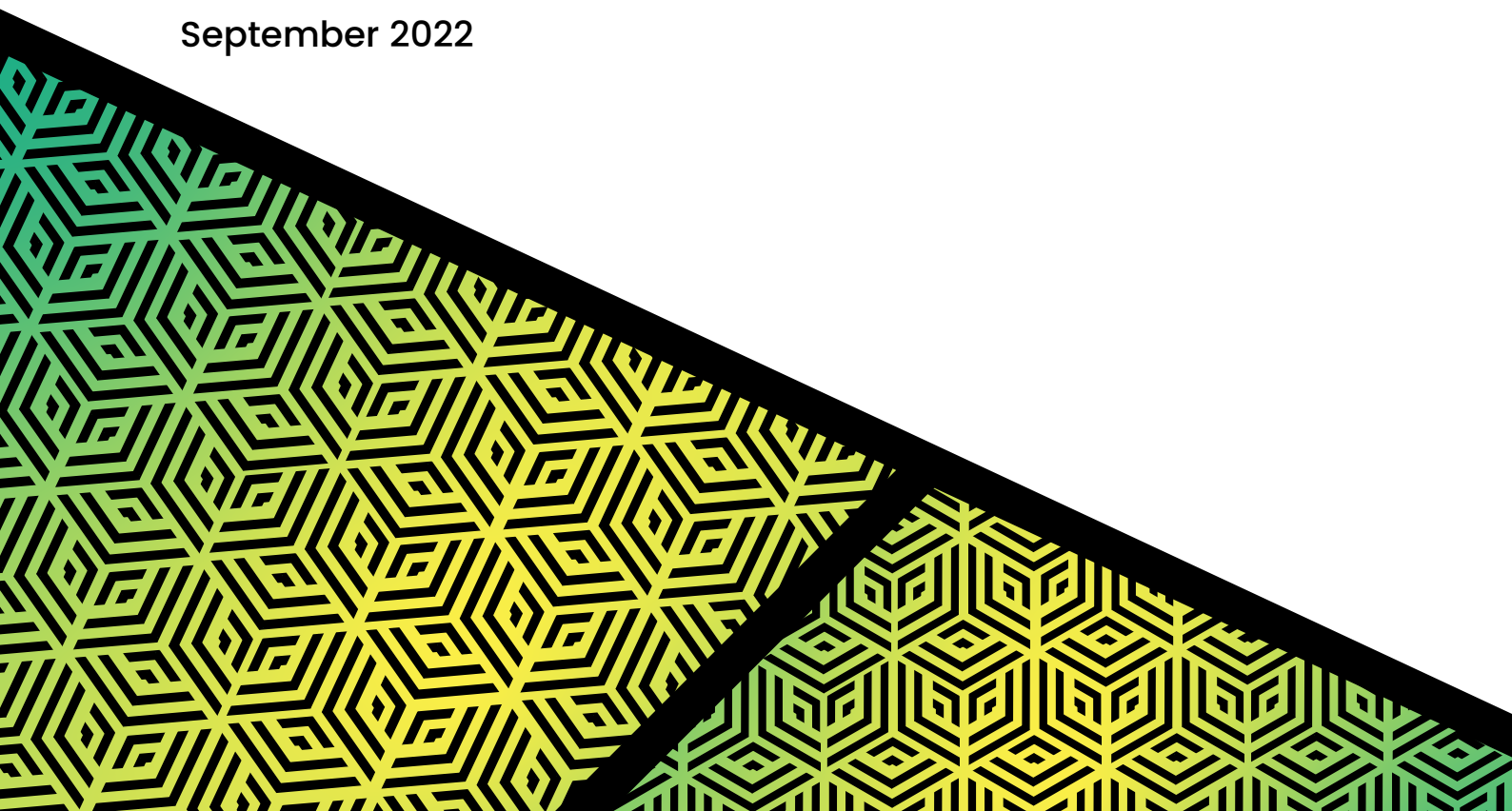
Australian Government
Australian Law Reform Commission

INTERIM REPORT B – ADDITIONAL RESOURCES

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Recommendation 17 — Unnecessary complexity note

September 2022



Interim Report B is the second of three Interim Reports to be published as part of the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation. This document is one of several additional resources, published on the ALRC's website, which provide further detail relevant to particular aspects of Interim Report B.

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RECOMMENDATION 17 — UNNECESSARY COMPLEXITY NOTE

Contents

Potential options for implementing Recommendation 17

1. This note provides potential options for implementing Recommendation 17 in Chapter 8 of Interim Report B.[1] This note is to be read alongside that Interim Report. Abbreviations used in this note are defined in the Glossary for Interim Report B.

2. This note is designed to assist law-makers and stakeholders to discuss how Recommendation 17 may best be implemented. As such, many of the options in this note would require further exploration, development, and consultation before they could be implemented. This note may also generate discussions among stakeholders that identify alternative options to those set out in this note.

1 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022).

Recommendation 17 Unnecessarily complex provisions in corporations and financial services legislation should be simplified, with a particular focus on provisions relating to:

a. the prescribing of forms and other documents;

b. the naming of companies, registrable Australian bodies, foreign companies, and foreign passport funds;

c. the publication of notices and instruments;

d. conditional exemptions;

e. infringement notices and civil penalties;

f. terms defined as having more than one meaning;

g. definitions containing substantive obligations; and

h. definitions that contain the phrase 'in relation to'.

Prescribing documents

3. More than 150 provisions in the *Corporations Act* prescribe the form and content of documents. A range of different approaches are taken to prescribing the form and content of these documents, with a lack of consistency and differing degrees of prescriptiveness. This section focuses on provision-specific documents that serve particular purposes, such as applying for a licence or notifying a person of something. This section is not concerned with documents for which entire regimes exist, such as product disclosure statements and prospectuses.

4. It is helpful to distinguish two types of circumstances in which the form and content of documents are prescribed:

- Documents that are required to be given to Government only, such as to ASIC or the Minister: such documents include application forms and certain types of notices. For example, s 822D of the Act requires licensed CS facilities to lodge a notice with ASIC in the prescribed form.[2]
- Documents that must be given to third parties or published to the general public. For example, s 446C(2) of the Act authorises liquidators to require current and former company officers to give the liquidator a statement in the 'prescribed form'.

5. To implement paragraph (a) of Recommendation 17, provisions in the *Corporations Act* relating to the form of documents should be amended to:

- standardise the identification of provisions in the Act that relate to the content or form of a document; and
- reduce the degree of prescription in the Act and delegated legislation as to the form and content of documents.

6. Significant steps have been taken already to reduce the prescription of the *Corporations Act* in relation to the form and content of documents as part of the modernising business registers ('MBR') program. Recommendation 17 builds on and extends the principles from the MBR program to other provisions of the *Corporations Act,* including to provisions that require documents to be given to ASIC and third parties. Given the scale of the MBR program, this section makes suggestions based on the law as it will be following commencement of the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth), which will simplify

2 'Lodge with ASIC' means 'lodge with ASIC in the prescribed form' by virtue of the definition of 'lodge with ASIC' in s 761A of the *Corporations Act*, and the effect of reg 1.0.05A of the *Corporations Regulations*.

many provisions that currently require information to be given to Government (largely ASIC). The MBR program will result in many references to ASIC being replaced with references to 'the Registrar', with whom documents and other data will be lodged.

Identifying when documents are prescribed

7. It is presently difficult to identify all provisions in the *Corporations Act* pursuant to which the form or content of a document is prescribed. The *Corporations Act* could be amended to clearly indicate in every case when a document is prescribed.

The existing legislation

8. Many provisions of the *Corporations Act* expressly provide that documents must be in a 'prescribed form'.[3] This means that the regulations can prescribe the form of the document.[4] Section 350 of the Act, which applies to documents lodged with ASIC, also provides that if regulations have not provided a 'prescribed form', ASIC can determine the form and content of the document.

