    (i) the person providing the advice is not licensed to provide financial product advice under the Act; and
    (ii) taxation is only one of the matters that must be considered when making a decision on a financial product; and
    (iii) the client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.

(5) For subparagraph (1)(b)(i), a person conducts a service covered by this subsection if:
  (a) the person provides advice in relation to the establishment, operation, structuring or valuation of a superannuation fund, other than advice for inclusion in anything covered by paragraph 2-75(1)(a) or (b); and
  (b) the person advised is, or is likely to become:
    (i) a trustee; or
    (ii) a director of a trustee; or
    (iii) an employer sponsor as defined by subsection 16(1) the *Superannuation Industry (Supervision) Act 1993*; or
    (iv) a person who controls the management;
  of the superannuation fund; and
  (c) except to the extent referred to in subsection (6), the advice:
    (i) does not relate to the acquisition or disposal by the superannuation fund of specific financial products or classes of financial products; and
    (ii) does not include a recommendation that a person acquire or dispose of a superannuation product; and
    (iii) does not include a recommendation in relation to a person's existing holding in a superannuation product to modify an investment strategy or a contribution level; and

(d) if the advice constitutes financial product advice provided to a retail client—the advice includes, or is accompanied by, a written statement that:
(i) the person providing the advice is not licensed to provide financial product advice under the Act; and
(ii) the client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.

(6) Advice does not need to meet the condition in paragraph (5)(c) to the extent that it is given for the sole purpose, and only so far as reasonably necessary for the purpose, of ensuring compliance by the person advised with:
(a) the *Superannuation Industry (Supervision) Act 1993*, except paragraph 52(2)(f) of that Act; or
(b) the *Superannuation Industry (Supervision) Regulations 1994*, except regulation 4.09 of those Regulations; or
(c) the *Superannuation Guarantee (Administration) Act 1992*.

Part 6—Exemptions from Part 7.6 of the Act

6-1 Need for Australian financial services licence: general

For paragraph 911A(2)(b) of the Act, a person is exempt from the requirement to hold an Australian financial services licence for a financial service that:
(a) the person provides; and
(b) is described by an item in the table; and
(c) if that item specifies circumstances—is provided in those circumstances; and
(d) is not a superannuation trustee service.

Note: Section 6-5 sets out some exemptions for superannuation trustee services.

A person is exempt for a financial service if:		
Item	**the service is:**	**and is provided in these circumstances:**
5	issuing, varying or disposing of a financial product (except a margin lending facility), pursuant to an arrangement between the person and a financial services licensee under which: (a) the financial services licensee, or their authorised representatives, may make offers to people to arrange for the issue, variation or disposal of financial products by the person; and (b) the person is to issue, vary or dispose of financial products in accordance with such offers, if they are accepted	the offers are covered by the financial services licensee's Australian financial services licence

A person is exempt for a financial service if:		
Item	**the service is:**	**and is provided in these circumstances:**
10	entering into an arrangement covered by item 5	the offers will be covered by the financial services licensee's Australian financial services licence
15	varying or disposing of a financial product	the person issued the original product and provides the service: (a) under the terms of the financial product; or (b) at the direct request of the person to whom it is provided (rather than through an intermediary)
20	operating a licensed market or licensed CS facility	the licensed market or licensed CS facility is operated by the person
25	any financial service	the service is provided incidentally to the person operating a licensed market or licensed CS facility
30	providing general advice in connection with an offer of financial products under an eligible employee share scheme	the person is: (a) the corporation whose financial products are being issued or sold under the scheme; or (b) an entity controlled by that corporation
35	dealing in a financial product in connection with an offer of the financial product under an eligible employee share scheme	these conditions are satisfied: (a) the scheme requires that any purchase or disposal of the financial product under the scheme occurs through a person who: (i) holds an Australian financial services licence to deal in financial products; or (ii) is in a jurisdiction outside this jurisdiction and is licensed or otherwise authorised to deal in financial products in that jurisdiction; (b) the person is: (i) the corporation whose financial products are being issued or sold under the scheme; or (ii) an entity controlled by that corporation
40	a custodial or depository service in connection with an eligible employee share scheme	the person is: (a) the corporation whose financial products are being issued or sold under the scheme; or (b) an entity controlled by that corporation
45	a service incidental to a service covered by item 40	the person is: (a) the corporation whose financial products are being issued or sold under the scheme; or (b) an entity controlled by that corporation
50	dealing in an interest in a contribution plan operated by the person in relation to an eligible employee share scheme	the person is: (a) the corporation whose financial products are being issued or sold under the scheme; or (b) an entity controlled by that corporation

