WEBINAR: What we've heard and where to next

FRIDAY 17 JUNE 2022

TRANSCRIPT

00:00:07:09 - 00:00:34:08
Matt Corrigan

Well, good afternoon, everyone. My name is Matt Corrigan. I'm the General Counsel here at the Australian Law Reform Commission. For those of you who paid attention when registering, I was not intended to be the host today. Unfortunately, our commissioner and Federal Court judge, Justice Colvin, is unable to chair this session. So it is my great pleasure to be the fill in or substitute for Justice Colvin this afternoon.

00:00:35:01 - 00:01:04:04
Matt Corrigan

It is my pleasure to welcome all attendees on behalf of the ALRC to today's concisely named, 'What we have heard and where to next? Feedback on Interim Report A of the Financial Services Legislation Inquiry'. We're grateful to have participants joining us from around Australia and around the world. We'd like to start by acknowledging the traditional custodians of country throughout Australia and their connections to land, sea and community.

00:01:05:01 - 00:01:30:01
Matt Corrigan

We pay our respects to their elders past, present and emerging and extend that respect to all Aboriginal and Torres Strait Islander peoples today. Now this webinar is part of an ongoing series hosted by the ALRC to explore matters relevant to the simplification of financial services law, so a very small task and therefore not able to be done in just one webinar.

00:01:30:13 - 00:01:59:12
Matt Corrigan

If anyone is interested in watching previous webinars and I particularly encourage viewers who weren't able to join us last month for the international comparison webinar that looked at the different design of legislation in jurisdictions such as the UK, Singapore, Hong Kong and New Zealand. That recording is available on our website and I urge you to view it if you have time. It is my role this afternoon just to give a very brief background to the session.

00:02:01:06 - 00:02:29:09
Matt Corrigan

Now, the inquiry, focusing on financial services legislation, has three sub topics, and today the purpose is to discuss the feedback that we received on Interim Report A, which had a particular focus on key definitions and concepts in financial services legislation. Interim Report A contains 13 recommendations on technical matters as well as 16 proposals and eight questions on which the ALRC sought formal submissions.

00:02:30:00 - 00:03:02:00
Matt Corrigan

And it is the response to those proposals and questions that is the primary focus of this afternoon's webinar. The proposals and questions covered a broad range of issues from legislative definitions, legislative hierarchy, financial advice and norms of conduct. But the inquiry doesn't stop there. Interim Report B is due to be published later this year, and that will address legislative design and the hierarchy of corporations and financial services laws.

00:03:02:10 - 00:03:28:02
Matt Corrigan

Interim Report C will focus on reframing Chapter 7 of the *Corporations Act* and we'll then have a final report that will wrap that up in a nice bow, and that is due in November of 2023. Today's webinar is an opportunity to hear about some of the key feedback we received from stakeholders in response to those preliminary ideas for simplifying corporations and financial services laws.

00:03:29:00 - 00:03:56:09
Matt Corrigan

We'll hear about the key issues that stakeholders raised and how the ALRC will further consider and address many of those issues as we work towards the completion of this Inquiry. Best practice law reform to which the ALRC aspires requires extensive consultation and engagement with stakeholders. In addition to the feedback received from submissions, we have met with over 130 consultees over the course of this Inquiry so far.

00:03:56:09 - 00:04:22:02
Matt Corrigan

And we participated in a number of workshops with key industry bodies. We've also partnered with CHOICE, FINSIA and a number of leading academics to commission survey research that we hope will provide insights into the views of consumers and financial professionals. We're grateful for the input we have received to date and are pleased to take this opportunity to highlight and engage with some of that feedback.

00:04:23:06 - 00:04:46:06
Matt Corrigan

We've also published a background paper which summarises the feedback from submissions, which is available for download on the ALRC website. And in many respects this webinar is an entree into that background paper. In a moment, I'll invite Professor Elise Bant to reflect on some of the key themes that emerged from the ALRC first Interim Report and the broader relevance of those issues to other areas of law.

00:04:47:06 - 00:05:08:11
Matt Corrigan

Now, Professor Bant is a friend and colleague of the ALRC. We are grateful for her scholarship and input not only to this Inquiry as a member of our Advisory Committee, but also as a member of our Advisory Committee for our previous Inquiry on corporate crime. Professor Bant is a professor of private law and commercial regulation at the University of Western Australia.

00:05:09:04 - 00:05:46:07
Matt Corrigan

She teaches unjust enrichment and commercial applications of equity, and her research interests include contract and consumer law, equity and trusts, property, and economic torts and remedies. She has written numerous articles which have been invaluable to the ALRC in their research to date. Particularly around the attribution of conduct of corporations and the simplification of misleading and deceptive conduct laws. One of her research projects at the moment, is just that, it's looking at developing a rational law of misleading conduct, a project that clearly has significant overlap with the work that we are engaged in at the moment.

00:05:47:04 - 00:06:11:14
Matt Corrigan

For the panel discussion, Professor Bant will be joined by my colleagues, Dr William Isdale and Ms Phoebe Tapley, who are both Senior Legal Officers at the ALRC and have developed exceptional knowledge of the law that we have focused on here today. Now they will provide an overview of the feedback received before we move into the panel discussion, and that's really what we hope will be the focus of today's webinar.

00:06:12:02 - 00:06:41:09
Matt Corrigan

A lively discussion informed by your questions, some of which we've already received through your registrations. But we do, as the webinar proceeds — if you do have questions please send them through. We really want this to be as interactive as possible. Notwithstanding that, we are operating in a virtual environment. So to submit those questions, financial.services@alrc.gov.au.

00:06:42:06 - 00:06:46:03
Matt Corrigan

Now I'd like to invite Professor Bant to offer her reflections. Thank you.

00:06:46:08 - 00:06:49:02
Professor Elise Bant

Thank you very much, Matt. I hope you can hear me clearly.

00:06:51:05 - 00:07:26:07
Professor Elise Bant

So my reflections on the work that's being done by the ALRC, I want to focus on some broader propositions and then hone in on some more specific points. The current Inquiry focuses on a very serious and widespread problem that certainly undermines, but also goes well beyond financial services legislation. The Financial Services Royal Commission, of course, emphasised the role that our legislative landscape and statutory design play in regulating Australia's corporate citizens.

00:07:27:02 - 00:07:58:12
Professor Elise Bant

It showed that complex, overlapping and unclear legislative frameworks encourage corporations engaged in financial services provision to adopt legalistic and even opportunistic approaches to their obligations. And scattergun approaches to litigation that waste everyone's time and resources to little benefit. Multiple versions and ever increasingly specific iterations of the same rules, carve outs and exceptions to key principles of the law, not only make legislation almost unnavigable, but also raise real and basic issues of fairness and transparency.

00:07:59:01 - 00:08:39:10
Professor Elise Bant

In a similar theme, the ALRC's Inquiry into corporate criminal responsibility found that the profusion of statutory corporate attribution rules had not helped hold corporations responsible for knowing, deliberate, dishonest and other highly culpable misconduct. So again, the key theme here which really runs through these Inquiries, but also through the current Inquiry, is that more law is not necessarily better law.

00:08:40:01 - 00:09:15:12
Professor Elise Bant

Less might be more. So in that context, the ALRC's Interim Report reflects a welcome holistic approach to the question of simplification and statutory design. Rather than focusing solely on Chapter 7 of the *Corporations Act*, which inevitably would run the risk of exacerbating incoherence and complexity across our legislative landscape, the report uses that chapter as a lens to consider shared principles and problems found in related statutes such as the *ASIC Act*,

00:09:16:01 - 00:09:46:03
Professor Elise Bant

the National Consumer Credit Protection Act and other sections of the *Corporations Act* beyond Chapter 7 that also regulate financial services and products. Of course, the web of related statutes go far beyond even these. Many of the key statutory principles that regulate financial services were born in consumer law reforms — in particular in what was formerly called the *Trade Practices Act* and is now largely found in the Australian consumer law.

00:09:46:14 - 00:10:39:05
Professor Elise Bant

Now, the important point about this is fiddling with one bit of the law relating to financial services and financial products without recognition of what that change will do in other areas of the law is a recipe for disaster. So this broad approach to the ALRC's Inquiry is very welcome and absolutely necessary. Consistently with that broad approach, I think that the ALRC's focus on changing the current unhelpful use of definitions as gatekeepers for substantive obligation and their recommendation that we revert to the use of definitions only where they contribute to clarity of meaning is really to be welcomed. Now, this is not only important for reasons of simplification and to make the legislation more accessible.