9. Regulations also provide that various other documents in the *Corporations Act* must be in a prescribed form, and this is not apparent on the face of the Act.[5] For example, s 446A(5)(a) of the Act does not indicate that the notice required under that provision must be in a prescribed form. A person must have regard to reg 1.0.03A of the *Corporations Regulations* to identify that the notice required under s 446A(5)(a) of the Act must be in a particular form.

10. Additional complexity appears in Chapter 7 of the *Corporations Act*. In that Chapter, 'lodge with ASIC' means 'lodge with ASIC in a prescribed form' when regulations so prescribe. Regulation 1.0.05A of the *Corporations Regulations* in fact prescribes that all references to 'lodge with ASIC', rather than just some, mean 'lodge with ASIC in a prescribed form'. The definition of 'lodge with ASIC' is therefore effectively redundant, and all references to 'lodge with ASIC' effectively mean 'lodge with ASIC in the prescribed form'.

Simplification

11. Standardising the approach would improve readability and reduce the extent to which the Act relies on interactions with delegated legislation. On each occasion that it is intended that the form or content of a particular document may be prescribed, the Act should clearly indicate as such.

12. Some standardisation will be achieved on commencement of the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth) (which may not occur until 2026). This Act amends several provisions in the *Corporations Act* that do not presently indicate that a document may be prescribed, to instead clearly indicate that the document must meet any requirements in the 'data standards', which are contained in delegated legislation. The ALRC suggests that those provisions listed in regs 1.0.03A and 1.0.03B of the *Corporations Regulations* that are not affected by the MBR reforms, such as s 446A(5)(a) of the *Corporations Act*, could be amended to clearly indicate that documents must be in 'the prescribed form'. Additionally, all references to 'lodge with ASIC' in Chapter 7 should be replaced with 'lodge with ASIC in the prescribed form', and the definition of 'lodge with ASIC' in s 761A should be repealed, along with reg 1.0.05A of the *Corporations Regulations*.

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3 See, eg, *Corporations Act 2001* (Cth) ss 348D(2)(c)(i), 475(1), 601PBB(2).

4 Section 1364(2)(b) permits the regulations to prescribe 'forms for the purposes of this Act and the method of verifying any information required by or in those forms'.

5 *Corporations Regulations 2001* (Cth) reg 1.0.03A. The ALRC has identified that the references to ss 265(4)(b), 268(1), and 268(2) in reg 1.0.03A are redundant because these provisions have been repealed.

13. An alternative approach to 'prescribed forms' would be to extend the MBR model of 'data standards' to documents and other data lodged with ASIC. For example, ASIC could be granted a power to make 'ASIC data standards', distinct from 'data standards' made by the Registrar, similar to the power in ss 1270G and 1270H of the *Corporations Act*. Provisions that require a document or other data to be lodged with ASIC could be amended to require that the document or other data 'meet any requirements of the data standards'. Such an approach may prove more robust and adaptive over the long term, as 'ASIC data standards' may support technological neutrality in how documents and data are provided to ASIC to a greater extent than provisions relating to 'prescribed forms'.

14. If the MBR model of 'data standards' is extended to other parts of corporations and financial services legislation, it may be appropriate, after an interval, to review the regime to assess its effectiveness, including the appropriate allocation of material between administrative instruments and legislative instruments. Data standards, which are made as legislative instruments, may result in the creation of a large and highly prescriptive body of delegated legislation regulating how information must be lodged with ASIC or otherwise published. In such cases, and as discussed in Interim Report B,[6] it may be appropriate to make greater use of administrative instruments, with data standards containing a narrower set of obligations.

15. Consideration could also be given to standardising who is responsible for determining the required form and content of 'prescribed forms' (or any replacement data standards, if the model at [13] were introduced). In most cases, ASIC is likely best placed to take that responsibility and to publish document templates, rather than including such detail in regulations. At present, a regulated person must:

- check whether the Act states that a particular document must be in 'the prescribed form';
- if the Act does not refer to a prescribed form — check whether any regulations require the document be in 'the prescribed form';
- if the Act or regulations do refer to a prescribed form — check whether any regulations in fact prescribe the form or content of the document; and
- if regulations do not prescribe the form or content of the document, and if the document must be lodged with ASIC — check whether the form or content of the document are prescribed on ASIC's website.

16. After taking all of these steps, the reader may discover that the form and content of the document have not in fact been prescribed. Some provisions of the Act make this clear by referring to 'the prescribed form (if any)',[7] but most do not. The MBR reforms provide that data standards are to be made by the Registrar, thereby providing for a single responsible person. Consequently, upon commencement of the MBR reforms, readers will no longer need to consult multiple locations to determine the required form and content of relevant documents or data — instead it will be sufficient to consult only the data standards published by the Registrar.

17. One objective of any reforms, including those discussed below, should be the repeal of Schedules 1, 2 and 2A of the *Corporations Regulations*. These schedules appear to have little practical benefit, because many of the forms in these schedules are in image format, or poorly formatted text, are often unsearchable,[8] and the schedules have been poorly maintained. For example, Schedule 1 makes reference to a number of repealed sections of the *Corporations Act*,[9] and purports to prescribe forms in relation to these repealed provisions.

6 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.8]–[8.11].
7 See, eg, *Corporations Act 2001* (Cth) s 445HA.
8 See, eg, Forms 909 and 911. These are in image format and cannot be found by using a word search.
9 *Corporations Regulations 2001* (Cth) sch 1 items 26, 30, 31, 154A.

Reducing prescription in relation to documents

18. There are many instances in which the *Corporations Act* and associated delegated legislation have historically been highly prescriptive in relation to the form and content of documents. There has been an increasing trend towards making the Act more principle-based, and instead using delegated legislation or administrative discretion to prescribe how and when information must be given. This trend has recently culminated in the passage of the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth), which uses new 'data standards' made by the Registrar to replace various 'prescriptive rules in primary legislation that are not uniform, technology neutral or governance neutral'.[10] Among other things, data standards can prescribe 'the manner and form in which … information is given to the Registrar'.[11] The bulk of this reform will commence on or before 1 July 2026.[12]

19. The principles that underlie the MBR program could be extended more broadly to reduce the prescriptiveness of other provisions prescribing the form or content of a document. In particular, the principle that Acts should not contain 'prescriptive rules' in relation to the form or content of documents could be extended to situations in which a document or other information is required to be given to ASIC or another person. Moreover, some requirements as to the form and content of documents may not require prescription in legislation at all, and could be left instead to administrative instruments such as document templates. For example, the 'prescribed form' for applications under s 601DA of the *Corporations Act* is ASIC Form 410, which is published on ASIC's website, and not in any legislative instrument. Likewise, other Acts deal with application forms by giving discretion to agencies receiving the forms, who publish templates on their websites. For example, many social security forms must be 'in a form approved by the Secretary'.[13] An alternative approach, as noted at [13], would be to replace 'prescribed forms' with a requirement that documents or other data must comply with requirements in data standards.

The existing legislation

20. Despite amendments being made by the MBR program and proposed amendments in the modernising business communications ('MBC') program,[14] the *Corporations Act* and *Corporations Regulations* continue to include various provisions that prescribe in detail the form and content of documents. Two examples are illustrative:

- Section 671B of the Act prescribes how information must be given by certain persons to third parties such as relevant market operators. Subsection (3) provides a long list of information that must be included, and subsection (4) requires that the information must be given in the prescribed form and accompanied by various documents. Forms 603, 604, and 605 in Schedule 2 to the *Corporations Regulations* contain the prescribed form as a low-resolution image, which ASIC also publishes on its website as a PDF.
- Section 913A(a) of the Act provides that applications for an AFS licence lodged with ASIC must include the information required by regulations. Regulation 7.6.03 of the *Corporations Regulations* prescribes 10 items of information that must be given to ASIC, but then provides that the application must include 'any other information that ASIC requires for the purpose of considering the application'. The prescription in regulations, as in many other cases, is arguably unnecessary given the administrative discretion granted to ASIC.