A person is exempt for a financial service if:		
Item	**the service is:**	**and is provided in these circumstances:**
165	any financial service the person (***person 1***) provides to another person (***person 2***)	these conditions are satisfied: (a) person 1 is not in this jurisdiction; (b) person 2 is an Australian citizen or is resident in Australia; (c) the service is provided from outside this jurisdiction; (d) person 1 does not engage in conduct that is: (i) intended to induce people in this jurisdiction to use the service; or (ii) likely to have that effect
170	any financial service the person (***person 1***) provides to another person (***person 2***)	these conditions are satisfied: (a) person 1 is not in this jurisdiction; (b) person 1 believes on reasonable grounds that person 2 is not in this jurisdiction; (c) person 1 is a participant in a financial market in this jurisdiction that is licensed under subsection 795B(2); (d) the service relates to a financial product traded on the licensed market
195	a financial service that consists only of: (a) the person (***person 1***) informing a person (***person 2***) that a financial services licensee, or a representative of a financial services licensee, is able to provide a particular financial service, or a class of financial services; and (b) giving person 2 information about how person 2 may contact the financial services licensee or representative	person 1: (c) is a representative of the financial services licensee, or of a related body corporate of the financial services licensee; or (d) discloses to person 2, when the service is provided and in the same form as the information referred to paragraphs (a) and (b): (i) any benefits (including commission) that person 1, or an associate of person 1, may receive in respect of the service; and (ii) any other benefits (including commission) that person 1, or an associate of person 1, may receive that are attributable to the service
200	a financial service that consists only of the person (***person 1***) arranging, on behalf of another person (***person 2***), for a holder of an Australian financial services licence to deal in a financial product	person 1 is not in this jurisdiction and believes on reasonable grounds that person 2 is not in this jurisdiction

A person is exempt for a financial service if:		
Item	**the service is:**	**and is provided in these circumstances:**
205	a financial service that consists only of the person (***person 1***) entering into an arrangement with the holder of an Australian financial services licence under which a financial product, or a beneficial interest in a financial product, is to be held on trust for, or on behalf of, another person (***person 2***)	person 1 is not in this jurisdiction, and believes on reasonable grounds that person 2 is not in this jurisdiction
335	a financial service in relation to a financial product that is: (a) a scheme for participating in and conducting legal proceedings; or (b) a scheme for proving claims against a company under Division 6 of Part 5.6 of the Act (including the preparation and lodgement of the proofs); or that is an interest in such a scheme	the members of the scheme: (c) are or may be entitled to a remedy arising out of the same or similar circumstances; and (d) wholly or substantially fund their legal costs under an agreement of the kind defined as a ***conditional costs agreement*** in section 181 of Schedule 1 (Legal Profession Uniform Law) to the *Legal Profession Uniform Law Application Act 2014* of Victoria, as in force on 17 January 2020, even if the agreement is not made in Victoria or for the purposes of that Act
340	a financial service in relation to a financial product that is: (a) an arrangement for participating in and conducting legal proceedings; or (b) an arrangement for proving claims against a company under Division 6 of Part 5.6 of the Act (including the preparation and lodgement of the proofs); or is an interest in such an arrangement	the legal costs of the person: (c) by or on whose behalf the proceedings are brought; or (d) by whom the claims against the company are made; as the case may be, are wholly or substantially funded under an agreement of the kind referred to in paragraph (d) of item 335

6-5 Need for Australian financial services licence: trustee of a superannuation entity

(1) For paragraph 911A(2)(b) of the Act, a person is exempt from the requirement to hold an Australian financial services licence for a financial service that the person provides in the capacity of trustee of a superannuation entity if the conditions set out in at least one item of the table are satisfied.

