ALRC Interim Report A – Hanrahan

The volume of material published by ALRC for consultation is an indication of how difficult the task is (but as Commissioner Hayne said, that is why it needs to be done). Realistically, many submissions may jump straight to specifics rather than engaging with the big picture. But the big picture should remain the focus.

The 'policy' question

The excellent work done to date by ALRC demonstrates that the fundamental problems with the Corporations Act – and with Chapter 7 in particular – identified over many years (including by experienced practitioners, courts, and Commissioner Hayne) cannot be solved 'within the context of existing policy settings' as required by the reference, unless 'policy' is very broadly conceived and until it is clearly identified and articulated.

The 'policy' confusion operates at three levels.

First, there was a 'policy' decision in Wallis to use a legislative framework for Chapter 7 that adopted broad, overinclusive definitions and requirements, sweeping up disparate products, services and transactions, on the basis that it would then be customised over time through subordinate legislation, exemptions and modifications to exclude things that ought not be caught and make the regulation work for the particular situation. This was a deliberate choice, designed to make the legislation adaptive enough to capture future developments (where it has failed, with litigation funding and crypto the most recent examples) and to prevent financial entities from being subject to multiple licensing and disclosure regimes (where it has failed for every APRA regulated entity that sells financial products to the retail market) or engaging in regulatory arbitrage (where it has also failed, for example as between Ch 6D and Ch 5C/Pt 7.9). Tinkering with perimeter definitions, including by making them less precise, does not address the fact that the exemptions and exceptions criticised by Commissioner Hayne are *baked into* this policy decision about legislative design. Nor does removing ASIC's power to customise the rules for new or anomalous situations. Physically locating exemptions and exceptions in one place (for example, in a consolidated instrument or in Tier 2 of my 'chapeau and Books model') may help with navigability but will not resolve the underlying issue.

I am not advocating for a return to product-by-product or service-by-service financial sector regulation but if the Wallis approach (including the twin-peaks regulator model) is to be retained in areas currently lumped together in Chapter 7 it needs to be properly reviewed to take thoughtful account of differing policy considerations within the overarching framework and of its relationship with other statutes and licensing regimes for the financial sector. It might be worth ALRC reflecting on the European Commission's recently published work on the regulation of artificial intelligence (AI), with its classification of AI into prohibited, high-risk and medium/low risk applications. This shows one way a risk-based regulatory framework can be designed for a dynamic field – it is not perfect but it is interesting. (Note that draft Title III on high-risk applications is drafted 'to ensure that the regulation can be adjusted to emerging uses and applications of AI' by allowing the Commission 'to expand the list of high-risk AI systems used within certain pre-defined areas, by applying a set of criteria and risk assessment methodology'. Also note draft Title V on 'measures in support of innovation'.)

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Second, there is confusion – in talking about the content of the existing law – as to what is 'policy' and what are measures adopted to achieve that policy. For example, there is a policy (following Ripoll) that there ought to be a statutory 'best interests' obligation imposed on some financial advisers. But is it also 'policy' that the legislative expression of that obligation ought to include the current definition of what it means to act in another's best interests or come with a safe-harbour provision? Are these 'policy settings' or legislative mechanics for implementing the policy? Until that is clarified, any changes to existing wording could be seen as a 'policy' change and open to challenge. My own view is ALRC should take the 'existing policy settings' in the reference to refer to policy at a coarse rather than granular level and push much harder to rationalise the law to bring it back to its very high-level settings.

Third, in many instances even the coarse policy is not evident. For example, what is the policy underlying the decision to allocate some financial product offers to Ch 6D and others to Pt 7.9, particularly for listed MIS and stapled securities? Why are the information needs of investors in the different market-traded vehicles different? What is the policy underlying the decision that some households are retail clients (and benefit from disclosure) and others are not in connection with the management of their private wealth management and protection decisions? That the definition of a retail client who purchases a financial service should be different from the definition that determines who is entitled to low-cost consumer dispute resolution through AFCA?

These areas of policy confusion affect the boundaries of the ALRC's existing reference.

Reorganising and rationalising

Aside from these broader policy questions, I think the ALRC's work would be more effective if it began with the important first step reorganising and rationalising the existing law. Otherwise, adjusting the definitions, moving rules between subordinate and principal legislation, adopting 'principles-based' drafting (which is an unhelpful concept) or including 'norms' of uncertain legal effect are unlikely to make a real difference. This stage cannot wait until the end of the reference; it should be done before the matters raised in Interim Report A are decided.