00:10:40:04 - 00:11:30:10
Professor Elise Bant

Where concepts are left undefined, that causes an important opportunity for courts to really engage with the nature of the obligation or the prohibition that's under inquiry. So, for example, the core prohibition on misleading conduct contains a number of important terms that remain undefined. Of course, misleading conduct is one of those undefined terms. Now, leaving that core concept undefined allows and requires courts to engage with the content of the prohibition by reference to its surrounding statutory common law and equitable context.

00:11:31:00 - 00:11:55:12
Professor Elise Bant

And the work that I've done with Jeannie Paterson in particular at Melbourne Law School, has shown that courts draw on those general law conceptions and other statutory conceptions to the extent that they are consistent with and promote the statutory language and purpose. And what this enables is for the statutory prohibition or obligation to connect to its surrounding legal landscape.

00:11:56:02 - 00:12:23:11
Professor Elise Bant

And this is very important if we are to have a coherent rule of law. If we don't have that, if we have very specific iterations of different prohibitions and different rules, the real likelihood is the law will fracture. And you'll have a whole series of prohibitions that look a little bit similar to one another, but are slightly differently phrased. Different language is supposed to indicate different meanings,

00:12:23:11 - 00:12:51:00
Professor Elise Bant

so you have courts grappling with ever increasing complexity and you have the capacity for litigation and arbitrage between different provisions because of that complexity and incoherence. Now, that has been increasingly a problem with misleading conduct. In fact, the prohibition on misleading conduct that was found in section 52 of the *Trade Practices Act* has become a victim of its own success.

00:12:51:00 - 00:13:25:03
Professor Elise Bant

It's been iterated and reiterated in enormously different forms across the whole spectrum of the statutory books, not just in financial services, but more broadly. And what this has meant is that courts have been increasingly challenged in trying to develop a coherent law of misleading conduct, one that holds true to the core statutory principles as they appear. So I can talk about that a little bit more later on, if it seems appropriate.

00:13:25:08 - 00:14:16:07
Professor Elise Bant

But if one was to revert, as the ALRC has proposed back to the broadly framed prohibition that sat at the core of section 52, it would allow — it would first of all send a very strong message that this is the core prohibition and indeed an appropriate way of regulating commerce more generally, as well as in financial services contexts. But it also allows the prohibition to connect with the many rules that deal with misleading conduct found across the statute books and also in the general law —in common law and equitable principles. The broadly framed prohibition on unconscionable conduct is another important prohibition in the statute books and also found in financial services reform.

00:14:16:14 - 00:14:49:03
Professor Elise Bant

Now here the ALRC has raised a proposal that the very specific statutory prohibition that picks up the narrow, equitable doctrine of unconscionable conduct within the meaning of the unwritten law be removed and leave in place the broader statutory prohibition on unconscionable conduct, which contains a list of interpretive principles, that operate much more broadly, in theory, than their equitable cousin.

00:14:49:09 - 00:15:24:08
Professor Elise Bant

I think this would be a good move. I think it's important to retain the broader statutory prohibition, which contains those interpretive principles, because in particular that statutory prohibition has started to develop a very rich and powerful jurisprudence of its own that has the potential to connect, again, not only with other statutes more broadly, but also with a related neighbourhood, if you like, common law and equitable principles.

00:15:25:04 - 00:16:10:11
Professor Elise Bant

In particular, the statutory prohibition prohibits unconscionable systems of conduct and patterns of behaviour. And this has been the source of development of a rich line of authority on the part of courts that have grappled with the nature of corporate culpability expressed through predatory business models. Now, this body of jurisprudence is not only relevant for regulation of financial services, but it also says something profound about corporate culpability more generally and has the capacity to inform the development of the law more broadly in a very important way.

00:16:11:01 - 00:16:41:09
Professor Elise Bant

So this is an example of the kind of principles that we need to have in place and retained as we go into the future. Finally, in my remaining 50 seconds, I'd like to say something about principles-based drafting. Commissioner Hayne famously said in the Financial Services Royal Commission final report that most rules applicable to financial services and products could be reduced to six core principles. Obey the law. Do not mislead or deceive. Act fairly.

00:16:41:14 - 00:17:15:13
Professor Elise Bant

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. Now I'm a big fan of principles-based drafting, but of course they cannot carry the whole load. So a real challenge with which the ALRC is grappling is the balance of general principles and specific guidance that need to be given to stakeholders so that they understand the nature of what they should be doing and not doing.

00:17:16:04 - 00:17:22:03
Professor Elise Bant

So I will just leave it there and thank you very much, Matt. I look forward to being involved in the panel discussion.

00:17:26:06 - 00:17:52:08
Matt Corrigan

Thanks very much. I think you've coined the phrase for the title of our Interim Report B, More Law is Not Better Law. I think that's a really apt title, and I think it really reflects our work in terms of not building on the law, but actually refining it and reducing it to its core principles and norms. And I really liked your analysis particularly around the problem of particularisation as really fracturing coherence.

00:17:52:13 - 00:18:04:14
Matt Corrigan

Thanks for that presentation. It's my great pleasure. Now to introduce Phoebe, who will be outlining some of the responses that we received to a number of our proposals and questions. Welcome, Phoebe.

00:18:09:09 - 00:18:45:00
Phoebe Tapley

Thank you, Matt. So we received 56 submissions from a range of stakeholders, including industry and professional bodies, consumer representatives, legal practitioners, academics, as well as individual financial services providers. And submissions were, on the whole, generally supportive of the majority of the reform ideas that we outlined in Interim Report A. However, they also raised a number of issues that we will be thinking about as we continue to develop our proposals for our next interim reports and ultimately for our final recommendations for reform

00:18:45:00 - 00:19:09:07
Phoebe Tapley

at the conclusion of our inquiry next year. So Will and I will provide a brief overview of some of the feedback we received from submissions, and then we'll have the opportunity to delve into some of the issues raised in more detail during the panel discussion. So turning first to the ALRC's use of data as part of this Inquiry, and if we could just change to the next slide, please.

00:19:10:00 - 00:19:41:08
Phoebe Tapley

So the ALRC has been using data to better understand the complexity of corporations and financial services legislation and to identify potential opportunities for simplification. So to this end, we've been looking at how the *Corporations Act* compares to other legislation on a number of potential metrics of legislative complexity. So you can see on this slide, for example, that bar graph highlights that the *Corporations Act* takes second place when comparing Commonwealths Acts by word length.

00:19:42:09 - 00:20:04:06
Phoebe Tapley

And there is a wealth of other data available on our website at the moment, and there's more to come. So if anyone's interested in this kind of analysis, we would encourage you to have a look around there and download any of the raw data that we've made available. And so we asked stakeholders in Interim Report A, "what additional data should we be looking at as part of this Inquiry?"

00:20:04:10 - 00:20:36:10
Phoebe Tapley

And we received a number of responses on that question, including that the ALRC should be considering the role of industry codes and ASIC guidance within the regulatory framework, and that we should be collecting empirical research in relation to the impact of the legislation on consumers. And another suggestion from a few submissions was that we should be examining the cost of the existing regulatory complexity and thinking about what the impact of any potential reforms would be on those costs.

00:20:37:12 - 00:21:03:13
Phoebe Tapley

So we're continuing to progress our data analysis at the moment, and we'll be taking those suggestions into account. So, for example, we're using data to understand the regulatory design across the statute book. And as part of that, we are looking at the ASIC guidance and industry codes and thinking about their role in

a qualitative sense in terms of the matters that they cover and the role that they play within the legislative architecture.

00:21:04:08 - 00:21:26:02
Phoebe Tapley

And as Matt mentioned at the start of the webinar, we're also working with CHOICE, FINSIA and a group of academics at the moment on a survey of finance professionals and consumers which we're hoping will give us a better sense of the real world impacts of the legislation on consumers and others who are dealing with this legislation on a day to day basis.

00:21:26:14 - 00:21:48:00
Phoebe Tapley

And finally, in relation to the suggestion on measuring costs, we very much agree that there would be value in understanding what the real cost is of this legislative complexity and how any reforms might affect that. But we haven't quite settled on how we can go about collecting that data. So that's something that we are exploring at the moment.