A trustee of a superannuation entity is exempt for a financial service if:			
Item	**the superannuation entity is:**	**the financial service is:**	**and these further conditions are satisfied:**
1	any superannuation entity	a superannuation trustee service	the person provides the service only to wholesale clients
5	a self managed superannuation fund	any financial service	none
15	a pooled superannuation trust that is used for investment of the assets of one or more regulated superannuation funds	a superannuation trustee service, or dealing in a financial product	each of the funds satisfies subsection (2) or (3) (see also subsection (4))
20	a pooled superannuation trust that is not used for investment of the assets of a regulated superannuation fund	a superannuation trustee service, or dealing in a financial product	none

(2) For item 15 in the table in subsection (1), a regulated superannuation fund satisfies this subsection if it has net assets of at least $10 million on the day when it first invests in the pooled superannuation trust.

(3) For item 15 in the table in subsection (1), a regulated superannuation fund satisfies this subsection if:

(a) the fund has net assets of at least $5 million on the day when it first invests in the pooled superannuation trust; and

(b) at some time on or after that day, the trustee of the pooled superannuation trust has a reasonable expectation that the net assets of the fund will be at least $10 million by the end of 3 months from that day.

(4) For the purposes of subsection 911A(4) of the Act, item 15 of the table in subsection (1) of this section exempts a person subject to these conditions:

(a) if, at the end of 3 months from the day when a regulated superannuation fund that satisfies subsection (3) of this section first invests in the pooled superannuation trust, the net assets of the fund are less than $10 million, the trustee of the pooled superannuation trust must offer to redeem the fund's investment in the trust as soon as practicable after the end of the 3 months;

(b) the fund ceases to satisfy subsection (3) of this section at the end of 3 months after the offer to redeem is made, unless:

(i) the offer is accepted during those 3 months; or

(ii) at the end of those 3 months the fund has net assets of at least $10 million.

Note: If the exemption ceases to apply, the trustee must apply for an Australian financial services licence if it continues to provide financial services previously covered by the exemption.

Part 8B—Exclusions and exemptions from Part 7.8B of the Act

Note: Part 7.8B of the Act deals with product disclosure for financial products (other than securities and some others).

Division 1—Exclusions from Part 7.8B

Note: Section 995A of the Act sets out the financial products to which Part 7.8B of the Act applies. Section 995A has effect subject to implementation orders made for the purposes of subsection 765A(1) of the Act. However, there are currently no further exclusions from Part 7.8B.

Division 2—Exemptions from giving Product Disclosure Statement

8B-1 Exemptions

This Division is made for the purposes of subsection 1008(3) of the Act.

8B-3 Condition for determining when financial products are of the same kind

For the purposes of this Division, a financial product is of the same kind as another financial product only if:

(a) in the case of a managed investment product or a foreign passport fund product—the other product is an interest in the same scheme or fund; or

(b) in the case of a superannuation product—the other product is:

(i) an interest in the same sub-plan; or

(ii) if there is no sub-plan—an interest in the same fund; or

(c) otherwise—they are both issued:

(i) by the same issuer; and

(ii) on the same terms and conditions (other than price).

8B-5 Client has, or has access to, up to date information

The PDS provider is exempt from giving the other person a Product Disclosure Statement for the financial product if:

(a) the other person already holds a financial product of the same kind (see section 8B-3); and

(b) the PDS provider believes on reasonable grounds that the other person has received, or has (and knows that they have) access to:

(i) a Product Disclosure Statement; and

(ii) information provided to the other person under [equivalent of section 1017B, 1017C or 1017D], or through continuous disclosure under Chapter 6CA, of the Act;

that together set out all the information that the first-mentioned Product Disclosure Statement would be required to contain.