10 Explanatory Memorandum, Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 (Cth) [1.30].
11 *Corporations Act 2001* (Cth) s 1270G.
12 *Treasury Laws Amendment (2022 Measures No. 1) Act 2022* (Cth) s 2, sch 4 pt 1. A Proclamation can specify a commencement date before 1 July 2026.
13 See, eg, *Social Security Act 1991* (Cth) ss 957C, 1061ZZGC.
14 See, eg, Treasury Laws Amendment (Modernising Business Communications) Bill 2022 (Cth).

21. Some provisions of the *Corporations Act* explicitly authorise ASIC to prescribe the form and content of a document.[15] However, the default position in the Act is that only regulations can prescribe the form and content of documents that must be in a 'prescribed form' and that are not being given to ASIC. This is because s 350 of the Act, which authorises ASIC to prescribe the form of a document in certain circumstances, applies only if the document must be lodged with ASIC.

22. There also appears to be a trend towards legislative prescription, with introduction of data standards as legislative instruments in the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth). These will replace much of the prescription in the Act related to application forms, but will also move existing prescription from administrative instruments in the form of ASIC templates into delegated legislation. For example, s 601DA of the *Corporations Act* currently prescribes that applications to ASIC to reserve a name must be in the 'prescribed form'. Section 350 of the Act allows ASIC to prescribe the form of the document, which it has done in relation to s 601DA applications in Form 410. As part of the MBR reforms, any prescription as to the form and content of the application will instead need to be contained in the data standards.

Simplification

23. Chapter 8 of Interim Report B discusses general approaches that can be taken to reduce legislative prescriptiveness.[16] This section applies these principles in the context of prescribing the form and content of documents.

24. In relation to documents lodged with ASIC, Government could allow ASIC to approve the form and content of the document under s 350 of the *Corporations Act*, for example by publishing a template of the document on the ASIC website. To achieve this:

- for documents that currently must be in a 'prescribed form' — any detail as to the form and content of the documents could be omitted from legislation; and
- for documents not currently required to be in a 'prescribed form', but for which legislation contains detailed requirements in relation to form and content — the detail could be replaced with a requirement that the document be in a 'prescribed form'.

25. In relation to documents that must be given to third parties or published to the general public, and that are currently required to be in a 'prescribed form', Government could consider enacting a new power for ASIC to approve the form and content of some or all of these documents. This could be modelled on s 350, or involve amendments to s 350 to broaden its application beyond documents lodged with ASIC. Consistent with s 350(1)(b)(ii), any new power should at least include a legal obligation to respond to the matters required by the form.

26. Alternatively, the MBR model could be applied to the *Corporations Act*. The Act could be amended to require that documents and data that must be lodged with ASIC or otherwise published must comply with data standards. Implementation of this approach is discussed above at [13]. This approach would see prescription removed from the *Corporations Act* and *Corporations Regulations* and consolidated in new ASIC data standards. Unlike the model described at [24]–[25], administrative instruments would play little role. As discussed, the operation of any new 'ASIC data standards' model may benefit from periodic review to ensure legislative prescription does not become excessive.

27. It could also be helpful to formally define in the Act the term 'prescribed form'. It is presently not immediately apparent (without reference to ss 350 and 1364(2)(d) of the Act) that the term 'prescribed form' means any form published in regulations or (when applicable) approved by ASIC. In contrast, the *Insolvency Practice Schedule (Corporations)* defines the concept of 'approved form' in s 5-5.

15 See, eg, *Corporations Act 2001* (Cth) ss 912EA(2)(b), 908BD, 908BH.
16 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.7]–[8.11].

Naming provisions

28. The provisions relating to the naming of companies, registrable Australian bodies, foreign companies, and foreign passport funds under the *Corporations Act* are unnecessarily complex. In particular, the ALRC suggests the rules relating to when a name is 'available' could be simplified by making them less prescriptive, more principle-based, and by making better use of administrative discretion and guidance. The ALRC has formed this view in part because ASIC already has significant discretion to approve any name, even if that name is deemed not available by rules in the Act and regulations.[17] In practice, the naming regime is entirely administered through the exercise of significant discretion by ASIC. Recognising this fact could eliminate many of the detailed rules in the Act and regulations, which could be simplified and included in administrative practice and guidance. The naming regime for businesses in the *Business Names Registration Act 2011* (Cth) and the *Business Names Registration (Availability of Names) Determination 2012* (Cth) could also be simplified based on the model explored in this section.

29. Due to amendments in the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth), the Registrar will eventually replace ASIC as the person responsible for approving names. The bulk of this reform will commence on or before 1 July 2026.[18]

The existing legislation

30. A company, registrable Australian body, foreign company, or passport fund can only have a name that is 'available'.[19] The Act has rules for determining whether a name is 'available'.[20] A name will not be available if it is:

- 'identical (under rules set out in the regulations)' to any other name that another body may be using or intending to use (as described more precisely in the Act).[21] The Act's provisions are slightly different for passport funds than for other bodies. Part 1 of Schedule 6 to the *Corporations Regulations* applies when determining whether a name is identical to another;[22]
- 'unacceptable for registration under the regulations'. Parts 2 and 3 of Schedule 6 to the *Corporations Regulations* determine whether a name is 'unacceptable';[23] and
- for companies, registrable Australian bodies, and foreign companies — listed in regulations, unless consent for use of the name is obtained from the person listed in regulations. Parts 4 and 5 of Schedule 6 to the *Corporations Regulations* provide that consents from ministers and regulators are required for the use of certain letters, words, and expressions in a name.[24]

31. Before considering the rules for whether a name is 'identical' or 'unacceptable' in regulations, it is useful to note that provisions of the *Corporations Act* provide that the Minister can consent to the use of any name, even if the name would not otherwise be available because it is identical or unacceptable.[25] The Minister has delegated these powers to ASIC.[26] ASIC therefore currently has discretion to override any of the rules in the Act or regulations and grant a name. Nonetheless, the Act and regulations do constrain the grounds on which ASIC may reject a name — and the principle that ASIC's discretion should be constrained should be preserved under a simplified framework.

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17 *Ministerial Powers (ASIC) Delegations 2021* (Cth) s 9.
18 *Treasury Laws Amendment (2022 Measures No. 1) Act 2022* (Cth) s 2, sch 4 pt 1. A Proclamation can specify a commencement date before 1 July 2026.
19 *Corporations Act 2001* (Cth) ss 148(1), 601DA(1), 1213B(1)(d).
20 Ibid ss 147, 601DC, 1213B(5).
21 Ibid ss 147(1)(a) and (b), 601DC(1)(a) and (b), 1213B(5)(a)(i)–(iv).
22 *Corporations Regulations 2001* (Cth) regs 2B.6.01, 5B.3.01, 8A.4.10.
23 Ibid. Part 2 of Schedule 6 to the *Corporations Regulations* refers to Part 3 of Schedule 6 in item 6203(b)(i).
24 Ibid regs 2B.6.02, 5B.3.02.
25 *Corporations Act 2001* (Cth) ss 147(2)–(3), 601DC(2)–(3), 1213B(6)–(7).
26 *Ministerial Powers (ASIC) Delegations 2021* (Cth) s 9.

The Corporations Regulations

32. Part 1 of Schedule 6 to the *Corporations Regulations* contains a single item that provides a list of matters to be disregarded when determining whether a name is 'identical' to another. These include, for example,

> the type, size and case of letters, the size of any numbers or other characters, and any accents, spaces between letters, numbers or characters, and punctuation marks, used in one or both names.[27]

33. The provision means that ASIC can conclude that a name is identical even if, for example, the only difference between a new name and an existing name is the use of 'Aust' rather than 'Australia'.