00:21:49:10 - 00:22:24:01
Phoebe Tapley

So turning now to definitions and if we could go to the next slide. So a key focus of Interim Report A was on the use and design of definitions within corporations and financial services legislation. So the ALRC had identified a number of issues with the existing use and design of definitions. For example, we found in many cases that definitions are interconnected, meaning that understanding the definition of one term requires you to look at the definition of another term, which requires you to look at the definition of yet another term and so forth.

00:22:24:04 - 00:22:52:10
Phoebe Tapley

So that understanding one term is a bit like unpacking a series of nesting dolls as illustrated in the image on the slide. So the ALRC proposed a suite of principles to reduce complexity in the drafting and use of definitions. And those included, for example, that key defined terms should generally have a consistent meaning across corporations and financial services legislation, and that interconnected definitions should be used sparingly.

00:22:53:08 - 00:23:19:02
Phoebe Tapley

And the majority of submissions that addressed this question supported the principles identified by the ALRC. Though some noted that care would need to be taken in implementing the principles to avoid any unintended consequences of applying them too generally. And there were also some suggestions for additional principles such as that definitions in the Commonwealth *Acts Interpretation Act* should be relied upon where they're available.

00:23:19:12 - 00:23:49:13
Phoebe Tapley

So we'll be taking that feedback into account as we refine those principles for the final report. So turning now to the next slide. Thank you. So two defined terms from the *Corporations Act* that we considered in more detail were financial product and financial service, which of course play a particularly important role in the *Corporations Act* and *ASIC Act* in terms of setting the regulatory boundaries of what falls within the scope of regulation.

00:23:50:07 - 00:24:17:01
Phoebe Tapley

So there's considerable complexity involved at the moment in applying these definitions, as illustrated by the two flow charts on the slides which show the convoluted pathway involved in understanding whether something's in or out of the regulatory parameters which are established by those definitions. And there was positive feedback on most of the amendments that the ALRC proposed in order to reduce the complexity of those definitions.

00:24:17:10 - 00:24:45:08
Phoebe Tapley

However, there were some reservations in relation to particular aspects, including the proposal in relation to removing specific inclusions of products from the definition of financial product. And submissions were also generally supportive of the proposed introduction of uniform definitions of financial product and financial service in the *ASIC Act* and the *Corporations Act*, and of aligning the definition of credit across relevant legislation.

00:24:46:02 - 00:25:20:10
Phoebe Tapley

However, a number of submissions also noted that there would be some complexities that would need to be worked through in order to ensure that appropriate regulatory boundaries are maintained if we do have these uniform definitions. And so that's something we'll be looking at further in Interim Reports B and C as part of our consideration of the structure of Chapter 7 of the *Corporations Act*, and how application provisions and exclusions can be used to vary the scope of regulation without the need to vary the underlying definitions of those key concepts.

00:25:21:09 - 00:25:48:05
Phoebe Tapley

And then the next topic of proposals in Interim Report A was disclosure. So as many of you would be aware, the regulation of financial product and services disclosure is a source of particular complexity within the *Corporations Act*. As illustrated by the graph on the slide, Part 7.9, which deals with financial product disclosure requirements, is by far the longest Part in the *Corporations Act* sitting in at just over 45,000 words.

00:25:48:12 - 00:26:14:04
Phoebe Tapley

And sitting beneath that, of course, is a vast array of regulations and ASIC legislative instruments that serve to modify the application and content of those disclosure requirements. So the ALRC's key proposal in this area was to reframe the law to incorporate an outcomes-based standard of disclosure in order to provide greater flexibility in the application and design of disclosure requirements.

00:26:14:13 - 00:26:45:04
Phoebe Tapley

And there was broad support for exploring how this reform could reduce the complexity of disclosure requirements and improve the quality of disclosure for consumers. However, many noted that the feasibility and the merits of this kind of approach would really depend on the detail of how it's implemented. And there was some concerns that this approach might in fact, increase the cost and complexity of disclosure, and that it would not necessarily translate to better disclosure for consumers.

00:26:46:03 - 00:27:08:11
Phoebe Tapley

So the ALRC will be working to produce a background paper later this year, which will further explore the role and framing of an outcomes-based standard for disclosure, drawing on the detailed feedback which was provided by several submissions. And as part of Interim Report B, we will be further developing the prototype legislation that was included in Appendix to Interim Report A,

00:27:09:01 - 00:27:42:09
Phoebe Tapley

for those of you who made it all the way to the Appendices. And this version of the prototype legislation will be focused on the financial product disclosure requirements which are currently set out in Part 7.9, as well as Chapter 6D, which deals with the prospectus requirements. And so the aim of this version of the prototype will be to illustrate how the legislative hierarchy model can present us with opportunities to reduce overlaps and inconsistencies and facilitate the tailoring of requirements for different products in a more transparent and coherent manner.

00:27:45:04 - 00:28:13:06
Phoebe Tapley

And finally, another key issue addressed by Interim Report A was the design and use of exemptions, exclusions and notional amendments to modify the regulatory boundaries which are established by those key concepts like financial product and financial service. So the pie chart on this slide illustrates the unusual extent to which the *Corporations Act* is subject to legislative instruments that serve to notionally amend or modify the text of the Act.

00:28:14:01 - 00:28:50:01
Phoebe Tapley

So as a package, the reforms that we outlined in Interim Report A, and summarised on this slide, were aimed at laying the foundations for a more principled and more navigable legislative hierarchy for financial services regulation. And submissions generally agreed that creating a consolidated legislative instrument for exemptions and exclusions would make the law easier to navigate and understand. And there was also strong support for introducing a rule-making power, with the majority of submissions supporting this power being granted to ASIC as the specialist regulator in this area.

00:28:50:08 - 00:29:11:07
Phoebe Tapley

Though there were some concerns in relation to ensuring that meaningful consultation takes place before the exercise of any such power. So these issues are very much the key focus of Interim Report B, so we'll be taking the feedback received on those proposals into account as we develop the proposals which will be set out in Interim Report B later this year.

00:29:12:04 - 00:29:20:06
Phoebe Tapley

And I'll now just hand over to my colleague Will, who will discuss the feedback on the other key topics in Interim Report A.

00:29:22:11 - 00:29:48:02
Dr William Isdale

Thank you for that, Phoebe. So I'm going to talk about three remaining areas of proposed reform and the feedback that we received in relation to those. The first of those was in relation to the definition of financial product advice. This is an important term or cluster of terms because it attracts certain regulatory obligations, including disclosure and conduct obligations that are specific to financial advice.

00:29:49:01 - 00:30:30:04
Dr William Isdale

Before I get into the ALRC's specific proposals and the feedback that we received in relation to them, I want to mention that since the ALRC's report was first handed down last year, the Department of Treasury has begun its Quality of Advice Review. And unlike the ALRC's Inquiry, that review will be considering issues of substantive policy, whereas the ALRC's Inquiry is limited to more technical matters of simplification. The ALRC will not be proceeding to make final recommendations in relation to advice until we've had the benefit of considering the final recommendations of the Quality of Advice Review.

00:30:31:14 - 00:31:04:14
Dr William Isdale

Now one of the ALRC's suggestions in this area was to remove what we describe as the intermediary concept of financial product advice in 766B of the Act. That's because financial product advice is always either general advice or personal advice. So the ALRC's view was that it was unnecessary to have all three concepts when two would suffice. We considered that in all instances where that overarching term was used, it could simply be replaced with the use of general advice or personal advice as appropriate.

00:31:06:02 - 00:31:42:04
Dr William Isdale

There was a recognition from stakeholders that there was unnecessary complexity caused by having those three terms instead of two. Although some stakeholders thought that reforming the law in that way would

create further confusion and that we should hold off, as I mentioned, until the Quality of Advice Review had delivered its suggestions, which will be targeted at more substantive causes of complexity which relate to the policy issues, not just the manner in which the law is expressed. A second proposal from the ALRC was to uncouple the concept of personal advice from financial service.

00:31:42:10 - 00:32:08:10
Dr William Isdale

Again, this is done to attach certain regulatory conclusions. As you will see on the left hand side of the slide, there is some overlap in regulation of financial services and advice, personal advice and general advice. But there is quite a clear distinction between the regulation of personal advice and general advice. So personal advice generally attracts a higher a level of regulation.