8B-10 Interests in self managed superannuation funds

The PDS provider is exempt from giving the other person a Product Disclosure Statement if:

(a) section 998 (issue) or 1000 (recommendation) of the Act applies; and

(b) the financial product is an interest in a self managed superannuation fund; and

(c) the PDS provider believes on reasonable grounds that the client has received, or has (and knows that they have) access to, all the information that the Product Disclosure Statement would be required to contain.

8B-50 Offers of bundled contracts of insurance

The PDS provider is exempt from giving the other person a Product Disclosure Statement if:

(a) section 998 (issue) or 999 (sale) of the Act applies; and

(b) the financial product is a general insurance product; and

(c) the product would be provided to the other person as a retail client; and

(d) the financial product would be provided as part of a contract of insurance that offers more than one kind of insurance cover; and

(e) the PDS provider reasonably believes that the other person does not intend to acquire the product.

8B-65 Other person not in this jurisdiction

The PDS provider is exempt from giving the other person a Product Disclosure Statement for the financial product if the other person is not in this jurisdiction.

8B-73 Recognised offers

(1) The PDS provider is exempt from giving the other person a Product Disclosure Statement if:

(a) subsections 999(1) and (3) (offer of a financial product for sale that would amount to indirect issue) of the Act apply; and

(b) the issuer issued the financial product as part of a recognised offer under Chapter 8 of the Act.

(2) The PDS provider is exempt from giving the other person a Product Disclosure Statement if:

(a) subsections 999(1) and (3) (offer of a financial product for sale that would amount to indirect issue) of the Act apply; and

(b) the financial product was issued because of the exercise of an option or the conversion of another convertible or converting security; and

(c) the option or convertible or converting security was issued as part of a recognised offer under Chapter 8 of the Act; and

(d) the exercise of the option, or the conversion of the security, did not involve a further offer.

(3) The PDS provider is exempt from giving the other person a Product Disclosure Statement if:

(a) subsections 999(1) and (5) (offer of a financial product for sale that would amount to indirect off market sale by controller) of the Act apply; and

(b) the controller sold the financial product as part of a recognised offer under Chapter 8 of the Act.

Financial Services Rules (Financial Product Disclosure) 2021

Part 1—Introduction

Division 1—Preliminary

1-1 Name

This instrument is the *Financial Services Rules (Financial Product Disclosure) 2021*.

1-10 Authority

This instrument is made under section 1098 of the *Corporations Act 2001*, and for the purposes of section 1007 of that Act.

Division 5—Definitions

5-5 Dictionary

Note: A number of expressions used in this instrument are defined in section 9 of the Act.

In this instrument:

Act means the *Corporations Act 2001*.

Issue Statement has the meaning given by subsection 10-10(1).

PDS preparer has the meaning given by subsections 10-10(3) and (4).

Sale Statement has the meaning given by subsection 10-10(2).

Part 5—Rules for financial products generally

Division 10—Product Disclosure Statement

10-10 Who must prepare the Statement

(1) A Product Disclosure Statement is an ***Issue Statement***, and must be prepared by the issuer of the financial product, unless it is a Sale Statement (see subsection (2)).

(2) A Product Disclosure Statement that:

(a) is required by section 999 (sale transaction analogous to issuing financial product) of the Act; or

(b) is required by section 1000 (recommendation) of the Act because the relevant recommendation is to acquire the financial product by way of transfer pursuant to a sale (rather than by way of issue);

is a ***Sale Statement***, and must be prepared by the person making the offer to sell, or receiving the offer to acquire, the financial product.

(3) The person by whom a Product Disclosure Statement for a financial product is required to be prepared is the ***PDS preparer*** for the financial product.

(4) For the purposes of this instrument, a Product Disclosure Statement prepared on behalf of a person is taken to be prepared by the person.

(5) A Product Disclosure Statement for a product that is not a jointly issued product may be prepared by, or on behalf of, a single PDS preparer.

10-15 Title to be used

(1) The title "Product Disclosure Statement" must be used on the cover of, or at or near the front of, a Product Disclosure Statement.

(2) In any other part of the Statement, "Product Disclosure Statement" may be abbreviated to "PDS".

(3) If the Statement is made up of 2 or more separate documents as provided in section 10-45, subsection (1) of this section may be complied with by using the title "Product Disclosure Statement" on the cover of, or at or near the front of, at least one of those documents.