34. Part 2 of Schedule 6 consists of three items. Item 6203 sets out the general rules for determining whether a name is unacceptable. These include some principled standards, such as one relating to the undesirability or offensiveness of a name when considering the views of members of the public or members of any section of the public.[28] More prescriptive rules include a prohibition on names that include any of the 27 words or phrases specified in Part 3 of Schedule 6,[29] unless an exemption in item 6204 applies. Similarly, names containing the word 'Commonwealth' or 'Federal' are prohibited, unless ASIC is satisfied that the word is used in a geographical context.[30]

35. Parts 4 and 5 of Schedule 6 include lists of words or phrases for which consent is required, and these lists also specify the person whose consent must be obtained. Thirteen words or phrases have been listed.

Simplification

36. The core of the ALRC's proposed simplification is a regime in which clearly bounded ASIC discretions replace extensive and prescriptive legislative rules, and details are left to administrative guidance and practice.

37. The Act's provisions about when a name is available could be amended to instead provide that ASIC may reject any name as unavailable if, in ASIC's opinion, the name:

- is substantially identical to a name that is reserved or registered under the *Corporations Act* for another body;
- is substantially identical to a name that is held or registered under the *Business Names Registration Act 2011* (Cth) in respect of another individual or body who is not the person applying to have the name;
- for a foreign passport fund — is substantially identical to the name of a managed investment scheme that is the subject of an application for registration that has been lodged under s 601EA but not yet determined;
- for a foreign passport fund — is substantially identical to the name of a foreign passport fund in relation to which a notice of intention under s 1213 has already been lodged;
    - [The four dot points above would replace Part 1 of Schedule 6 of the *Corporations Regulations*.]
- contains words or phrases that could be misleading to members of the public or members of any section of the public;

27 *Corporations Regulations 2001* (Cth) sch 6 pt 1 item 6010(d).
28 Ibid sch 6 pt 2 item 6203(a).
29 Ibid sch 6 pt 2 item 6203(b).
30 Ibid sch 6 pt 2 items 6203(c), 6205.

- [This would replace the prescriptive rules contained in items 6203(b)–(f) and in Part 3 of Schedule 6 to the *Corporations Regulations*. A name would be misleading if, for example, it suggests a connection that does not otherwise exist. This discretion may need broadening or supplementing if it is considered inadequate to capture all words and phrases in Part 3 of Schedule 6. For example, the use of 'consumer' in a name may not always be misleading. It is questionable whether the use of words such as 'consumer' should be prohibited if the use of those words would not be misleading in a particular name.]

- is undesirable, or likely to be offensive to members of the public or members of any section of the public; or
  - [This would replace item 6203(a) of Schedule 6 to the *Corporations Regulations*.]
- contains letters, words, or expressions prescribed by legislative instrument, and for which consent has not been obtained as required by that legislative instrument.
  - [This would replace reg 2B.6.02, and would operate in conjunction with lists equivalent to those currently in Parts 4 and 5 of Schedule 6 to the *Corporations Regulations*. This dot point could be omitted if the policy underpinning the existing lists of names in Parts 4 and 5 would be upheld by the prohibitions above on names that could be misleading, undesirable, or offensive. For example, it is not immediately apparent whether the existing requirement to obtain consent to use 'Anzac' in a name is based on concerns that it may be misleading, or on some other basis.]

38. An important feature of any simplified regime should be that ASIC's discretions remain clear and clearly bounded so that applicants know what to expect when making an application. The ALRC suggests that this objective of predictability in the law does not necessitate the detailed legislative rules currently present in the Act and regulations. The above suggestions would not affect the existing powers of the Minister to approve a name even where ASIC has determined that it is 'unavailable'.[31] This power could remain with the Minister, noting that the Minister has presently delegated the power to ASIC.

Publication of notices and instruments

39. Corporations and financial services legislation mandates a number of different ways that administrative and legislative notices and instruments must be published, creating complexity for users. Many instruments and notices are published in the *ASIC Gazette* or *Business Gazette*. These are poor mediums for publishing because they are difficult to search. In addition, in many cases when legislation states that the *Gazette* must be used, legislative and notifiable instruments are instead used in practice, such that the legislation appears inaccurate on its face. Corporations and financial services legislation may benefit from being modernised to eliminate the use of the *ASIC Gazette* and the *Business Gazette*. In addition, legislation could be modernised so that all relevant provisions clearly indicate how relevant notices and instruments will be published: whether as a legislative instrument, notifiable instrument, or in some other manner that results in the notice or instrument being publicly available and searchable. The *ASIC Gazette* and the *Business Gazette* are not meaningfully searchable.[32]

40. The suggestions in this section only relate to notices and instruments that must already be published in the public domain. Some notices and instruments are not currently subject to publication requirements. For example, exemptions made under ss 340 and 340A of the *Corporations Act* do not need to be published publicly. Proposal B3 in Interim Report B proposes that powers to exempt

31 *Corporations Act 2001* (Cth) ss 147(2)–(3), 601DC(2)–(3), 1213B(6)–(7).

32 While the *Business Gazette* is searchable within each single document, a person would have to download hundreds of individual *Business Gazettes* and establish a database to search across all published *Business Gazettes*.

a person from provisions of Chapter 7 of the *Corporations Act* should be exercised through notifiable instruments, ensuring they are publicly available.

The existing legislation

41. Corporations and financial services legislation largely pre-dates the passage of the *Legislation Act 2003* (Cth) ('*Legislation Act*'),[33] such that many provisions do not refer to 'legislative instruments' and 'notifiable instruments' (concepts introduced by the *Legislation Act*).[34] Instead, corporations and financial services Acts often state that particular notices and instruments must be published in 'the *Gazette*'. For these purposes, ASIC currently publishes the *ASIC Gazette*, as well as the *Business Gazette*, in which businesses and others can publish notices required under legislation.[35] However, in practice, many such notices and instruments are published as legislative instruments or notifiable instruments, and are not found in the *Gazette*. The *Legislation Act* provides that publication as a legislative or notifiable instrument satisfies any obligation to publish in the *Gazette*.[36] However, it is more difficult for readers to find relevant instruments and notices if the relevant legislation does not clearly state the means of publication or how a person might determine the means of publication.

42. Since 2003, reforms to corporations and financial services legislation have introduced requirements that ASIC or other persons must publish instruments and notices as legislative instruments or, more recently, notifiable instruments. Moreover, the definition of 'legislative instrument' in s 8 of the *Legislation Act* includes a functional limb that requires an instrument to be published as a legislative instrument if it meets certain criteria.[37] For example, under the *Legislation Act* an exemption may need to be published as a legislative instrument because it relates to a class of persons, even though the *Corporations Act* may otherwise state that the exemption must be published in the *Gazette*.

43. As a result, there is apparent inconsistency between the publication requirements under the *Legislation Act* and under other legislation. In part, this is because some powers contained in corporations and financial services legislation, including ASIC's exemption and modification powers, may be exercised in relation to either classes of persons or specified persons. When exercised in relation to classes of persons, a legislative instrument is required under the *Legislation Act* (rather than in the *Gazette*). In addition, in a small number of cases, ASIC has published individual relief instruments as notifiable instruments, even though the applicable Act states that the instrument must be published in the *Gazette*.[38]

44. The *ASIC Gazette*, published weekly, is a particularly poor medium for publishing notices. This is because it is published as images, which are not readable or searchable by computers, making the publication of instruments in the *ASIC Gazette* difficult to track and scrutinise. Instruments published in the *ASIC Gazette* can have significant implications for rights, such as when an exemption instrument deprives third parties of rights against the exempt person. While the exempt person will ordinarily be aware of the exemption instrument's publication in the *ASIC Gazette*, third parties will not ordinarily be aware.

45. Several recently introduced provisions containing new individual exemption powers require that exemptions be published as notifiable instruments, including the Asia Region Funds Passport, corporate collective investment vehicle, and deferred sales model reforms.[39]

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33 Formerly the *Legislative Instruments Act 2003* (Cth).
34 Legislative and notifiable instruments must be published on the Federal Register of Legislation.
35 In contrast, some other agencies, such as APRA, routinely publish instruments and notices in the *Commonwealth Gazette*, which is published on the Federal Register of Legislation.
36 *Legislation Act 2003* (Cth) s 11(4).
37 Ibid ss 8(4) See also 56.
38 *ASIC Corporations (Law Societies — Fidelity and Indemnity Schemes) Instrument 2022/435* (Cth) 435; *ASIC Corporations (Law Societies — Statutory Deposit Accounts and Public Purpose Funds) Instrument 2022/436* (Cth) 436.
39 *Corporations Act 2001* (Cth) ss 1217(7), 1243(6); *Australian Securities and Investments Commission Act 2001* (Cth) s 12DY.