My strong suggestion is to reorganise the legislation itself into a sensible thematic structure (which it currently lacks). Ideally most of Chapter 7 should not sit in the corporations and markets legislation; and Chapter 7 itself mixes up apples and oranges and should be broken into its different parts. This is not just a question of navigability – it is needed to address the problem of concepts and rules from one domain leaking into another. A particular problem has arisen from blurring the line between financial consumers and retail investors, and mixing the (quasi-prudential) regulation of market operators and intermediaries with the consumer protection laws. (To reiterate – most of Chapter 7 is not a consumer protection statute.) If creating several separate Acts is not considered feasible, I have suggested another model for restructuring (rather than breaking up) the legislation in the **attachment** (the chapeau and Books model). This needs to be done before further work on definitions and hierarchy, not after. (Conceptually it can be done without renumbering the individual sections – even just as a thought exercise at this stage.)

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It is important that ALRC takes the opportunity to state clearly what is needed to fix the fundamental design problems with this legislation. There is likely to be resistance from within government and the bureaucracy ('oh that can't be done' or 'oh that is policy, stay away' or 'don't boil the ocean'). But it is not about ALRC being pragmatic at this stage. This reference should be seen as an opportunity to devise a new roadmap for how complex business statutes can be structured and maintained over time (learning the sad lessons from the tax simplification project). The legislation must make sense thematically first – otherwise the confusion is just papered over.

The audience for this statute is lawyers and usability should be viewed from that perspective. This is a complex field and overall 'length' is to be expected and not necessarily a problem. But the legislation must be sophisticated, not convoluted or obscure. The ALRC's work must contribute to better regulatory stewardship by government. It should recognise that it is inevitable that future amendments and enhancements will be needed as markets develop, and that the design of the statute itself must be able to accommodate that without turning into 'legislative porridge'. Regrettably there are regulated entities and their internal and external service providers who profit from and entrench the existing lack of clarity in the law. The urgent reinstatement of a specialist stewardship body for the legislation – based on the former CAMAC – to act in the public interest is clearly needed.

The changes that will be needed to fix Chapter 7 (let alone the rest of the Corporations Act and its relationship with the ASIC Act and the NCCP Act) means that this reference is unlikely to achieve change (even just attitudinal change, which is an incredibly valuable first step) unless there is a compelling and simple story that government and the business community can understand and get behind. Any reform, even fabulous reform, involves transition costs and therefore will be resisted. I describe the problem in these terms: this legislation is part of Australia's national infrastructure – like roads or pipes. After 20 years, that infrastructure is now in very poor shape (think about a rutted single lane road, with potholes, cul-de-sacs, road humps, level crossings, concealed speed cameras, confusing signs). We need to invest in modernising and strengthening that infrastructure in the broader public interest. Good legal infrastructure is about <u>both</u> the content of the law <u>and</u> the design of it. This project focuses on the latter and my answers below reflect that.

Response to questions

A1	What additional data should the Australian Law Reform Commission generate, obtain, and analyse to understand: • legislative complexity and potential legislative simplification; • the regulation of corporations and financial	It would be good to map the relationship of the financial services and financial products laws (my Books 6 and 7 in the attachment) to other financial sector laws. This interaction adds a further level of complexity that is specific to the financial sector. It is exacerbated by the blurred responsibilities of ASIC and APRA. It is acute in superannuation (including two licensing regimes). But the task is already so vast, it might be best just to plough on.