10-20 Statement must be dated

(1) A Product Disclosure Statement must be dated. The date must be:
   (a) if a copy the Statement has been lodged with ASIC (see [equivalent of section 1015B of the Act])—the date on which it was so lodged; or
   (b) otherwise—the date on which the Product Disclosure Statement was prepared, or its preparation was completed, as the case requires.

(2) If the Statement is made up of 2 or more separate documents as provided in section 10-45, then:
   (a) this section must be complied with for each of the documents; and
   (b) if not all of the documents are dated with the same date, the date of the Product Disclosure Statement as a whole is taken to be the most recent of the dates of those documents.

10-25 Content: general principles

(1) A Product Disclosure Statement must include the name and contact details of:
   (a) the issuer of the financial product; and
   (b) in the case of a Sale Statement—the seller.

(2) The Statement must include the statements and information required by this Division. It may also include other information and may refer to information contained in another document.

Note: A Supplementary Product Disclosure Statement containing additional information may be given with a Product Disclosure Statement that does not contain all the required

information. The additional information is taken to be included in the Product Disclosure Statement (see subsection 1004(2) of the Act).

(3) The information included in the Statement must be worded and presented in a clear, concise and effective manner.

Information to support decision by retail client to acquire the financial product

(4) The Statement must include:

(a) such information about the matters set out in subsection 10-30(1) as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product; and

(b) any other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product.

However, information about a matter is required to be included only to the extent that the requirement is applicable to the financial product, and the Statement need not indicate that a particular requirement is not applicable to the financial product.

(5) The Statement need not include material if it would not be reasonable for a person (who is considering, as a retail client, whether to acquire the product) to expect to find the material in the Statement. In applying this test, the matters that may be taken into account include, but are not limited to:

(a) the nature of the product (including its risk profile); and

(b) the extent to which the product is well understood by the kinds of person who commonly acquire products of that kind as retail clients; and

(c) the kinds of things such persons may reasonably be expected to know; and

(d) if the product is an ED security that is not a continuously quoted security—the effect of the following provisions of the Act:

(i) Chapter 2M as it applies to disclosing entities;

(ii) sections 674 and 675; and

(e) how the product is promoted, sold or distributed.

Sources of required information

(6) Information is required to be included only to the extent to which it is actually known to at least one of the following:

(a) the PDS preparer;

(b) in the case of a Sale Statement—the issuer of the financial product;

(c) any person named in the Statement as an underwriter of the issue or sale of the financial product;

(d) any person who:

(i) is named in the Statement as a financial services licensee providing services in relation to the issue or sale of the financial product; and

(ii) participated in any way in the preparation of the Statement;

(e) any person who has given a consent referred to in [equivalent of section 1013K] in relation to a statement included in the Statement;

(f) any person named in the Statement, with the person's consent, as having performed a particular professional or advisory function;

(g) if any of the above persons is a body corporate—any director of that body corporate.

Information about relationship between financial product and other persons

(7) The PDS preparer may include in the Statement a statement about the association between the financial product and another person, but must not include a statement creating the impression that:

(a) the financial product is issued or sold by that other person; or

(b) that the financial product is guaranteed or underwritten by that other person;

if that is not the case.

(8) If the Statement states that a person provides, or is to provide, services in relation to the financial product, the Statement must clearly distinguish between the respective roles of that person and the issuer or seller of the financial product.

10-30 Content: specific matters

(1) For the purposes of subsection 10-20(4), the matters are the following:

(b) significant benefits to which a holder of the product will or may become entitled, including the circumstances in which, the times when, and the way in which, those benefits will or may be provided, and the dollar amounts of those benefits;

(c) significant risks associated with holding the product;

(d) the cost of the product, stated in dollar amounts;

(da) amounts (stated in dollars) that will or may be payable by a holder of the product, in respect of the product, after its acquisition, including in any of the following ways:

(i) by direct payment by the holder;

(ii) by deducting an amount from a payment by or to the holder, or from money held on the holder's behalf under the terms of the financial product;