Simplification

46. References in corporations and financial services legislation to publication in the *Gazette* should be reviewed to identify whether they should be replaced (on a case-by-case basis) with a requirement to do one of the following:

- make the notice or instrument as a legislative or notifiable instrument, as appropriate; or
- when it would not be appropriate to publish the notice or instrument as a notifiable or legislative instrument — publish in another appropriate manner.

47. When a particular instrument is not to be published as a legislative or notifiable instrument, the alternative means of publication should result in the notice or instrument being publicly available and searchable. It may be appropriate to amend the *Corporations Act* to impose such a requirement on ASIC and/or on other Government agencies that publish corporations and financial services-related instruments or notices.

48. The approach suggested in this section builds on the MBR program and its principles. Simplification should address 'restrictive legislation' that 'has not been modernised in relation to … how to notify regulated entities'[40] and any reforms should be 'technology neutral'.[41] The *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth) will repeal a number of prescriptive publication requirements relating to the *Gazette* and will instead grant to the Registrar power to determine the most appropriate form of publication. For example, s 601AH(4) will be amended so that the requirement for ASIC to 'give notice of a reinstatement in the *Gazette*' is replaced with a requirement for the Registrar to 'publish notice of a reinstatement'.

49. While it is desirable to have flexibility in relation to the publication of instruments and notices that are not published as legislative or notifiable instruments, it is also desirable to minimise the number of locations readers must consult when searching for instruments and notices. Government should, at any point in time, seek to minimise the variety of ways in which it publishes instruments and notices.

50. Replacing existing requirements to publish in the *Gazette* would necessitate making provision-specific judgement decisions. Some general principles could be applied in reviewing provisions that currently require publication in the *Gazette*:

- Provisions should clearly indicate whether the notice or instrument will be published as a legislative instrument, notifiable instrument, or in some other manner.
- Instruments should be published as legislative instruments when they meet the criteria of a legislative instrument in s 8(4) of the *Legislation Act*.[42]
- Notices and instruments authored by government should be published as notifiable instruments when:
    - the criteria in s 8(4) of the *Legislation Act* are not met; and
    - 'public accessibility and centralised management is desirable'.[43] This could include exemptions and modifications in relation to specified persons (individual relief instruments).

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40 Department of the Treasury (Cth), *Modernising Business Registers Program* (Consultation Paper, July 2018) 3.

41 Explanatory Memorandum, Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 (Cth) [1.5].

42 Section 8(4) provides that an instrument is a legislative instrument if the instrument is made in the exercise of a power delegated by the Parliament and any provision of that instrument:
- determines or alters the content of the law, rather than determining cases or particular circumstances in relation to which the law, as set out in an Act or another legislative instrument or provision, is to apply; and
- any provision has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right or varying or removing an obligation or right.

43 Replacement Explanatory Memorandum, Acts and Instruments (Framework Reform) Bill 2014 (Cth) 3.

- Notices required to be published by a business or other non-government person should not be published as legislative or notifiable instruments. Legislative and notifiable instruments are ordinarily made pursuant to a 'power' held by a public body, rather than in accordance with an obligation imposed on a non-government person.[44] Instead, notices published by non-government persons should be published in another manner, and the publication requirement, consistent with the MBC program, should be expressed in a way that is technology neutral. For example, notices published in the *Business Gazette* would often be inappropriate for publication as a legislative or notifiable instrument.

51. Some classes of notice or instrument could arguably be published either as a notifiable instrument or in some other manner determined by the responsible Government agency. For example, Government may wish to consult on whether the following types of instruments, a significant number of which are regularly published, should be notifiable instruments or instead published in some other manner:

- Notices of licence cancellation (for example, s 915B(3)(d) of the *Corporations Act*)
- Banning order instruments (for example, ss 920A and 920B of the *Corporations Act*)
- Notices of proposed foreign company deregistration (s 601CL(4) of the *Corporations Act*)
- Notices of foreign company deregistration (s 601CL(5) of the *Corporations Act*)
- Notices of proposed domestic company deregistration (s 601CC(3) of the *Corporations Act*)
- Notices of domestic company deregistration (s 601CC(4) of the *Corporations Act*)
- Notices of proposed managed investment scheme deregistration (s 601PB(2) of the *Corporations Act*)
- Notices of managed investment scheme deregistration (s 601PB(3) of the *Corporations Act*)
- Notices of proposed alterations to company registration details (s 164(3) of the *Corporations Act*)

52. ASIC could publish data such as that in the dot point list above in periodic notifiable instruments (such as weekly), rather than publishing each separate notice as a different instrument, if this were considered more appropriate and convenient.

53. These principles reflect trends in recent amendments to corporations and financial services legislation, which clearly provide whether a notice or instrument will be published as a legislative instrument, notifiable instrument, or in some other manner. Recent amendments also provide for exemptions from primary legislation to be either legislative instruments — when they relate to a class of persons, products, or services — or notifiable instruments.[45] The principles also have regard to the purpose of notifiable instruments under the *Legislation Act*.

54. The Appendix to this note suggests dozens of Gazettal obligations in corporations and financial services legislation that should be replaced with an obligation to publish as either a legislative or notifiable instrument. The Appendix provides suggestions as to how this could occur.

Resourcing and timeliness implications

55. Any reforms that convert Gazettal obligations into obligations to publish instruments and notices as notifiable instruments may have implications for resourcing and timeliness of publication.

56. ASIC currently publishes hundreds of notices and individual relief instruments in the *ASIC Gazette* annually at little cost. In contrast, ASIC can incur greater costs when publishing notifiable instruments on the Federal Register of Legislation, particularly when a notifiable instrument must be quickly registered and published. The ALRC understands that the potential volume of notifiable

44 See, eg, *Legislation Act* s 11.
45 *Corporations Act 2001* (Cth) ss 1217, 1243; *Australian Securities and Investments Commission Act 2001* (Cth) s 12DY.

instruments means these costs could have significant resourcing implications for ASIC. Government could consider establishing improved intra-government arrangements for publishing large numbers of notifiable instruments or could provide ASIC with additional resources to reflect the additional costs of publication on the Federal Register of Legislation.

57. Additionally, s 12 of the *Legislation Act* provides that notifiable instruments can only commence once registered on the Federal Register of Legislation. In contrast, instruments published in a Gazette can commence before their publication. However, any reforms that require additional instruments to be published as notifiable instruments need not affect the flexibility of the existing regime in this regard. For example, the *Corporations Act* could override s 12 of the *Legislation Act* and permit the earlier commencement of some notifiable instruments.

Conditional exemptions

58. Provisions relating to exemptions and the imposition of conditions in relation to exemptions are unnecessarily complex. They are inconsistent and unclear, in terms of:

- their drafting;
- whether conditions are expressly permitted; and
- the consequences of not complying with a condition on an exemption.

59. Provisions relating to exemptions should be simplified as follows:

- provisions that permit exemptions should expressly permit the imposition of conditions on the exemption; and
- all such provisions should specify a consequence for breach of any condition.

60. Conditions on exemptions should be expressly permitted in each case because, in practice, Government can in any event impose obligations on a person in an 'application' provision, and imposing obligations by way of 'conditions' may allow for more proportionate and tailored consequences for breach of such obligations. There is also an argument that conditions can still be imposed even when not expressly permitted. That being the case, it would be preferable to make it clear on the face of the provision that conditions may be imposed.

61. Exemptions, and obligations that are imposed on persons relying on exemptions, are key tools in the existing regulatory regime. Accordingly, it is appropriate to invest in clarification, simplification, and standardisation of such provisions.