00:32:09:03 - 00:32:40:11
Dr William Isdale

The ALRC considered that we could more clearly demarcate that regulatory boundary and simplify the expression of the law, namely by minimising the use of notional amendments and exemptions by decoupling those concepts. And the feedback here was similar to that in relation to the first proposal I mentioned, which is, there was a recognition that this created a great deal of complexity, but concerns that these regulatory amendments would just introduce further confusion and we should wait until the Quality of Advice Review had delivered its recommendations.

00:32:41:14 - 00:33:27:05
Dr William Isdale

And finally, the ALRC suggested renaming the term general advice. We're not the first to point out that the term general advice, the underlying definition, includes conduct that is not advisory in character. And so the ALRC's proposal was that we should use a term that more intuitively corresponds with the substance of the definition, although we didn't go so far as to suggest a specific replacement term. However, some stakeholders pointed out, such as consumer advocate groups, that there was a concern that if we were to proceed with that proposal, that it could give the impression that the underlying problem had been solved when in fact it hadn't, and that the real concern here

00:33:27:10 - 00:34:05:06
Dr William Isdale

is the way in which consumers of advice may be misled in practice, which is likely due to the conduct of financial services entities, and not because of the labelling of concepts within legislation. Now I'll go to the next slide, which is about definitions of retail client and wholesale client. So on this next slide, you'll see that there are these two key terms retail client and wholesale client, and that is a key regulatory boundary because retail clients generally attract a higher level of consumer protection under the legislation than do wholesale clients.

00:34:06:12 - 00:34:37:12
Dr William Isdale

Now, generally, a person is classified as a retail client unless they can make use of one of a number of exceptions. And the ALRC proposed simplifying those exceptions, such as by removing certain product specific exceptions and also by removing the current product value and asset and income threshold exceptions. Now, the ALRC received a great deal of support for some amendments in this area, but not for the specific proposals that we had outlined.

00:34:38:09 - 00:35:26:10
Dr William Isdale

In particular, stakeholders suggested that the existing product value and asset and income exceptions were grossly out of date. And this is because the monetary thresholds that are specified in the law were introduced in 2001 and have not been updated since to take account of rising asset values and inflation and the like. So, for example, the Accounting, Professional and Ethical Standards Board observed that there has been a 1000% increase in the estimated number of households that meet the asset and income exceptions, and that the exceptions appear to have become arbitrary, outdated and inconsistent with underlying policies. The law firm Maurice Blackburn also observed that in their experience, many high net worth consumers who are classed as wholesale

00:35:26:10 - 00:36:06:09
Dr William Isdale

clients are not actually sophisticated in matters of finance and investment. Now, some suggested improvements to the definition of retail client that we heard from stakeholders included, that there should be a simplification or alignment of the concepts of retail client and consumer across federal legislation. That an indexation method could be applied to make sure that those threshold amounts for the product value and asset/income exceptions would remain current and up to date, and also that if those exceptions were to remain, that you might limit the scope of assets that are included within those thresholds.

00:36:06:09 - 00:36:32:09
Dr William Isdale

So for example, it could be limited to investable assets that would exclude someone's principal place of residence. We also heard stakeholder feedback on the sophisticated investor exception. Now, a key theme that we heard from stakeholders here was that the current tests for who is a sophisticated investor are incredibly subjective and that that makes it difficult for financial services entities.

00:36:33:00 - 00:37:02:10
Dr William Isdale

So, for example, the Australian Banking Association noted that the current tests are highly subjective, which reduces the practical utility of this exception. Now one means of making a more objective test proposed by Minter Ellison, for example, was to have the option of enabling clients to obtain a wholesale qualification by undertaking some sort of course of financial education. It was also proposed that perhaps in some circumstances people could self-certify as wholesale.

00:37:03:09 - 00:37:33:09
Dr William Isdale

The Advisers Association favoured a combination of both subjective and objective tests to determine whether someone would satisfy the sophisticated investor exemption. I'll now move to the next slide on conduct obligations. Now the Financial Services Royal Commission final report, which was delivered in 2019, noted a great deal of noncompliance with some of the core conduct obligations that already existed in the *Corporations Act* and *ASIC Act*.

00:37:34:03 - 00:38:02:10
Dr William Isdale

But the ALRC was concerned to consider how might we greater emphasise the significance of these conduct obligations and ensure greater compliance with the law. Now, one of the ideas to do this, which Professor Bant mentioned, is the inclusion of norms in an object clause. Professor Bant noted that Commissioner Hayne in his final report mentioned six norms of conduct that are outlined on the left hand side of the slide, which he considered underlay much of the existing conduct regulation.

00:38:04:00 - 00:38:33:09
Dr William Isdale

The ALRC considered that it might improve the expressive power of the law if those objects were expressly included in the statute. And there was a good deal of support for that suggestion, although some stakeholders thought that maybe we could go further and make those norms directly enforceable. So for example, Professor Hanrahan considered that if we want to legislate for open textured standards, we should do so and then use that as an opportunity to remove some of the prescriptive obligations and duties in the law.

00:38:35:06 - 00:38:58:12
Dr William Isdale

There was a broad level of support for the specific norms that Commissioner Hayne outlined, although some stakeholders also suggested that the Financial Conduct Authority's 'Principles for Business', which are binding on financial services entities in the United Kingdom, might be more suitable than those outlined by Commissioner Hayne. The ALRC also made a number of suggestions in relation to improvement of the efficiently,

00:38:58:12 - 00:39:30:00
Dr William Isdale

honestly, and fairly obligation. Now that obligation is important because of its breadth. And as you can see, even in the terms of, for example, the word fairly is incredibly expensive as to what it might entail on the part of a financial services entity. So how to introduce clarity in this area? Well, the ALRC suggested that one way to do that might be to make it clear that it imposes three separate obligations to act efficiently, honestly and fairly, and not just one overarching obligation.

00:39:30:04 - 00:39:44:06
Dr William Isdale

And that's currently the subject of some uncertainty in the case law. The law firm Herbert Smith Freehills agreed that there is a judicial trend towards reading those as separate obligations and that the ALRC's proposals would be consistent with that trend.

00:39:46:09 - 00:40:08:06
Dr William Isdale

I'll also mention that another suggestion the ALRC had in that area was that we could legislate examples of conduct that would fail to meet the requirement to act fairly. Some stakeholders thought that that would be a welcome addition of clarity into the Act, but others thought that it might risk a court narrowly reading the obligation by reference to those specific examples.

00:40:09:04 - 00:40:33:14
Dr William Isdale

The Mortgage and Finance Association of Australia thought that examples would be better placed in regulatory guidance rather than in the legislation. And finally, I'll just mention that we made a number of proposals in relation to consolidation of provisions relating to misleading and deceptive conduct and unconscionable conduct. And there was a great deal of support from stakeholders in relation to those proposals. I'll end there and hand back.

00:40:34:08 - 00:40:34:14
Dr William Isdale

Thank you.

00:40:36:04 - 00:41:06:00
Matt Corrigan

Thank you Phoebe and Will for that overview. This is really now the opportunity to change tack a little bit and to move to the Q&A session. I have Phoebe and Will sitting next to me here and we have Professor Bant online in Perth. Elise, Will very briefly just outlined the support that we received for submissions and proposals in relation to consolidating prohibitions on misleading and deceptive conduct.

00:41:06:00 - 00:41:23:00
Matt Corrigan

And I know in your opening remarks you explored that issue a little bit, but I wonder where you see in particular the scope is for further reform and what are the issues and pitfalls that the ALRC will need to consider in developing further proposals.

00:41:24:13 - 00:42:04:03
Professor Elise Bant

Thanks very much, Matt. Well, the prohibition on misleading conduct is I think a foundational norm of Australian law. It says something very distinctive about fair trading expectations in Australia. Consumers expect not to be misled and I think most businesses understand that this is a core part of their responsibilities as responsible members of our commercial society. But the prohibition has become so important and foundational that it's been, as I said, a victim of its own success.

00:42:04:14 - 00:42:52:08
Professor Elise Bant

It's been replicated. Professor Paterson, Joe Sabar and I have done a recent review which found that there are at least 114 prohibitions on misleading conduct, varying in language, in scope, in operation, remedial consequences, whether they attract penalties or not, whether they attract personal rights of redress, private rights of redress or not. And this is not a good thing because it means that again, there's that possible arbitrage between different provisions on the part of participants, but it also makes life very difficult for courts, for advisers trying to give advice and so on.