	services in Australia; and • the structure and operation of financial markets and services in Australia?	
A2	Would application of the following definitional principles reduce complexity in corporations and financial services legislation? When to define (Chapter 4): • 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. • To the extent practicable, words and phrases with an ordinary meaning should not be defined. • Words and phrases should be defined if the definition significantly reduces the need to repeat text. • 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): • Each word and phrase should be used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act.	Definitions serve different functions. This must be considered in designing them. Some definitions do mark out the perimeters of regulation. If an activity is within the definition if it regulated, and if it is outside it is not. This may be undesirable, but it is inevitable given the nature of the matters being legislated. Because they determine whether a particular law applies or not, these definitions should be clear and as detailed as possible – this is a rule of law issue. The problems that have always bedevilled the definition of 'managed investment scheme' and 'derivatives' show how hard this is to achieve – there is plenty of judicial commentary on definition design in, for example, the cases dealing with litigation funding. The tension is always between open-ended functional definitions that are needed to catch financial innovation (the idea behind CLERP 6 and FSR) and lists of legacy products and services. But certainty is important (even if it is expressed as examples of things that are or are not within the general definition) otherwise there is a lot of wasted money and effort getting legal opinions on scope that can never be definitive (unless ASIC wants and gets a rulings power). Other definitions seek to give content to what Edelman J calls 'open-textured standards'. For example, what it means to behave 'fairly' or in someone's 'best interests', or what is 'unconscionable'. Often these open-textured standards (should) derive their content from the general law. Definitions or elaborations of the standards are inserted (apparently by drafters who do not know or understand the general law!) at the urging of regulated entities who want a checklist that they can push down through their organisation as a set of instructions or metrics. This should be resisted absolutely (unless we decide to go in the reverse direction of full codification). I agree that definitions should be consistent across the CA and the ASIC Act (at least – and ideally across the whole statute book). They should also be grouped together in one place (in my model, in the chapeau). Grouping them up will make it easier to winnow out the silly ones – eg definitions of words that have their ordinary meaning or where the definition does not correspond intuitively to the word or a word has different

	• Relational definitions should be used sparingly. • 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): • Interconnected definitions should be used sparingly. • Defined terms should correspond intuitively with the substance of the definition. • It should be clear whether a word or phrase is defined, and where the definition can be found.	meanings in different contexts. It will also promote consistent and natural language definitions. I am less worried about making clear (for example, by a hyperlink) whether a word is a defined term – in this (necessarily) complex legislation this could get very cluttered.
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'.	Yes. And remember these are distinct things and the distinction is important. It is good to approach these 'perimeter' definitions from the perspective of – to what should relevant law apply? What 'service' in the financial sector should only be provided by people who are licensed? What 'product' should only be sold to consumers with a PDS? What should be regulated as a gaming product not a financial product? The legislative purpose should drive the definition, not the other way around. The conceptual distinction between providing a financial product and providing a financial service is not always well understood (and it is made less clear by the structure of Chapter 7). Speaking very generally, in our system, 'products' are not regulated for quality – it is about how and to whom they are sold. But services are most assuredly regulated for quality – we call it conduct regulation. Understanding how collective investments (like super funds, mutual funds, LICs, ETFs) straddle service and product helps before there is any attempt at redrafting.

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: • 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); • 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); • 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); • remove the incidental product exclusion by repealing s 763E of the *Corporations Act 2001* (Cth); • insert application provisions to determine the scope of Chapter 7 of the *Corporations Act 2001* (Cth) and its constituent provisions; and • consolidate, in delegated legislation, all exclusions and exemptions from the	No. See my comments on A2. There is value in specific inclusions and exclusions in perimeter definitions, even if they are just examples. If we accept the principle that this approach to giving certainty is important (given the high-level policy choice about legislative design made by Wallis) then the capacity to add or remove things from being financial products or financial services – by regulation or by ASIC instrument – is important and should be retained. This is because innovation in financial products and services moves quickly and waiting for principal legislation to be amended is just not practicable (and can get caught up in political horse-trading). But, in allowing this, we should insist that proper processes (consultation etc) are followed by the person exercising the power, including by strict oversight of Departments' and agencies' formal and substantive compliance with the *Legislation Act 2003* (Cth). Also, there needs to be a single source of truth about what has been deemed in or out. In other words, one definition in the chapeau, with one section only that confers regulation or instrument making power to add or subtract from it. Then either a note to the section that lists all the regulations or instruments made under that section from time to time, or if the two-tier model is used, a provision containing all the inclusions and exclusions.