The existing legislation

62. In several dozen provisions, the *Corporations Act* empowers ASIC, the Minister, or regulations to make exemptions for persons, products, services, or circumstances from substantive obligations in the Act. As Table 1 shows, exemption provisions are inconsistently designed in relation to whether ASIC, the Minister, or regulations are permitted to impose conditions, and what the consequences may be for breaching a condition.

Table 1: Inconsistent approaches to exemption conditions

Design feature	Example provisions
No express provision for conditions	155; 601YAB; 742; 798L; 854B; 893A; 1020G; 1045A; 1200T(2)
Breach of condition is a non-strict liability offence	111AS and 111AT (see 111AU(1)); 798D
Breach of condition is a strict liability offence	283GA; 601QA; 655A; 669; 673. These are offences by virtue of s 1311(1) and strict liability under s 1311F.
Breach of condition allows ASIC to seek a court order requiring a person to comply with the condition	111AS and 111AT (see 111AU(2)); 283GA; 601QA; 601YAA; 655A; 669; 673; 907D; 908EB; 926A; 926B; 951B; 992B; 994L; 1020F; 1075A; 1217; 1217A; 1362A
The Act is silent on the consequences for breaching a condition	250PAA; 250PAB; 257D(4); 259C(2); 340; 340A; 341; 341A; 342AA; 342AB; 791C; 798M; 820C; 893B; 911A(5); 1200J(3); 1317AJ

63. Under s 1368, which relates to Chapters 6D and 7 of the *Corporations Act*, the regulations may also prescribe that breach of an exemption condition imposed by regulation is an offence. However, ASIC has no equivalent power to make breach of a condition an offence.

No express consequences for breaching a condition

64. As shown in Table 1, some provisions of the Act are silent on the consequences of breaching a condition. It is therefore not immediately clear what the consequences are for breaching a condition. This is undesirable from a rule of law perspective.

Conditions and application provisions

65. Instruments granting an exemption ordinarily include an 'application' provision that sets out the boundaries of an exemption.[46] The ALRC understands that the consequence for breaching an application provision is that the exemption falls and the person fails to comply with the provision from which they were exempt (generally bringing criminal or civil consequences). There do not appear to be express consequences in the Act for breaching an application provision. Some application provisions impose obligations, as illustrated by Example 1.

Example 1: Obligations in application provisions

Section 155 of the *Corporations Act* does not expressly provide for conditions to be imposed in relation to an exemption made under that section from the obligation to display an ACN on particular documents. However, the exemption in cl 7004 in Schedule 7 of the *Corporations Regulations* (which is made under s 155)[47] is drafted in such a way as to effectively impose an ongoing obligation to remain registered on the Australian Business Register and to display the company's name with other information on public documents and negotiable instruments. A person failing to include the required information on a public document would appear to fall outside the exemption and therefore potentially commit an offence of strict liability under s 153(3).

46 Such a provision may alternatively be referred to as a 'scoping' provision. ASIC refers to such a provision as the 'case'.
47 *Corporations Regulations 2001* (Cth) reg 2B.6.03.

67. Example 2 shows that ASIC can use both application provisions and conditions to impose obligations.

Example 2: Obligations in both conditions and application provisions

ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813 contains both conditions and application provisions that impose significant obligations. Section 5(3) (an application provision) provides that the exemptions apply, inter alia, only if a fundraiser notifies ASIC within 15 days of becoming aware of any breach (or likely breach) of the conditions set out in s 7. This suggests that a person who breaches the conditions in s 7 can continue to rely on the relief (that is, the exemption does not fall) so long as the person continues to comply with the obligations in s 5(3). In addition, s 7 imposes several significant obligations, such as to prepare financial statements and obtain an auditor's report. In the event of any breach of the obligations in s 7, ASIC may apply to court for an order that the person must comply with the conditions (see, for example, s 601QA(1)(a) of the *Corporations Act*).

68. Therefore, in practice, provisions that do not expressly provide for conditions do not limit the ability to impose obligations through an exemption. There also appears to be an argument that conditions may be implicitly permitted even when not expressly authorised.[48] However, provisions that do not expressly permit conditions may limit Government's flexibility in a way that impacts regulated persons — when conditions are not expressly permitted, and obligations are instead imposed in an application provision, any breach of those obligations, even if minor and technical, means that the exemption falls and the person has presumably failed to comply with the provision from which they were exempt. This can bring serious civil and criminal consequences. Uniformly and expressly permitting conditions would ensure Government can better tailor exemptions. That is, Government could impose obligations in the form of conditions when breach should not immediately invalidate reliance on the exemption, and could impose obligations in application provisions when breach should immediately invalidate reliance on the exemption.

Simplification

69. All provisions authorising exemptions should:

- expressly permit conditions to be imposed in relation to the exemption. This is because, in practice, obligations can currently be imposed in relation to exemptions by way of application provisions, and conditions may be implicitly permitted in any event; and
- expressly provide consequences for breaching a condition. This would clarify existing provisions that are currently silent on this issue, and promote meaningful and proportionate enforceability of obligations.

70. Treasury should consider developing a standard design or set of designs for exemption provisions, which should permit the imposition of conditions, and provide a clear set of consequences for breaching a condition. For example, s 331 of the *SIS Act* provides a standard provision for breaches of a condition in an exemption made under the Act. Under s 331(1), a 'person must not, without reasonable excuse, contravene a condition of an exemption'. Breach of this requirement is a strict liability offence and carries a 5 penalty unit penalty. Additionally, if

> a person has contravened a condition of an exemption … the Court may, on the application of the Regulator, order the person to comply with the condition.[49]

48 *Johns v Australian Securities Commission* (1993) 178 CLR 408.

49 *Superannuation Industry (Supervision) Act 1993* (Cth) s 331(2). The 'Regulator' is defined in s 10, and depends on the provision of the Act. It will be either ASIC or APRA.

71. A set of standard provisions such as these could simplify the *Corporations Act* and other corporations and financial services legislation.

Infringement notices and civil penalties

72. The provisions relating to the imposition of civil penalties and infringement notices in the *Corporations Act* are unnecessarily complex. There are similar issues with the architecture for infringement notices and civil penalties in the *ASIC Act* and the *NCCP Act*, as well as various APRA-administered Acts. The observations in this section could also apply to those Acts. Multiple different regimes for infringement notices exist in the *Corporations Act*, and the civil penalty architecture is unnecessarily complex in terms of how civil penalties are created and administered under Part 9.4B. In summary, Government could amend the *Corporations Act* to:

- apply the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) ('*Regulatory Powers Act*') to all infringement notice provisions in the *Corporations Act*; and
- replace the civil penalty architecture in the *Corporations Act* with the standard provisions in the *Regulatory Powers Act*.

73. Government should also consider amending the *Corporations Act* to apply the *Regulatory Powers Act* to the provisions in the *Corporations Act* regarding enforceable undertakings.

74. Applying the *Regulatory Powers Act* more broadly has the potential to reduce the complexity of the statute book generally. Users of legislation, particularly firms and their advisers, would become increasingly familiar with standardised provisions for civil penalties, infringement notices, and enforceable undertakings in that Act. Applying this Act to more aspects of corporations and financial services legislation would achieve significant simplification.

75. The suggestions in this section are not intended to affect the penalties that apply under existing civil penalty provisions in the *Corporations Act*. Penalties were significantly increased following the ASIC Enforcement Review,[50] and these need not change as a result of implementing Recommendation 17. Similarly, the respective amounts specified for particular infringement notices should not be affected by Recommendation 17. The *Regulatory Powers Act* provisions can be tailored when necessary to preserve existing monetary values for civil penalties and infringement notices.