(iii) by debiting an account representing the holder's interest in the financial product;

and whether as a fee, expense or charge relating to a particular transaction connected with the financial product, or otherwise;

(db) when and how the amounts referred to in paragraph (da) will or may be payable;

(dc) if amounts paid in respect of the financial product are paid into a common fund with amounts paid in respect of other financial products—amounts (stated in dollars) that will or may be deducted from the fund by way of fees, expenses or charges;

(e) if the product will or may generate a return to a holder of the product—any commission, or other similar payments, that will or may affect the amount of the return, including the dollar amounts of the commission or payments;

(f) any other significant characteristics or features of the product, or of the rights, terms, conditions and obligations attaching to the product;

(g) the dispute resolution system that covers complaints by holders of the product, including how that system may be accessed;

(h) any significant taxation implications of financial products of that kind (subject to subsection (2) of this section);

(i) any cooling-off regime for acquisitions of the product (whether the regime is provided for by a law or otherwise);

(j) the matters set out in section 10-33, if the product has an investment component, or is one of the following:

(i) a superannuation product;

(ii) a managed investment product;

(iii) a foreign passport fund product;

(iv) an investment life insurance product.

(2) Information about the matter referred to in paragraph (1)(h) (significant taxation implications) need only be general information.

(3) If the product issuer (in the case of an Issue Statement) or the seller (in the case of a Sale Statement) makes other information relating to the financial product available to holders or prospective holders of the product, or to people more generally, the Statement must state how that information may be accessed.

10-33 Content: labour standards and environmental, social and ethical considerations

For the purposes of paragraph 10-30(1)(j), the matters are:

(aa) the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of investments made for the purposes of the product; and

(a) whether the product issuer does, or does not, take into account labour standards for the purpose of selecting, retaining or realising such investments; and

(b) whether the product issuer does, or does not, take into account environmental, social or ethical considerations for that purpose; and

(c) if the Product Disclosure Statement states that the product issuer does take into account labour standards for that purpose:

(i) what standards the product issuer considers to be labour standards for that purpose; and

(ii) to what extent the product issuer takes those standards into account in selecting, retaining or realising such investments; and

(d) if the Product Disclosure Statement states that the product issuer does take into account environmental, social or ethical considerations for that purpose:

(i) what considerations the product issuer regards as environmental, social or ethical considerations for that purpose; and

(ii) to what extent the product issuer takes those considerations into account in in selecting, retaining or realising such investments.

Division 15—Supplementary Product Disclosure Statement

15-1 Title to be used

(1) The title "Supplementary Product Disclosure Statement" must be used on the cover of, or at or near the front of, a Supplementary Product Disclosure Statement.

(2) In any other part of a Supplementary Product Disclosure Statement, "Supplementary Product Disclosure Statement" may be abbreviated to "SPDS".

15-5 Form

A Supplementary Product Disclosure Statement must begin with:

(a) a statement that it is a Supplementary Product Disclosure Statement; and

(b) an identification of the Product Disclosure Statement that it supplements; and

(c) a statement that it is to be read together with that Product Disclosure Statement and any other specified Supplementary Disclosure Statements.

15-10 Other requirements

Division 10 applies to a Supplementary Product Disclosure Statement in the same way as it applies to a Product Disclosure Statement, except as provided in this Division.

Division 20—Short-Form Product Disclosure Statement

20-1 Title to be used

(1) The title "Short-Form Product Disclosure Statement" must be used on the cover of, or at or near the front of, a Short-Form PDS.

(2) In any other part of a Short-Form PDS, "Short-Form Product Disclosure Statement" may be abbreviated to "Short-Form PDS".

20-5 Contents

(1) The Short-Form PDS for a financial product must contain:

(a) a summary of the statements and information that were included in the Product Disclosure Statement for the product because of:

(i) subsection 10-25(1); and

(ii) paragraphs 10-30(1)(a), (b), (c), (d) to (dc), (e), (g) and (i); and

(b) a statement:

(i) notifying the recipient that the recipient may ask for the Product Disclosure Statement for the product; and

(ii) setting out how the recipient may ask for the Product Disclosure Statement.