00:42:52:14 - 00:43:17:02
Professor Elise Bant

So I think consolidating to the core prohibition that we first saw enunciated in section 52 of the *Trade Practices Act*, so misleading or deceptive conduct or conduct that is likely to mislead or deceive, is the way to go. The concerns about that have been generally twofold. One is how do we know that we're covered? Well, I think if you're in trade or commerce, you're covered.

00:43:17:11 - 00:43:41:10
Professor Elise Bant

So go from there, you know, so no exceptions. No one engages in misleading and deceptive conduct. It's sweet. It's simple. Secondly, if you do engage in misleading conduct, there are concerns that, well, perhaps I'll be subject to a civil penalty, for example, if I've done something which is accidental or minor, or even made a reasonable but misleading statement.

00:43:42:08 - 00:44:27:08
Professor Elise Bant

However, that concern is already addressed through the development by courts of very careful rules around the way in which penalties are assessed. The 'French factors' that were first articulated by Justice French have been a further developed through a series of court decisions, and it is pretty straightforward to articulate the nature of culpability that will be picked up on and the subject of penalty and also, you know, the sort of things that regulators will follow up through litigation rather than through administrative or other mechanisms.

00:44:27:14 - 00:44:54:04
Professor Elise Bant

So it's not a one size fits all approach that the law takes. The fact that you have one core prohibition does not mean that there's not room for nuance and for an approach that matches the remedy or the penalty to the nature of the wrongdoing that has occurred. I'd also say that these are very important safety net provisions.

00:44:54:04 - 00:45:34:10
Professor Elise Bant

That language comes from my colleague, Professor Jeannie Paterson. A prohibition on misleading conduct is wonderfully agile and adaptable to changing circumstances. It's no surprise that it has been a prohibition of choice for regulators dealing with misconduct by big data, through automated processes, online trading behaviours and so on. It captures the sorts of misconduct that we don't want to see characterising our commercial landscape very effectively.

00:45:35:00 - 00:46:11:04
Professor Elise Bant

So I think, really, we should be doing this across the spectrum of statutes. But starting with financial services is a very good step. And we have to make sure that we revert, as the ALRC has suggested, to that core prohibition. That's the foundational one. That's the powerful one. That's the flexible, expressive one. We go with that and we educate our stakeholders about what that means through, I would say, worked examples kept outside the statute and put in appropriate places on regulatory websites and the like.

00:46:11:04 - 00:46:15:01
Professor Elise Bant

We can talk about worked examples perhaps a little bit later.

00:46:16:13 - 00:46:41:03
Matt Corrigan

Thanks Elise. That sounds remarkably straightforward, Will. That should mean that your work's easy to undertake, but I suppose that, Will, I'll take this a little bit off script, what were some of the submissions in response to that proposal around misleading and deceptive conduct? What was the general feedback? Did they all see it as straightforward and as eloquently put by Elise there?

00:46:41:11 - 00:47:04:12
Dr William Isdale

I don't think that they would describe it as straightforward, but it was remarkable the level of support that we had in relation to those proposals to consolidate misleading and deceptive conduct and unconscionable conduct. They were in fact, I would say, the most popular proposals that were in Interim Report A. But stakeholders pointed out, that I guess there are two key issues that need to be worked through before you can achieve consolidation.

00:47:05:03 - 00:47:29:10
Dr William Isdale

The first is consideration of the technical thresholds that apply in respect to the different provisions. Each of them will have different words, as to when they actually, the scope of their application. And for example, there's overlapping provisions in both the *ASIC Act* and the *Corporations Act* applying to, for example, financial services. But the definition of financial services is different under both of those acts.

00:47:29:10 - 00:47:52:00
Dr William Isdale

So you need to carefully consider the scope of each particular provision and ensure that if you are removing a provision, you're only removing it because it's already overlapped by some other broader prohibition, like Elise mentioned. And then the second issue is in relation to the remedial consequences. So are there more remedies available in respect of some of the statutory provisions than there are in others?

00:47:52:05 - 00:48:13:11
Dr William Isdale

And we need to make sure that an appropriate scope of remedies is available for the core prohibition, which we would consider should remain. So those are the complexities that stakeholders pointed out and those issues are issues that are going to be canvased in greater detail in a background paper that the ALRC will be developing and releasing on this topic later this year.

00:48:15:03 - 00:48:42:02
Matt Corrigan

Thanks, Will. I think Elise we had at least in one consultation, the over particularisation, particularly in this space, was really in relation to the regulatory arbitrage that you mentioned, was really put to us in quite colourful terms that because of these proliferation of specific offences, you end up arguing about whether something is blue or navy blue as opposed to what is the fundamental norm of conduct that we're seeking to regulate.

00:48:42:14 - 00:48:48:13
Matt Corrigan

Phoebe, what were some of the other proposals on which we seem to have quite broad support?

00:48:49:12 - 00:49:17:11
Phoebe Tapley

Sure. So I think one set of reforms that received a quite high level of support, like the consolidation of misleading and deceptive conduct provisions, was again another consolidation exercise. This time in terms of the exemptions and exclusions. So taking them into a single legislative instrument rather than the myriad ASIC legislative instruments plus the regulations plus the Act that they're currently scattered across.

00:49:18:11 - 00:49:59:07
Phoebe Tapley

And as well as that, the proposed introduction of what we're describing as a rule-making power. So together, those proposals really anticipate the work that we're doing as part of Interim Report B in terms of developing a legislative hierarchy model that allows for the kind of regulatory flexibility that you need in an area like financial services, where the subject matter of the regulation is in a constant state of flux as innovation takes place and new technologies emerge. But at the same time, we need a way to keep the law transparent and accessible by those who are affected by it,

00:50:00:05 - 00:50:53:10
Phoebe Tapley

even as we do adapt to these new changes. So we're really pleased to see that that model received some strong support from stakeholders in Interim Report A, and we'll be really fleshing that out in more detail for Interim Report B and working through some issues that we didn't necessarily grapple with in too much depth in Interim Report A. So things like how the responsibility for those powers should be allocated, what kind of oversight and accountability mechanisms might be appropriate, both in terms of pre-legislative scrutiny and post-legislative scrutiny, things like the sunsetting and thinking about the complexities involved of sunsetting for an instrument that is consolidating quite a few different amendments and exemptions, and then

00:50:53:10 - 00:51:20:02
Phoebe Tapley

also thinking about the implications of this model for the design of penalties and offences. So we'll be drawing on the valuable feedback that we did receive in relation to those sorts of issues from submissions and something that we're also thinking about, and particularly recently is the extent to which these principles and mechanisms that we're engaging with for this Inquiry are broadly applicable.

00:51:20:02 - 00:51:46:03
Phoebe Tapley

The extent to which they might apply beyond corporations and financial services legislation, and on that point, we benefited this week from a round table with representatives from quite a few different government agencies who are also administering quite a significant amount of delegated legislation. So that's something that we'll be thinking about for Interim Report B as well.

00:51:47:09 - 00:51:54:01
Phoebe Tapley

So that's one area where we saw broad support. I'm not sure if Will you wanted to add anything to that one.

00:51:54:08 - 00:52:24:10
Dr William Isdale

Although this wasn't something that we specifically asked for stakeholder feedback on a lot of stakeholders went out of their way to mention their strong support for recommendations that were made in Interim Report A. A lot of those recommendations were to do with consistent use and design of definitions. The *Corporations Act* is heavily reliant on definitions. Phoebe mentioned the use of interconnected definitions that are very complex to follow. The fact that, at the moment, there's no single glossary or dictionary of those definitions.

00:52:25:01 - 00:52:44:09
Dr William Isdale

There are definitions that are defined but not used, and definitions when they are used are not clearly drawn to readers' attention. So some of the recommendations were about marking where defined terms are used so that that's obvious to readers, fixing some of those problems I mentioned — improving navigability and the clarity of the statute.

00:52:46:12 - 00:53:02:04
Matt Corrigan

That's all very positive, and not every proposal was universally loved. Phoebe, do you want to touch on some of those where stakeholders may have taken a different view or pointed out problems with the proposals that we had set out?