	definition of 'financial product' and from the definition of 'financial service'.	
A5	The *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to remove the definitions of: • 'makes a financial investment' (s 763B *Corporations Act 2001* (Cth) and s 12BAA(4) *Australian Securities and Investments Commission Act 2001* (Cth)); • 'manages financial risk' (s 763C *Corporations Act 2001* (Cth) and s 12BAA(5) *Australian Securities and Investments Commission Act 2001* (Cth)); and • 'makes non-cash payments' (s 763D *Corporations Act 2001* (Cth) and s 12BAA(6) *Australian Securities and Investments Commission Act 2001* (Cth)).	Perhaps. I am not sure they add very much although it is worth checking the caselaw. My sense is that 'at the margins' problems are usually considered one level down – for example, is this arrangement an MIS, a derivative, a credit facility? There is a broader question about whether these three concepts capture all (and only) financial products. In the universe of 'products' that have a buyer and a seller there are two hemispheres – financial products (ASIC regulated) and non-financial products (ACCC regulated). What belongs where? What is the dividing line?
A6	In order to implement Proposal A3: • 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; • 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 • a definition of 'credit' that is consistent with	There is benefit in sorting out the definition of credit. See the comment in A3 about shaping the definition with an eye to what should trigger operation of the relevant provisions. In my model for restructuring the Act, it would make sense for the credit laws to be folded in as another Book (so Book 6 deals with the AFSL regime and another Book deals with the ACL regime) and then the Financial Consumers Book could cover all financial products including credit.

	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).	
A7	Sections 1011B and 1013A(3) of the *Corporations Act 2001* (Cth) should be amended to replace 'responsible person' with 'preparer'	It is hard to get excited about this one. I guess so. There is a bigger problem with this part of the Act (see A8).
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.	There are much broader problems with Pt 7.9. These stem from its (illogical) relationship with Ch 6D, the cumbersome rules about delivery of PDSs (based on the 20th century assumption that people were buying financial products through financial advisers and getting paper documents), too much granular prescription, and a lack of clarity about what the disclosure is for and how it is used across different categories of products. The whole concept of the PDS needs to be completely reworked to take account of the DDO regime and changes to technology and consumer behaviour over the 20 years since it was adopted. In a perfect world, I would ditch the whole thing and start again with a more realist understanding of what disclosure can and should do in a consumer protection regime. Start by working out what should be covered by Ch 6D. Listed and unlisted securities and listed MIS (like the takeover laws)? Maybe also other 'enterprise' MIS (that is, where MIS is used to carry on an activity, rather than as a vehicle for investing in other financial assets – see the CAMAC report for the distinction)? Another option is to apply Ch 6D to things that can be traded in secondary markets. The idea is to link the type of disclosure mandated by Ch 6D to the type of fundraising involved. The disclosure in Ch 6D is intended to inform the capital market and help investors and traders make allocation decisions within their overall portfolio. The current laws in Ch 6D are settled and may need some tinkering but not much. This would leave 'consumer' financial products, where the disclosure is intended to support consumer purchasing decisions in relation to a particular financial product, to

		be covered in Pt 7.9. The PDS regime should go in the Financial Consumers Book (along with FSGs for financial services, which support purchasing decisions in relation to financial services). The law should say that the issuer of the product must produce a short document that gives consumers in the target market adequate information about the characteristics and costs of the financial product to decide whether to acquire it. It should be clear concise and effective. It should not try to educate consumers about products of that general type, about financial literacy or about tax – that work should be done by MoneySmart or its successor (to which the PDS should provide a link). The document should be available to a consumer if they want to read and rely on it. (If they choose not to, they cannot sue based on it.) The law should not prescribe the content of the PDS disclosure – just what outcome the disclosure needs to produce. That said, the outcome will be different across different types of products that are available to 'financial consumers' as defined. Under the general disclosure obligation, there should be separate legislative instructions for different product types as to what the disclosure outcome should be. Eg the PDS for an unlisted collective investment product (super, mutual fund, CCIV, LIC, ETF) would aim for a different outcome from the PDS for an insurance, banking, or credit product. Of course, 'principles based' disclosure laws have been the holy grail since at least the early 1990s. Issuers say they want them, but then they lobby for more granular guidance so they can tick off compliance. These documents are now (quite rationally, because of the poor design of the enforcement regime) clearly drafted to manage liability risk not to support consumer decision-making. A proper liability scheme would help. I would not support 'adding' an outcomes-based standard of disclosure. I think we should remove the existing rubbish rules and substitute an outcomes-based standard (tailored to particular categories of products) supported by a proper enforcement structure that penalises the issuer for either failure to disclose or misleading disclosure, that is effectively enforced. Also, there ought to be a digital place where issuers are required to upload a machine-readable version of every PDS they have in the market. This would allow ASIC to use