(2) The Short-Form PDS may also:
   (a) include other information that is permitted to be included in the Product Disclosure Statement for the product; and
   (b) refer to other information set out in the Product Disclosure Statement or Financial Services Guide for the product, in a way that identifies the document or the part of the document that contains the information; and
   (c) without limiting paragraph (a), may include a statement that section 10-40 permits to be included in the Product Disclosure Statement.

(3) The document or part identified under paragraph (2)(b) is taken for the purposes of this instrument to be included in the Short-Form PDS.

20-10 Other requirements

Division 10 applies to a Short-Form Product Disclosure Statement in the same way as it applies to a Product Disclosure Statement, except as provided in this Division.

Division 25—Supplementary Short-Form Product Disclosure Statement

25-1 Title to be used

(1) The title "Supplementary Short-Form Product Disclosure Statement" must be used on the cover of, or at or near the front of, a Supplementary Short-Form PDS.

(2) In any other part of a Supplementary Short-Form PDS, "Supplementary Short-Form Product Disclosure Statement" may be abbreviated to "Supplementary Short-Form PDS".

25-5 Form of Supplementary Short-Form Product Disclosure Statement

A Supplementary Short-Form PDS must begin with:
   (a) a statement that it is a Supplementary Short-Form PDS; and
   (b) an identification of the Short-Form PDS that it supplements; and
   (c) a statement that it is to be read together with that Short-Form PDS and any other specified Supplementary Short-Form PDS.

25-10 Other requirements

Division 10 applies to a Supplementary Short-Form Product Disclosure Statement in the same way as it applies to a Product Disclosure Statement, except as provided in this Division.

Part 10—Rules for particular kinds of financial product

Division 35—Financial products traded on a financial market

35-1 Information that need not be included in PDS for continuously quoted securities

(1) This section applies to a Product Disclosure Statement that relates to a continuously quoted security, subject to subsection (3).

(2) Despite anything in Division 10, information is not required to be included in the Statement if:

(a) in the case of a continuously quoted security that is not a security of a notified foreign passport fund—the information is included in any of the following documents:

(i) the annual financial report most recently lodged with ASIC by the issuer of the product;

(ii) any half-year financial report lodged with ASIC by the issuer of the product after the lodgment of that annual financial report and before the date of the Statement;

(iii) any continuous disclosure notices given by the issuer of the product after the lodgment of that annual financial report and before the date of the Statement; and

(aa) for a continuously quoted security of a notified foreign passport fund—the information is included in any of the following documents:

(i) a copy of a report for the fund for the most recent financial year for the fund, prepared in accordance with the financial reporting requirements applying to the fund under the Passport Rules for the home economy for the fund;

(ii) a copy of an auditor's report that relates to the report mentioned in subparagraph (i);

(iii) any continuous disclosure notices given by the issuer of the product after the lodgment of the report mentioned in subparagraph (i) and before the date of the Product Disclosure Statement; and

(b) the Product Disclosure Statement:

(i) states that, the issuer of the product, as a disclosing entity, is subject to regular reporting and disclosure obligations; and

(ii) informs people of their right to obtain a copy of any of the documents referred to in paragraph (a) or (aa), as the case may be.

If the Statement informs people of their right to obtain a copy of the document, the issuer of the product must give a copy of the document free of charge to anyone who asks for it.

(3) ASIC may determine by notifiable instrument that this section does not apply to Product Disclosure Statements for continuously quoted securities if ASIC is satisfied that in the previous 12 months:

(a) the issuer of the continuously quoted securities contravened any of the following provisions of the Act:

(i) Chapter 2M;

(ii) subsection 674(2) or 675(2);

(iii) [equivalent of subsection 1012DAA(10) or 1012DA(9)];

(iv) [equivalent of section 1308 as it applies to a notice under equivalent of subsection 1012DAA(2) or 1012DA(5)]; or

(b) the PDS preparer for the Product Disclosure Statement contravened [equivalent of section 1016E, 1021D, 1021E or 1021J of the Act].