00:53:02:12 - 00:53:35:03
Phoebe Tapley

Sure. And I think Will has already alluded to this in his overview comments. But a particular area where we saw a real divergence in the views from stakeholders was in relation to the amendments we outlined for the retail client definition, which is, of course, a very central concept within Chapter 7 of the *Corporations Act* in terms of turning on or turning off certain protections and obligations on providers in relation to disclosure, as well as

00:53:35:03 - 00:54:09:06
Phoebe Tapley

some of those key obligations around acting in the best interests of a consumer. So that's obviously a key concept, but it is quite complicated the way that it is currently structured. So we were really interested in thinking about whether there is a pathway to simplifying that concept and I think something that we did struggle with in relation to this particular definition is that we found that there's a certain incoherence in the existing policy rationale for how we apply those protections.

00:54:09:06 - 00:54:39:09
Phoebe Tapley

It's quite difficult to discern because of the sort of carve-ins and carve-outs and the way that that definition is structured. So we did make an attempt of outlining some potential amendments and those included removing the high net worth and product value exceptions and also the product-specific limbs of the definition which deal with the treatment of superannuation products, insurance products and traditional trustee company services.

00:54:39:14 - 00:55:26:07
Phoebe Tapley

And there was fairly mixed views in relation to those amendments. So, for example, on the product value exception and the asset and income exceptions, there were some who agreed that those were not appropriate ways of determining the application of the retail client definition. But on the other hand, there were some who said that removing those exceptions would really result in some great uncertainty in terms of classifying clients who were there before you when you're providing a financial service. And then in relation to those product-specific provisions, we had suggested that it would be possible to maintain the existing regulatory boundaries without needing that special treatment of them.

00:55:27:00 - 00:56:02:14
Phoebe Tapley

But there were some concerns that there would be some shift in the way that we treating particular products. So there were certainly some concerns raised. But I think it's fair to say that there was still a strong appetite for simplification of this concept and for some reform here. So although we're not going to proceed with the proposed reforms that we outlined in Interim Report A, we will certainly be thinking about that concept and whether there are other options for reform, including the ones that were outlined in the submissions that we received.

00:56:04:03 - 00:56:34:11
Matt Corrigan

Thanks Phoebe. I might then just turn to Elise. Elise, you did touch on this in your previous answer. This question is around the use of examples in legislation. So for example, in Proposal A20, which Will did talk about, we did suggest that to the extent that fairness had some ambiguity or it was vague that you might have examples that would elucidate when it may apply.

00:56:34:14 - 00:56:56:07
Matt Corrigan

And similarly in Proposal A24, we did propose reframing the so-called safe harbour to the best interests duty and reframing them as indicative behaviours of compliance. So I wonder from your perspective, what do you see is the role of examples within the regulatory framework and what's really the best way to maximise their value?

00:56:57:14 - 00:57:35:05
Professor Elise Bant

Thanks, Matt. I think stakeholders clearly want guidance and certainty as to the operation of key concepts and obligations. But how you do that, I think depends on the nature of the prohibition or obligation. So overarching and core prohibitions like misleading or unconscionable conduct work very well as broadly framed statutory standards applicable to everyone. This is because they're prohibitions that reasonable traders will understand that they shouldn't be engaging in these kinds of behaviours.

00:57:35:05 - 00:58:12:12
Professor Elise Bant

And if you're looking to engage in good trading practices, you're unlikely to fall foul of those prohibitions in any serious way. And so illustrations, for example, the use of worked examples where you have representative cases that put in plain language. he offending conduct is identified for stakeholders, the ramifications and so on are explained in context, work very nicely, and they can be placed on regulatory websites and also industry websites and that sort of thing.

00:58:13:06 - 00:58:50:03
Professor Elise Bant

You can also, of course, have ASIC-issued guidelines. You just have to be careful that those don't become another set of complex regulatory materials which just add rather than detract from the complexity overall. Where you have broadly framed positive duties, like a duty to act in the best interests of a customer or client, breach of which can result in serious consequences such as penalties, stakeholders, including non-expert stakeholders, might need more guidance.

00:58:50:03 - 00:59:34:11
Professor Elise Bant

Now, I think it's reasonably well accepted. I don't know whether I'm going off safe ground here, but I think it's reasonably well accepted that the safe harbour provisions don't provide a good means of navigating that balance between having principles based regulation and also having a degree of guidance and certainty. It tends to promote a tick-a-box compliance mentality, you know, a sort of formalistic approach, but it also undermines existing laws and prohibitions and prevents courts from connecting that really important positive obligation to connecting surrounding statutory and general concepts.

00:59:35:03 - 01:00:04:03
Professor Elise Bant

So if you were to actually remove the safe harbour provisions entirely, you'd have courts engaging directly with that best interests principle and looking to articulate it by reference to its surrounding statutory context — other obligations that are just sitting on the border with it are things that can help inform are understanding of what that core idea means, as well as looking to equitable ideas of fiduciary obligation and so on.

01:00:05:01 - 01:00:32:01
Professor Elise Bant

Now, removing those entirely might leave stakeholders with a sense of concern that they really don't know what they're supposed to be doing. So the ALRC's idea of having an indicative list could be helpful in that context, and it could be helpful not merely for stakeholders, but for courts that are trying to connect the best interests duty with other related obligations.

01:00:32:06 - 01:01:17:01
Professor Elise Bant

So that could be useful. We've seen a similar approach taken I think with the unconscionable conduct statutory prohibition, where you have a list of interpretive principles that courts must have regard to and which allow courts to understand and develop and articulate the substance of the, in that case, the prohibition more fully. A third option is to include actually a nonexclusive list of more prescriptive obligations that would set a baseline expectation for what is required of acting in the best interests — if you like, a floor for satisfying the duty.

01:01:17:01 - 01:02:07:06
Professor Elise Bant

Here, it's easy to stray into policy questions, but for example, for mine, I would just include in that floor that you can't accept conflicted remuneration. You know, I can explain why that is if it comes up later. But I think that if you're going to act in the best interests of someone and you are in a position of conflict because of remuneration, it necessarily and fundamentally affects your ability to give disinterested, independent, non-biased advice. So I realise that's going into policy field, but I do think that that's the kind of thing that could be nested as a floor requirement within a non-exhaustive list of prescriptive obligations.

01:02:07:06 - 01:02:12:12
Professor Elise Bant

So there's three sort of ways you can go, each have their strengths and perhaps their restrictions.

01:02:14:02 - 01:02:43:04
Matt Corrigan

Thanks Elise. You've touched on a few things that have raised a few questions from our audience members. One does relate to legislative examples, but another question relates directly to the best interests duty. So I might, given that we've just touched on the best interests duty, turn to Will and ask, this is an audience question, where to next in terms of the ALRC's thinking in relation to that proposal, what are we going to do about the best interests duty?

01:02:43:08 - 01:02:54:03
Matt Corrigan

And then Elise I'll come back to another question from our audience just around the utility of examples in legislation.

01:02:54:08 - 01:03:21:09
Dr William Isdale

Well, the first point to note is just that we're not going to do anything until we've heard from the Quality of Advice Review as to what they think about this issue. I think one of the difficulties that we bump up against in this area is that the ALRC's Inquiry is constrained to make recommendations within the context of existing policy settings. And there is there are some sources of complexity that we can't be rid of without meddling with the underlying policy issues.

01:03:22:03 - 01:03:43:10
Dr William Isdale

The best interests duty is one that pushes right against the boundaries of what is a policy change and what is a more technical change. And so as Elise mentioned, we suggested that the existing safe harbour at the moment, it doesn't really provide a safe harbour at all because it's subject right at the very end to sort of a clause that is sort of overarching, encompassing 'and anything else that would be necessary'.

01:03:43:14 - 01:04:13:05
Dr William Isdale

And so some stakeholders pointed out that the safe harbour doesn't really provide any real safety or certainty, it just provides some rough guidance. And so rather than giving a false sense of security, it would be more appropriate to recast it as some sort of legislative list or examples, as Elise mentioned, and remove that illusion that exists at the moment that it provides certainty or that it should be followed point by point as a tick-a-box approach as Elise mentioned.

01:04:13:12 - 01:04:33:09
Dr William Isdale

So I think we're still — I would be reluctant to say that the ALRC's thinking has differed too much from that. We certainly heard the issues raised by stakeholders, but we don't have a new proposal to go forward with yet. We will wait to see what the Quality of Advice Review might say about that and other conduct obligations that affect advice providers.

01:04:34:08 - 01:05:04:05
Matt Corrigan

Thanks Will. So the question that we had from our audience was framed in the sense that — a little bit of concern that often examples in legislation are framed as, the two typical cases of the good and the bad, and that the real challenge is really in the middle and that the examples very rarely address that and they have very little utility themselves from a statutory interpretation point of view.