		regtech to understand what products are being offered and to identify potentially defective disclosure. This is not the same as saying ASIC should pre-vet or post-vet PDSs. It would also allow fintechs to develop product comparison tools and analytics.
A9	The following existing powers in the *Corporations Act 2001* (Cth) should be removed: • powers to grant exemptions from obligations in Chapter 7 of the Act by regulation or other legislative instrument; and • powers to omit, modify, or vary ('notionally amend') provisions of Chapter 7 of the Act by regulation or other legislative instrument.	No, for the reasons explained about the legislative design policy in Chapter 7. Exemptions, modifications and 'crafted regimes' are needed to make the thing work. The dynamic nature of the financial sector combined with the overinclusive and untailored nature of Chapter 7 means the whole thing would likely collapse under its own weight without the capacity for someone sensible to make timely case-by-case or class adjustments where needed. I cannot see the Executive giving up its regulation making power. I know there is a view that ASIC uses its power to construct laws that would otherwise not exist (overstepping the mark) but I have a different view. Usually these ASIC-constructed regimes are built because something that is not 'really' a financial product (see the litigation funding cases) gets caught up by the regime which then must be modified to be made workable. I am concerned about the lack of faith in (or maybe adequate control over) ASIC's instrument-making power. Both the current government and opposition seem to be increasingly opposed to delegating rule-making power to agencies. However the agencies are close to the market and (hopefully) experts. I would make an argument in favour of retaining or expanding ASIC's power to grant exemptions and modifications, but building its capability and noting its commission governance structure and the post-Hayne enhancements to its oversight should expose it to greater scrutiny. See also my comment about two-tier Books in A11, for the navigability point. It is also important to remember the difference between class orders and case-by-case relief. There is no need for the latter to be consolidated into the legislation but it should be published (eg on ASIC website).
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	It is important that secondary legislation can be located. Consolidating it in one place would help. This feels more like an issue that should be resolved through the *Legislation Act 2003* (Cth) which is currently being reviewed.

	consolidated legislative instrument.	In my model, the official version of the legislation would either list and link to relevant regulations and instruments at the end of each Book, or those could be consolidated into the second tier of each Book (see A11).
A11	In order to implement Proposals A9 and A10: • Should the *Corporations Act 2001* (Cth) be amended to insert a power to make thematically consolidated legislative instruments in the form of 'rules'? • Should any such power be granted to the Australian Securities and Investments Commission?	Possibly. The Book approach in my model could accommodate two tiers in each Book – primary legislation (should be fairly settled and only amended by the Parliament) and then secondary legislation or 'rules' that could be amended from time to time by Regulation or instrument. See my comment on A9. There is a technical issue about how Henry VIII clauses are drafted that contributes to how regulations and instruments are structured – it makes them cumbersome. If the regulation or instrument making power were expressed as an ability to go in and alter the text of Tier 2 in the Book, subject to consultation, a period of exposure, and disallowance, it might help. Consolidation should help reduce the temptation to erect tottering structures.
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.	Yes. This is just a technology issue.
A13	The *Corporations Act 2001* (Cth) should be amended to: • remove the definition of 'financial product advice' in s 766B; • substitute the current use of that term with the phrase 'general advice and personal advice' or 'general advice or personal advice'	Again, there is a broader problem here. There is no such thing as 'general advice' – it is an oxymoron. Something is either advice or it is not. If it is not advice (for example, it is an advertisement or a sales call), then the general prohibitions on misleading or deceptive conduct should apply and should be policed by a properly resourced consumer protection agency. It is counter-productive to call it advice. There is a clear case for regulating people who provide financial advice on a commercial

	as applicable; and • incorporate relevant elements of the current definition of 'financial product advice' into the definitions of 'general advice' and 'personal advice'.	basis. I think they should be licensed and properly supervised and they should only be licensed if they can demonstrate they are competent and not conflicted in the provision of that advice. What makes something 'financial advice'? Of course, it is hard to define. I would start by narrowing the existing definition of personal advice. It could be limited to situations where there is a two-way exchange between the giver and the receiver (in person or via technology). The exchange must include the giver soliciting and obtaining information about the receiver's individual circumstances, and the giver providing a recommendation to acquire, retain or dispose of a particular financial product. The circumstances must be such that a reasonable observer would think the giver has based the recommendation on the information provided by the receiver and expected or intended that the receiver would change their position based on the recommendation. The assumption is that if the giver is paid for the recommendation there is an intention it be acted on. Lawyers will recognise that this type of exchange is likely to give rise to a fiduciary relationship between the giver and the receiver, even if it is a one-off interaction. (That's why the best interest duty makes sense in this context.) This is probably what was originally intended in FSR but the concept of 'general advice' muddied the waters (in my suggestion, the policy is driving the definition, rather than the other way around). Call what is now 'general advice' something else and regulate it under the general M&D laws in the Financial Consumers Book.
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'.	See A13. The concept of general advice should be removed and the concept of financial advice recast. I see no point in regulating 'general advice' as the provision of a financial service. It is a business communication (and often a marketing one) like any other and should be addressed under the consumer laws. Regulating it as a financial service creates an expectation that someone (ASIC?) is overseeing it for quality.