Infringement notices

76. The *Corporations Act* contains the following infringement notice regimes, most of which are Act-specific, in that they do not apply the *Regulatory Powers Act*:

- Section 908CH of the Corporations Act — *Regulatory Powers Act* provisions apply to breaches of the financial benchmark rules and the compelled financial benchmark rules.[51]
- Section 1272F of the Corporations Act — *Regulatory Powers Act* provisions apply to obligations to apply for and have a director identification number.
- Part 9.4AA of the Corporations Act — Act-specific infringement notice regime applies for alleged contraventions of continuous disclosure provisions.
- Part 9.4AB of the Corporations Act — Act-specific infringement notice regime applies for the following provisions:[52]
    - strict liability offences against the Act;
    - absolute liability offences against the Act;

50 Australian Government, *ASIC Enforcement Review Taskforce Report* (2017).

51 Section 908CG(1)(a) also allows the regulations to provide that a person may 'pay a penalty to the Commonwealth' as an alternative to civil proceedings for breaches of the benchmark administrator rules. This appears to suggest that an additional infringement notice regime could in future be established in the regulations.

52 *Corporations Act 2001* (Cth) s 1317DAN.

- other prescribed offences;[53]
- prescribed civil penalty provisions;[54]
- civil penalty provisions of an approved code of conduct; and
- civil penalty provisions of a mandatory code of conduct.

- Part 7.2A, Div 7.2A.2 of the *Corporations Regulations* — Act-specific infringement notice regime applies to breaches of the market integrity rules.
- Part 7.5A, Div 2, Subdiv 2.3 of the *Corporations Regulations* — Act-specific infringement notice regime applies to breaches of the derivative transaction rules and derivative trade repository rules.
- Part 7.8, regs 7.8.05C–7.8.05Q of the *Corporations Regulations* — Act-specific infringement notice regime applies to breaches of the client money reporting rules.

77. There appears to be no principled justification for using the *Regulatory Powers Act* provisions in relation to breaches of the benchmark administrator rules but not for breaches of other rules administered by ASIC. Instead, the creation of infringement notice regimes in the *Corporations Regulations* is likely a product of the fact that these rules were introduced before the *Regulatory Powers Act* commenced.

78. The infringement notice provisions in Parts 9.4AA and 9.4AB were significantly updated as part of 2019 reforms flowing from the ASIC Enforcement Review.[55] The Explanatory Memorandum to the reforms noted that the

> standard framework in the *Regulatory Powers Act* has not been triggered because of the need for a tailored framework that will operate effectively and as intended with the intricacies of each of the respective Acts.[56]

79. Nonetheless, the reforms at least in part reflect the framework contained in the *Regulatory Powers Act*. Government could consider whether the benefits of retaining the extensively tailored *Corporations Act* provisions outweigh the costs that flow from their complexity. Every Act has 'intricacies' — the ALRC's review has suggested that too often such intricacies have been used to justify unnecessary complexity in the *Corporations Act*. Moreover, the *Regulatory Powers Act* provisions have been applied to other parts of the *Corporations Act*, as noted above.

Simplification

80. The *Corporations Act*-specific infringement notice regimes could be replaced with provisions applying Part 5 (Infringement notices) of the *Regulatory Powers Act*. If necessary, the provisions of the *Regulatory Powers Act* could be applied in a tailored way to meet the needs of specific parts of the *Corporations Act*. For example, tailoring will be necessary to preserve the existing infringement notice amounts in the *Corporations Act*, which are higher than in the *Regulatory Powers Act*.[57]

81. Reforms could be staged so that the regimes in the *Corporations Regulations* are first repealed and replaced by amendments to the *Corporations Act*, thereby standardising the infringement notice regimes for breach of ASIC-administered rules. In replacing the infringement notice regime in Part 7.2A Div 7.2A.2 of the *Corporations Regulations*, amendments should ensure that ASIC can preserve the existing arrangements that allow the Markets Disciplinary Panel to issue infringement notices involving alleged contraventions of the market integrity rules by market participants.[58]

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53 *Corporations Regulations 2001* (Cth) reg 9.4AB.01.
54 Ibid reg 9.4AB.02.
55 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).
56 Revised Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) [1.168].
57 See, eg, ss 104(2) and (3) of the *Regulatory Powers Act* compared to s 1317DAP(2) of the *Corporations Act*.
58 Australian Securities and Investments Commission, *Markets Disciplinary Panel* ((Regulatory Guide 216), 2021) [216.4]–[216.15].

82. The second stage could then involve the replacement of Parts 9.4AA and 9.4AB of the Act with provisions applying the *Regulatory Powers Act*. The complex policy settings underlying Part 9.4AB in particular would necessitate a careful application of the *Regulatory Powers Act*.[59]

Civil penalties

83. As discussed in Chapter 8 of Interim Report B in relation to Proposal B17 (A simpler offence and civil penalty architecture), the civil penalty architecture in the *Corporations Act* is unnecessarily complex. Obligations or prohibitions attract civil penalty liability if they are listed in s 1317E(3). Each provision listed in s 1317E(3) has a notation directly underneath it alerting readers to the fact that it is a civil penalty provision. This note-based approach is unnecessarily complex when compared to alternative law design approaches in other Acts, in which each civil penalty provision is clearly indicated in the penalty provision itself, and the maximum penalty amount is specified in the same provision. Including the maximum penalty amount directly under each penalty provision may also encourage appropriately calibrating penalty values to the seriousness of the conduct covered by that provision. In contrast, the existing practice of applying a single maximum penalty value to almost all provisions of the *Corporations Act* does not facilitate consideration of the seriousness of various types of conduct, and consequently of the appropriate maximum penalty amount in each case.

84. The civil penalty architecture, like that for infringement notices, was reformed in 2019 following the ASIC Enforcement Review.[60] The Explanatory Memorandum repeated that the

> standard framework in the *Regulatory Powers Act* has not been triggered because of the need for a tailored framework that will operate effectively and as intended with the intricacies of each of the respective Acts.[61]

85. As discussed at [79], Government should consider whether the benefits of retaining the extensively tailored *Corporations Act* provisions outweigh the costs that flow from their complexity. The benefits of the *Regulatory Powers Act* will never be fully realised if numerous Commonwealth Acts, including most corporations and financial services Acts, are carved out of its application.

Simplification

86. The civil penalty architecture in Part 9.4B of the *Corporations Act* could be replaced with a provision applying Part 4 (Civil penalty provisions) of the *Regulatory Powers Act*. As with infringement notice provisions, the provisions of the *Regulatory Powers Act* relating to civil penalty provisions could be applied with any tailoring necessary to meet the needs of specific parts of the *Corporations Act*. For example, it may be desirable to retain the materiality and seriousness thresholds in s 1317G(1)(b)–(d). Given the complexity of provisions governing how civil penalties are calculated, it may also be desirable to insert notes along with penalties specifying the value of the civil penalty for each civil penalty provision. For example:

> (1) A person must not engage in conduct contrary to a product intervention order that is in force in relation to the person.
>
> Civil penalty: 5,000 penalty units.
>
> Note: Section [equivalent to 1317G(3)–(4)] provides that higher penalties may be payable in some circumstances.

59 For example, the infringement notice provisions apply differently depending on whether the notice is given by ASIC or the Financial Services and Credit Panel, differences that are presently managed through complex notional amendments in s 1317DATB. Likewise, the infringement notice provisions use the concepts of 'restricted civil penalty provisions'. This extensive tailoring could be applied to any extension of the *Regulatory Powers Act* provisions to the *Corporations Act*, or policy settings could be simplified. Nonetheless, the core infringement notice provisions in Pt 9.4AB broadly mirror those in the Part 5 of the *Regulatory Powers Act*, as discussed at [78].

60 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).