01:05:05:05 - 01:05:27:04
Matt Corrigan

I wondered if you had any thoughts about that. And I know the examples that you were talking about in your previous answer were related to regulatory guidance as opposed to within the statute. So I maybe wonder whether you could discuss a little bit further also about why you think that's a better place, perhaps, if indeed that is your view, for examples.

01:05:28:10 - 01:05:54:14
Professor Elise Bant

So it would be possible to embed examples in the legislation. My instinctive feeling about that, though, is that, you know, we already have large legislation and we already have, you know, a fair amount that people need to wade through. And sticking your examples in the legislation gives them a kind of force, I think, which I'm not sure about the overall benefits of them.

01:05:54:14 - 01:06:40:01
Professor Elise Bant

It's one thing to have a list of illustrative or interpretive principles like you find currently with the statutory prohibition on unconscionable conduct, which themselves contain actually quite broadly framed language and allow — you know, they're illustrative and they're guiding, but they don't, for example, dictate a certain understanding of that guidance for courts. Courts can connect ideas and principles and concepts in a way which promotes the statutory language and purpose without being hooked or restricted to a particular understanding.

01:06:42:01 - 01:07:06:10
Professor Elise Bant

If you embed examples, you have to start being really careful about the nature of the examples that you embed, because they can't be sort of technology specific so that they're going to date quickly. You know, they become — the question becomes to what extent are they illustrative, or in fact, determinative?

01:07:07:08 - 01:07:49:12
Professor Elise Bant

What are the relevant considerations that should be identified as being critical for why it is that certain contexts produce certain outcomes. So I would rather see those sorts of points of guidance going into non-statutory contexts. If you're going to have guidance within the statute, then I would go for the sort of indicative principles or baseline prescriptive obligations - nicely, clearly worded -and leave the courts to do their job on that front and leave the more everyday garden-variety guidance to take place outside the statute.

01:07:50:05 - 01:08:34:11
Professor Elise Bant

In terms of people not knowing exactly how it applies, you know, different prescriptions and obligations apply in different contexts, well, that's always a challenge. But I think the thing is, is that if you're engaging, if you have a range of illustrative materials that reflect a spectrum of different industries and contexts, then to some degree we require stakeholders to engage with the deep question of responsibility for fair trading, which underpin all of these, and if in doubt, go for the better trading practice

01:08:34:11 - 01:09:25:03
Professor Elise Bant

is my general rule of thumb and I sort of think that to a certain extent, uncertainty may actually encourage, not simply a compliant sort of tick-a-box approach, but actually a deep engagement with the underpinning principles that these laws are trying to promote and enforce. I think that Professor Matthew Harding actually made a submission a bit like that to the ALRC, where he noted that one of the strange by-products of uncertainty is

that it puts the onus on participants to engage genuinely with the principles rather than simply taking a reactive and defensive approach.

01:09:27:01 - 01:09:55:08
Matt Corrigan

Thanks Elise. And that really sort of rings true with Commissioner Hayne's views that we really should be thinking about what the purpose of the law is rather than just mindlessly complying. Phoebe, we've got another audience question. I might chime in on this one, but I'm going to refer to you in the first instance. The question is, should any notional modification of the *Corporations Act* or regulations be limited to emergency or urgent cases?

01:09:55:13 - 01:09:57:05
Matt Corrigan

And if not, why not?

01:09:57:14 - 01:10:26:13
Phoebe Tapley

A good question, and I think it's, I would be interested in your views on this matter as well. But I think our starting point is that notional amendments are not the way to deal with these sorts of emergency situations. We're looking at these issues at the moment for Interim Report B, and I think we're certainly conscious of that being a need to deal with within the law.

01:10:26:13 - 01:11:17:07
Phoebe Tapley

But I think what we're sort of leaning towards is that it will be possible to deal with those, for example, through the rule-making power or through exemptions and just providing for the power in the Act having a more agile application. So you might have lesser scrutiny requirements up front before you can bring that into force if there are sort of pressing circumstances and then making sure that you are sort of back loading the review processes so that we are checking that there was a real justification for those rules but I defer to any views you might have on that as well Matt.

01:11:17:07 - 01:11:51:14
Matt Corrigan

Thanks Phoebe. I tend to agree. I think we've really identified notional amendments as a source of complexity within the *Corporations Act* and the *Corporations Regulations*. And it was really interesting, as Phoebe mentioned, we met with 12 different government agencies this week in Canberra and when ASIC was explaining the extent to which they rely on exemptions and modifications a number of the other departments were horrified simply just because they just could see how much complexity that would necessarily bring to the legislative framework.

01:11:51:14 - 01:12:14:13
Matt Corrigan

And so we've been very conscious about that. And as Phoebe said, we've really been looking at alternatives. We accept that there's a degree of flexibility and adaptability that is required in this space, given the innovative nature of the industry and the fact that it is subject to constant change, but we do feel that in many ways the extent of notional amendments is a real by-product of: one,

01:12:14:13 - 01:12:37:09
Matt Corrigan

there is far too much prescription in the primary law, and that level of prescriptions means that it's not necessarily fit for purpose in each and every circumstance in which it applies, which is why we typically then rely on notional amendments. And I think increasingly over time, we've also seen notional amendments being relied on to fix drafting errors or unforeseen circumstances that arise in the legislative drafting process.

01:12:38:00 - 01:13:09:00
Matt Corrigan

So we do think that a focus on rules and a focus on good lawmaking should remove the need for notional amendments. And to the extent that there are emergencies, then yes, there may be a role. But as the questioner suggests, I do think that should necessarily be limited to circumstances where there is a genuine emergency and it is therefore time limited so that any notional amendment is then reflected in the text of the amendments through the normal legislative process.

01:13:10:08 - 01:13:12:03
Matt Corrigan

Is that the answer you expected me to give?

01:13:13:07 - 01:13:14:06
Phoebe Tapley

That sounds about right.

01:13:15:01 - 01:13:55:03
Matt Corrigan

And the other question we had and I'd be interested in Elise's question, — I'll ask the question and Elise will answer it. I'm interested in Elise's thoughts on this. The questioner has pointed out, that because the definitions in the financial services space aren't pure definitions, that they necessarily define the regulatory parameters. They question whether it is in fact possible to amend those definitions within existing policy settings, because any amendment to those definitions necessarily changes the regulatory boundaries, and that goes into questions of policy.

01:13:55:10 - 01:13:59:06
Matt Corrigan

So I wonder, Elise, if you had any thoughts in relation to that question.

01:14:02:12 - 01:14:10:02
Matt Corrigan

We may have a technical difficulty between Brisbane and Perth. So Phoebe, what's your thoughts on that issue?

01:14:10:12 - 01:15:02:09
Phoebe Tapley

Yeah, I think that's a very good question and one that we've been grappling with since receiving the terms of reference for this Inquiry. It is a little unusual for us to have this lens of looking exclusively at legislative design issues and focusing on what we can do to simplify the law within those existing policy settings. I think it's fair to say that we're choosing not to take an overly narrow approach to those terms of reference because as the question has alluded to, there is a fine line between what is a legislative design choice and what is a policy choice, so I think we are really trying to engage with areas where

01:15:02:09 - 01:15:37:07
Phoebe Tapley

we see that there is potential opportunities for greater simplification if there is a change in the policy setting or where there might be a level of incoherence in the policy settings, then we're certainly endeavouring to at least note those and to consider what the alternatives might be, even though we may not be in a place to make a proposal or a recommendation on those sorts of issues, because it is — because we don't have the space to consider those more fundamental policy issues.

01:15:37:07 - 01:16:08:13
Phoebe Tapley

But perhaps another review might be able to engage with them. But I think having said that, in our view, there is quite a lot of scope for simplification, even within those sort of boundary setting types of definitions. And particularly in relation to the financial product, financial service definitions. The way that those are structured right now is in our opinion, overly complex.

01:16:09:02 - 01:16:52:05
Phoebe Tapley

We have these functional definitions and then those functional definitions are defined themselves. And then we have specific inclusions of products that are always a financial product. And we have examples in there yet again and we have a range of exclusions which are again scattered throughout the legislative hierarchy. So I think the proposals that we made in the Interim Report A, we're really trying to engage with how do we restructure that definition and still achieve the same aims of being able to change the scope of the regulatory boundaries where there is a policy choice to that end.