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.	See A13. The concept of general advice should be removed and the concept of financial advice recast.

A16	Should the definition of 'retail client' in s 761G of the *Corporations Act 2001* (Cth) be amended:
	• to remove:
	  ○ subsections (5), (6), and (6A), being provisions in relation to general insurance products, superannuation products, RSA products, and traditional trustee company services; and
	  ○ the product value exception in sub-s (7)(a) and the asset and income exceptions in sub-s (7)(c); or
	• in some other manner?
		I would suggest removing the concept of retail client – which is unhelpful for the message it sends to the public who think it is better to be in the 'sophisticated' club – and replacing it with the concept of financial consumer. (This is subject to the comment below about the relationship with the idea of 'retail investor' in Ch 6D.)
		Financial consumers are the key concept for Book 7 in my model. I would include households (individuals and entities controlled by individuals, for example SMSFs) other than very high net worth (VHNW) households. It could also include small business. This aligns with, for example, the AFCA jurisdiction and the approach I took at the Hayne Royal Commission. It is also closer to the various industry codes' approaches.
		There are different ways we could choose to delineate VHNW. Eg total household assets of $10m, or total household assets of $500,000 excluding their principal residence and superannuation. The number is less important than the concept, which is to move away from drawing arbitrary lines towards the principles-based concept of making a 'consumer' the focus of consumer protection laws (such as PDS and FSG laws and the advice rules in Pt 7.7A).
		Some sectors will probably just treat all customers in particular lines as financial consumers (eg house and content insurance) because the cost of separating out VHNW from other customers is not worth it. That is fine too.
		There is a complication here, to do with the relationship between Ch 7 and Ch 6D. I said in A8 we need to rationalise Ch 6D and Pt 7.9. A modified Ch 6D should apply to capital raisings in the true sense. A modified Pt 7.9 should apply to other financial products if they are sold to consumers. The two forms of pre-sale disclosure are intended to perform quite distinct functions.
		For Ch 6D, there are some design options. We could persevere with a retail investor style definition in modified Ch 6D and accept there may be some regulatory arbitrage by

		product issuers between Ch 6D and Pt 7.9 at the margins (because the proposed definition of financial consumer is wider). Or we could make the Ch 6D disclosure regime apply whenever an offer is open to an audience that includes financial consumers as defined, while not treating people who acquire those products as financial consumers for the purposes of Book 7. Or we could go back to the old 'offer to the public' test for Ch 6D disclosure. This requires careful thought about the purpose of Ch 6D disclosure – to support the efficient functioning of capital markets in the face of information asymmetries, not to inform 'consumer' choices. The key question is, does the offeree have or have access to enough information to make appropriate capital allocation decisions without the law having to mandate its provision? If not, the law should require a prospectus (whether or not the investor reads it). It will help enormously if we stop trying to shoe-horn market products into the consumer products disclosure regime.
A17	What conditions or criteria should be considered in respect of the sophisticated investor exception in s 761GA of the *Corporations Act 2001* (Cth)?	See A16. I suggest replacing the idea of retail client with financial consumer for the purposes of the laws that will end up in Book 7. It is ok to exclude large businesses and VHNW households from the definition of financial consumer (that is a policy choice). Note though that some of our 'financial consumer' laws (eg s 12DA) don't just apply to consumer transactions – these laws of general application may actually belong in the chapeau.
A18	Should Chapter 7 of the *Corporations Act 2001* (Cth) be amended to insert certain norms as an objects clause?	There is an underlying assumption here – that Chapter 7 itself is coherent – with which I fundamentally disagree. My model splits Chapter 7 between Books 5, 6 and 7. In my model I suggest that each Book have an objects statement up front, but it is different for each. For example, Books 5 and 6 are about the integrity of the financial system, while Book 7 is about consumer rights and protections. More broadly, I disagree with the proposal to insert 'norms' rather than objects. If we want to legislate for open-textured standards (see my comment on A2) we should do so – and use it as an opportunity to remove prescriptive black-letter offences and duties