61 Revised Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) [1.128].

87. However, in general, tailoring should be resisted as much as possible. The *Regulatory Powers Act* civil penalty provisions have been introduced to a number of corporations-related Acts, such as the *Competition and Consumer Act*, without the need for extensive tailoring.[62]

Enforceable undertakings

88. Although not a primary focus of this recommendation, the enforceable undertaking provisions of the *Corporations Act* are also unnecessarily complex. At least four regimes apply to the Act:

- s 908CI — *Regulatory Powers Act* provisions apply to enforceable undertakings made in relation to alleged breaches of the benchmark administrator rules.
- Part 7.2A, Div 7.2A.1 of the *Corporations Regulations* — Act-specific enforceable undertakings regime applies to alleged breaches of the market integrity rules.
- Part 7.5A, Div 2, Subdiv 2.2 of the *Corporations Regulations* — Act-specific enforceable undertakings regime applies to allleged breaches of the derivative transaction rules and derivative trade repository rules.
- Part 7.8, reg 7.8.05B of the *Corporations Regulations* — Act-specific enforceable undertakings regime applies to alleged breaches of the client money reporting rules.

Simplification

89. The *Corporations Act* could be amended so as to apply Part 6 (Enforceable undertakings) of the *Regulatory Powers Act* to each of the provisions listed in the four dot points above. Such a reform process could also be an opportunity to revise the scope of enforceable undertaking powers in the *Corporations Act*, which have developed in a haphazard manner and cover only a relatively narrow set of provisions in the *Corporations Act*. Given ASIC has various powers to enter into *Corporations Act*-related enforceable undertakings in s 93AA and Part 3A of the *ASIC Act*, any review of enforceable undertaking powers could also consider the *ASIC Act* powers. Section 114 of the *Regulatory Powers Act* is drafted broadly to allow a range of enforceable undertakings, including taking or refraining from taking specified actions. However, Government should ensure that s 114 is sufficiently broad to cover all the types of enforceable undertaking ASIC can currently accept.

90. While enforceable undertaking powers in corporations and financial services legislation appear to have been little used since the Financial Services Royal Commission, they remain a well-accepted part of a regulatory toolkit and it is important to ensure they are appropriately designed.

Terms defined as having more than one meaning

91. Definitions should be consistent so that each word and phrase is used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act.[63] Interim Report A identified several defined terms that take on multiple meanings in the *Corporations Act*, such as ‘property’ and ‘rules’.[64]

62 *Competition and Consumer Act 2010* (Cth) ss 56EU, 56EV.
63 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [5.5]–[5.34].
64 Ibid.

Definitions containing substantive obligations

92. Definitions should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes.[65] Interim Report A identified several defined terms that include substantive obligations.[66] These included the definitions of 'special resolution' and 'extraordinary resolution' in s 9 of the *Corporations Act*.

Selected relational definitions

93. As highlighted in Interim Report A, definitions that incorporate the phrase 'in relation to' can be difficult to interpret.[67] Instead, it is often simpler and clearer to illustrate the use of the defined term in context within the definition itself.

65 Ibid [4.85], [4.96]–[4.106].
66 Ibid.
67 Ibid [5.49]–[5.81].

Appendix

1. The ALRC has developed Table 2 based on the application of the principles set out in [50] of this note regarding the appropriate medium of publication for various types of instruments and notices. Reasonable minds may differ as to the application of these principles in particular cases.

2. For example, there may be reasonable disagreement concerning whether the notice contemplated by s 65 of the *Corporations Act* should be published in the form of a notifiable instrument, or in some other form. Section 65 provides that

> ASIC may declare a body corporate to be an authorised dealer in the short term money market by notice published in the *Gazette*.

3. The ALRC has suggested in Table 2 below that this notice should be published as a notifiable instrument, given the importance of eligible money market dealers in s 543 of the *Corporations Act*. However, reasonable minds could differ on whether such a determination is of general relevance such that 'public accessibility and centralised management is desirable' as expressed in explanatory materials introducing notifiable instruments to the *Legislation Act*. Alternatively, such a notice may be appropriately published in the *Commonwealth Government Notices Gazette*.

Specifying by class

4. Some provisions of the *Corporations Act* appear to be expressed such that they may be exercised in relation to specified persons only, and not in relation to classes of persons, such as s 65 cited above and s 111AT of the *Corporations Act*. However, the effect of s 33(3A) of the *Acts Interpretation Act 1901* (Cth) ('*Acts Interpretation Act*') is that such powers can in fact be exercised in relation to classes of persons or matters. Section 13(3) of the *Legislation Act* includes a similar provision in relation to powers that are to be exercised in the form of legislative and notifiable instruments. The effect of s 33(3A) of the *Acts Interpretation Act* and s 13(3) of the *Legislation Act* should be considered when reviewing provisions requiring particular publication methods. For example, when drafting a power that is intended to be exercised in relation to specified persons only, such that the appropriate publication method may be a notifiable instrument, it may be appropriate for the authorising provision in the Act to specifically provide that:

> The power conferred by [insert relevant provision] does not include the power to exempt a class or kind of person, or to exempt a person from a class or kind of provision.

5. The ALRC's analysis in Table 2 below assumes that powers that appear to be aimed at specified persons, products, or services should not be exercised by way of legislative instrument, and should be accompanied by a provision such as that quoted above. However, inclusion of wording such as that quoted above could change the existing effect of the Act, given that such powers can presently be exercised in relation to a class of persons under s 33(3A) of the *Acts Interpretation Act*.

6. For example, amending s 65 of the *Corporations Act* to read as follows would oust the effect of s 33(3A) of the *Acts Interpretation Act*:

> (1) ASIC may, by notifiable instrument, declare a body corporate to be an authorised dealer in the short term money market.
>
> (2) The power conferred by subsection (1) does not include the power to declare a class or kind of body corporate.

7. However, if s 65 is to be exercised both in relation to specified persons and classes of persons, then the Act should require that:

- where the power is exercised in relation to a class or kind of body corporates — the instrument is a legislative instrument; and
- where the power is exercised in relation to a specified body corporate — the instrument is a notifiable instrument.

Table 2: Examples of replacing Gazettal obligations

Provision	Notes
Corporations Act 2001	
Section 65	Convert ASIC's Gazettal obligation to publication as a notifiable instrument.
Section 111AT	Convert ASIC's Gazettal obligation to publication as a notifiable instrument.
Section 173(6)–(8)	Convert ASIC's Gazettal obligation to publication as a notifiable instrument.
Section 196(1)–(2)	Add requirement that the exemption instrument for the specified person be published as a notifiable instrument.
Section 196(3)–(5)	Convert ASIC's Gazettal obligation to publication as a legislative instrument.
Section 205G(6)–(8)	Convert ASIC's Gazettal obligation to publication as a notifiable instrument.
Section 250PAA(3)	Repeal. Unnecessary by virtue of s 56(1) *Legislation Act 2003*.
Section 250PAB	Convert ASIC's Gazettal obligation to publication as a notifiable instrument.
Section 257B(7)–(8)	Convert ASIC's Gazettal obligation to publication as a legislative instrument. See *ASIC Corporations (Approved Foreign Financial Markets) Instrument 2015/1071* (Cth).
Section 283GA	Specify that, when exercised in relation to a class of persons, the instruments is a legislative instrument. Specify that, when exercised in relation to specified persons, the instruments is a notifiable instrument. Repeal Gazettal obligation.
Section 283GB	Convert ASIC's Gazettal obligation to publication as a notifiable instrument.
Section 341	Convert ASIC's Gazettal obligation to publication as a legislative instrument (see s 342AB(3))
Section 353	Convert ASIC's Gazettal obligation to publication as a legislative instrument.
Section 601CK(7)	Convert ASIC's Gazettal obligation to publication as a notifiable instrument.
Section 601PB	Notifiable instrument. Consider consultation (see [51]).

Provision	Notes
Section 601PC(4)	Notifiable instrument. Consider consultation (see [51]).
Corporations Regulations 2001	
Reg 7.9.74A(5)	Convert ASIC's Gazettal obligation to publication as a legislative instrument.
Reg 7.9.75(6)	
Reg 7.9.75C(4)	
Corporations (Aboriginal and Torres Strait Islander) Act 2006	
Section 18715	Convert Registrar's Gazettal obligation for individual relief to publication as a notifiable instrument. Each provision already requires that class relief be published as a legislative instrument.
Section 22515	
Section 31015	