01:16:52:09 - 01:17:24:06
Phoebe Tapley

And our view is that we can do that using application provisions and exclusions and making them more transparent by putting them all in one place. Without the need to actually vary the definitions themselves. So I think our view at this stage and we're testing that, of course, is that there is scope for simplification of those definitions. Even within those policy constraints.

01:17:25:04 - 01:17:34:04
Matt Corrigan

Thanks. Thanks, Phoebe. We have lost Elise, I think, unfortunately. Will, did you want to touch on that, or I do have another question for you.

01:17:34:05 - 01:18:01:11
Dr William Isdale

I was just going to quickly reiterate. I completely agree with everything Phoebe said, but there's more than one way to demarcate regulatory boundary and using definitions to do it in the ALRC's view is an unnecessarily complicated means of doing that and is simpler way may be, for example, that where you're going to have exceptions you put those in a consolidated legislative instrument in the one place rather than have to jump through a complex web of interconnected definitions to scope out the regulatory boundaries.

01:18:02:12 - 01:18:25:03
Matt Corrigan

So the next question, Will, is about those Commissioner Hayne norms, and that's obviously been the focus of your presentation. But then we've touched on that in the questions. I wonder where you think the ALRC is going in terms of that specific proposal. Are we going are we going to suggest that the norms be in an objects clause, what are your thoughts at the moment?

01:18:26:00 - 01:18:52:01
Dr William Isdale

At the moment, I think that we received very positive feedback in relation to the inclusion of norms. The concern will be to make sure that it doesn't introduce additional uncertainty. So for example, how can we make clear that these norms are just reflective of the existing substance of regulation and how can we draw those links to explain to people that this is a summary, or a high level overview, we're not seeking to introduce new law in doing this.

01:18:52:05 - 01:19:32:01
Dr William Isdale

We're just trying to improve the expressive power of the existing law. And one way that we might further this in the second or third Interim Reports is in a consolidation of provisions that relate to conduct. Can we bring them into the one part of the Act? For example, at the moment conduct obligations are quite scattered across the *Corps Act*, but also in the *ASIC Act*. For example, a way of enhancing the expressive power would be to bring them into the one location with an objects clause like the six norms at the beginning of that part as a summary or high level overview of what is contained in that part and once we do that

01:19:32:01 - 01:19:41:11
Dr William Isdale

consolidation, we'll need to revisit whether the six norms suggested by Commissioner Hayne are entirely reflective of everything that's in there or whether they need to be changed in some way.

01:19:42:13 - 01:20:15:09
Matt Corrigan

Thanks Will. We had a follow up question in relation to the best interests duty and that's from a licensee perspective. And their concern is that licensees and other users who are subject to the legislation typically rely on regulatory guides and other extrinsic sources and that any tinkering that we might do in relation to, or recommend in relation to, the legal framework may be of relevance to lawyers but not to licensees and others.

01:20:15:09 - 01:20:47:08
Matt Corrigan

Because unless the regulatory guides change, if we just move, for example, the steps in the best interest duty into the regulatory guide, we're not going to necessarily shift behaviour. Have you got any thoughts on that? I mean, I think from our perspective, our work necessarily should inform regulatory guides and other material put out by regulators and that we wouldn't just want to change the legislation without that subsequently filtering down into regulatory guides.

01:20:48:05 - 01:20:58:14
Matt Corrigan

But I suppose the broader point that the question is getting at is how do we make sure that the law and the materials that are put out by the regulator is accessible.

01:20:59:11 - 01:21:29:08
Dr William Isdale

Yes, and another key point is how do we make sure that there's enough clarity given to providers of advice. If we removed those safe harbour provisions altogether, if they are then in the regulatory guidance instead that provides some guidance but maybe not the same level of certainty because it no longer has the status or any status as law. I think that it is such a difficult balance and the ALRC generally favours the principles-based approach to legislative drafting.

01:21:29:14 - 01:21:52:13
Dr William Isdale

But there are areas where it is necessary to have some degree of prescription to give the certainty that's needed. And we're sort of at the boundaries of that in relation to conduct obligations, because otherwise we're relying on very broad and ambiguous obligations like acting in someone's best interests or acting fairly. It's difficult to know what that actually entails without providing some specificity. And Interim Report B is all about

01:21:52:14 - 01:22:12:01
Dr William Isdale

where should the specificity be? Should it be in the primary law? Should it be — maybe the answer is not that it would be in the regulatory guidance with no legal force or effect, but perhaps rather than being in the Act, which should provide the core architecture, it might move somewhere lower down in the hierarchy to fill in a greater level of detail.

01:22:13:12 - 01:22:37:03
Matt Corrigan

Thanks Will. I think we've got time for one last question. This is another one that we've received online and you might have to put your Professor Bant hat on for this one, Will. Do you see particular advantages in framing the law in terms of positive duties on the regulated as opposed to prohibitions? What are the advantages of a positive duty?

01:22:37:14 - 01:23:00:14
Dr William Isdale

Well, it goes much further generally. We already have positive duties. We have, most notably, the obligation to act efficiently, honestly and fairly. I think that that makes it less possible for regulated entities to engage in arbitrage and to find the loopholes that exist, for example. So it is more flexible in applying to new products and approaches.

01:23:00:14 - 01:23:24:11
Dr William Isdale

You don't have to introduce a new provision each time that says, oh, and then this new thing, you also have to act or not do a certain thing. And furthermore, it's very difficult ahead of time to think of all conceivable circumstances that you need to provide a prohibition for. And what we've found in the law at the moment is just a proliferation of prohibitions as people uncover more and more conduct of which there is disapproval.

01:23:24:11 - 01:23:55:10
Dr William Isdale

And then we introduce new provisions and it becomes very complicated. It's probably simpler to rely on a positive, broader, overarching obligation, and that already exists. And then we can remove some of those prescriptive obligations, and that would be consistent with the existing policy settings. So I think the key point to note is not that we're saying we should introduce more positive overarching obligations, just that they already exist and we can place greater reliance on them to serve the interests of simplification by removing some of the prescriptive provisions.

01:23:56:04 - 01:24:23:03
Matt Corrigan

And I think that fits quite nicely with Professor Bant's comment that we need not more law, but better law. So I think that's a nice point for us to wrap up. I hope that this discussion and the presentations just show that we are genuinely engaged in consultation. We found all of the submissions to be very, very interesting and they certainly challenged our thought processes.

01:24:23:12 - 01:24:53:02
Matt Corrigan

It's really made us think about where we need to go next, and some of the issues that we need to work through. In conclusion, I'd just like to say, even if you have made a submission, please stay in touch. If there are issues that are particularly important that you want us to know about, you can email the Inquiry at any time at the address on the slide. I can't stress enough, input from industry, from the profession, is so important to our work.

01:24:53:14 - 01:25:26:11
Matt Corrigan

We want our recommendations to be practical and implementable. We need to hear from those at the coalface as to what will and won't work. And we really are grateful for those who choose to engage. At the end of September this year, we'll be publishing our second Interim Report. Now, I have promised that it will be a little bit shorter. For those of you that have grappled with Interim Report A, at 650 pages, it is true that was a 650 page treatise on the complexity of someone else's legislation.

01:25:27:07 - 01:26:05:07
Matt Corrigan

We'll be going for a much shorter, more targeted report looking at the legislative design issues that are very pertinent to Interim Report B. So a number of the issues that were raised in Interim Report A and the submissions, we will be holding over to Interim Report C early next year, hopefully by the middle of next year. We'll also be publishing this year — because our internal reports are not enough — a number of new background papers. This year we've got three background papers in the pipeline, the first of which is in relation to emerging technologies and new business models.

01:26:06:05 - 01:26:49:14
Matt Corrigan

And that's being led by our Special Counsel, Dr Andrew Godwin. We've also got a background paper that will focus on the issues that we've discussed today in relation to misleading and deceptive conduct and unconscionability, and Will is leading on that. And Phoebe will be doing some work on our third and final background paper for this year, looking at disclosure and in particular how we might progress a more outcomes-based disclosure standard. So as I said, to ensure that you hear all the latest news from this Inquiry, including getting copies hot off the press of those new publications as and when they become available, please sign up to our newsletter, which you can do from our website.

01:26:49:14 - 01:26:57:11
Matt Corrigan

This concludes today’s event. And I really thank you for joining us and I hope you’ve enjoyed the discussion as much as I have. Thank you.