		that needlessly particularised. I do not think restating norms is needed to help regulated entities or courts interpret the substantive obligations. The obligations just need to be drafted properly and enforced.
A19	What norms should be included in such an objects clause?	See A18.
A20	Section 912A(1)(a) of the *Corporations Act 2001* (Cth) should be amended by: • separating the words 'efficiently', 'honestly', and 'fairly' into individual paragraphs; • replacing the word 'efficiently' with 'professionally'; and • inserting a note containing examples of conduct that would fail to satisfy the 'fairly' standard.	No. I disagree with these proposals. Part of the problem is that s 912A(1)(a) was intended as a licensing criterion, not a legal duty (until it was – regrettably, to my mind – converted into a duty by the ASIC Enforcement Review civil penalty reforms). This section belongs in Book 6 – not Book 7. It is about who is fit to be licensed to provide financial services, and how they must operate their financial services business <u>overall</u> to remain entitled to exist in this space. That's why it is supposed to be an omnibus standard, rather than a legal duty in relation to a particular dealing with an individual counterparty. Remember the AFS licensing regime covers intermediaries who have wholesale clients only, as well as those whose clients include retail. Behaving dishonestly in the provision of financial services is an offence. Efficiently is not the same as professionally. Many entities that are AFS licensed are not professionals. This is not an idle comment – they are different relationships with different duties (a professional having an overarching duty that prevails over their duty to their individual customer). On the 'fairly' definition, I repeat my comment about defining open-textured standards in A2. My sense is that 'examples' like these in legislation or ASIC Regulatory Guides tend to be so banal that they undermine the hortatory effect of the standard.
A21	Section 912A(1) of the *Corporations Act 2001* (Cth) should be amended by removing the following prescriptive requirements:	No. The core function of s 912A(1) is to set out what a person must do and have to be entitled to obtain and retain an AFS licence. These provisions make it clear – for ASIC

	• to have in place arrangements for the management of conflicts of interest (s 912A(1)(aa)); • to maintain the competence to provide the financial services (s 912A(1)(e)); • to ensure representatives are adequately trained (s 912A(1)(f)); and • to have adequate risk management systems (s 912A(1)(h)).	and the regulated entity – what those criteria are. It is helpful to think of these as quasi-prudential standards, rather than rules of conduct. Then they make sense.
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.	Yes, I think the consolidation achieved through the chapeau and Books model would tidy up this and other bits of overlap.
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 *AustralianSecurities and Investments Commission Act 2001* (Cth) should be consolidated into a single provision.	Yes, consolidating these into the chapeau will help. There are a couple of other parts of the ASIC Act that probably should be relocated along with all of Pt 2 Div 2, eg Pt 3A and 3B.
A24	Would the *Corporations Act 2001* (Cth) be simplified by: • amending s 961B(2) to re-cast paragraphs (a)–(f) as indicative behaviours of compliance, to which a court must have regard when	Section 961B(2), 961C and 961D should be repealed. They were the product of a poor lawmaking process; even those who lobbied for their inclusion have since walked away from this approach. See my comments in A2 about defining open-textured standards. Section 961B should be redrafted to match the approach adopted in s 181 and s 601FC of the Act to similar

	determining whether the primary obligation in sub-s (1) has been satisfied; and • repealing ss 961C and 961D?	'best interests' duties. It should state that an AFS licensee or representative who provides financial advice to a financial consumer must act in the best interests of the consumer. (Using my proposed definition of financial advice and financial consumer - see my comments about the definitions of financial advice and financial consumer in A13 and A16.)

ALRC Interim Report A – Hanrahan Attachment

What a reorganised *Corporations Act 2001* (Cth) could look like - the 'chapeau and Books' model

This model has a 'chapeau' Act and separate 'Books' (Schedules) containing discrete parts of the existing law.

This is very much a minimalist reform option – the only change between (rather than within) Acts is to relocate ASIC Act Pt 2 Div 2 to the Financial Consumers book (and possibly ASIC Act Pt 3A and 3B to the chapeau). The structure is not perfect, but it does try to link like with like and organise the law thematically. The process of allocating individual existing sections between the chapeau and the Books has some nuances not captured here – happy to discuss. It could be achieved by ALRC (initially at a conceptual or demonstration level) by electronically tagging each section to its best home (one being 'delete') and pushing the sort button (the old scissors and scrapbooks method). The preliminary sorting exercise could be done with each section retaining its existing numbering to minimise disruption. But remember this is not a cosmetic exercise – the revised structure will drive significantly greater conceptual and interpretative clarity particularly in the disparate parts of the increasingly incoherent Chapter 7. This will inform where reform is needed.

Other Books could be added to this structure where ASIC has or is given lead administrative responsibility (eg consumer credit). Responsibilities that ASIC is shedding (eg business registers to ATO) could be excised. The structure does not address the problems at the interface between ASIC and APRA responsibilities in regulating financial sector entities, but it may help demonstrate the areas where enhanced regulatory coordination is needed.

The design improves coherence and navigability because a person who is, for example, not running a CIV need never look at Book 2 and a person selling financial products or services to financial consumers can look in Book 7 for all the rules. The Books only contain active obligations (ie, what a person or entity must do) and the chapeau provisions are consistent across the whole suite. Enforcement provisions can be significantly rationalised to address the problem of excessively particularised laws (ie separate offences that prohibit the use of the colour blue and the use of the colour navy blue – there are many of these in the disclosure space). The current law is full of different solutions to the same problem which this exercise should tease out and expose.

Each Book should open with a statement of application (eg 'This Book applies to entities that carry on business providing financial services to people located in Australia') and an objects statement (eg 'The object of the laws in this Book is to ensure that entities to which it applies meet occupational licensing criteria, including providing relevant financial services efficiently, honestly and fairly, and are effectively overseen by ASIC'). Each Book could either end with a table listing (and linking to) any legislative instruments made under it, or comprise two tiers (principal legislation, and secondary legislation in the form of Rules that can be amended from time to time by ASIC or by regulation and kept current by publishing consolidated versions after each amendment).

There are always issues at the margins of coverage and it might work out that we need (say) 10 Books rather than 7. That is fine – it is about improving design, not creating silos. There is a technical (policy) issue in the relationship between Ch 6D (prospectus disclosure) and Pt 7.9 (PDS disclosure) that needs to be sorted out (see the discussion in the submission). In the model below, this is the distinction between Books 3 and 7.

Hanrahan 23/02/22

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The model						
Chapeau The chapeau contains all the interpretation, mechanics, administration and enforcement provisions that apply across all Books. Includes a dictionary of all defined terms used in the chapeau or in any Book (to drive consistency). Could contain existing CA Ch 1 (delete Pt 1.5), all the definitions and interpretation provisions currently scattered through the CA and the ASICA, most of Ch 9 including general offences, Sched 3, Ch 10. It helps clarify whether we need 'special' interpretation and enforcement provisions in each Book, or if the general rules in the chapeau are enough.						
Book 1 – Corporations	**Book 2 – Collective investment vehicles**	**Book 3 – Disclosure**	**Book 4 – Insolvency**	**Book 5 – Financial markets operators and participants**	**Book 6 – Financial services providers**	**Book 7 – Financial consumers**
Current CA Ch 2A – 2L, 5A, 5B,	Current CA Ch 5C, Ch 8A, new CCIV laws	Current CA Ch 2M – 2P and Ch 6C, 6CA, 6D, Ch 8, Pt 9.2, Pt 9.2A, Pt 9.4A	Current CA Ch 5, Sched 2	Current CA Ch 6 – 6B, Pt 7.2 – 7.5B, Pt 7.10 and 7.11	Current CA Ch 5D, Pt 7.6, 7.8	Most of current ASICA Div 2 Pt 2, Current CA Pt 7.7, 7.8A, 7.9, 7.9A, 7.10A
How corporations are formed (and dissolved) and how their internal governance and finance works	How CIVs are formed (and dissolved) and how their internal governance and finance works	Disclosure by issuers in connection with capital raisings Periodic and continuous reporting and disclosure Audit	What happens when corporations or CIVs are insolvent or require restructuring	A licensing regime for market infrastructure providers to protect market confidence and integrity The rules for how traders in secondary markets must behave (including in control transactions)	A licensing regime for brokers, advisers, fund managers and other financial intermediaries that protects the financial system from rogue or inappropriate operators (quasi prudential)	What those who sell financial products and services to financial consumers must disclosure and their obligations to clients, and consumer rights and redress.