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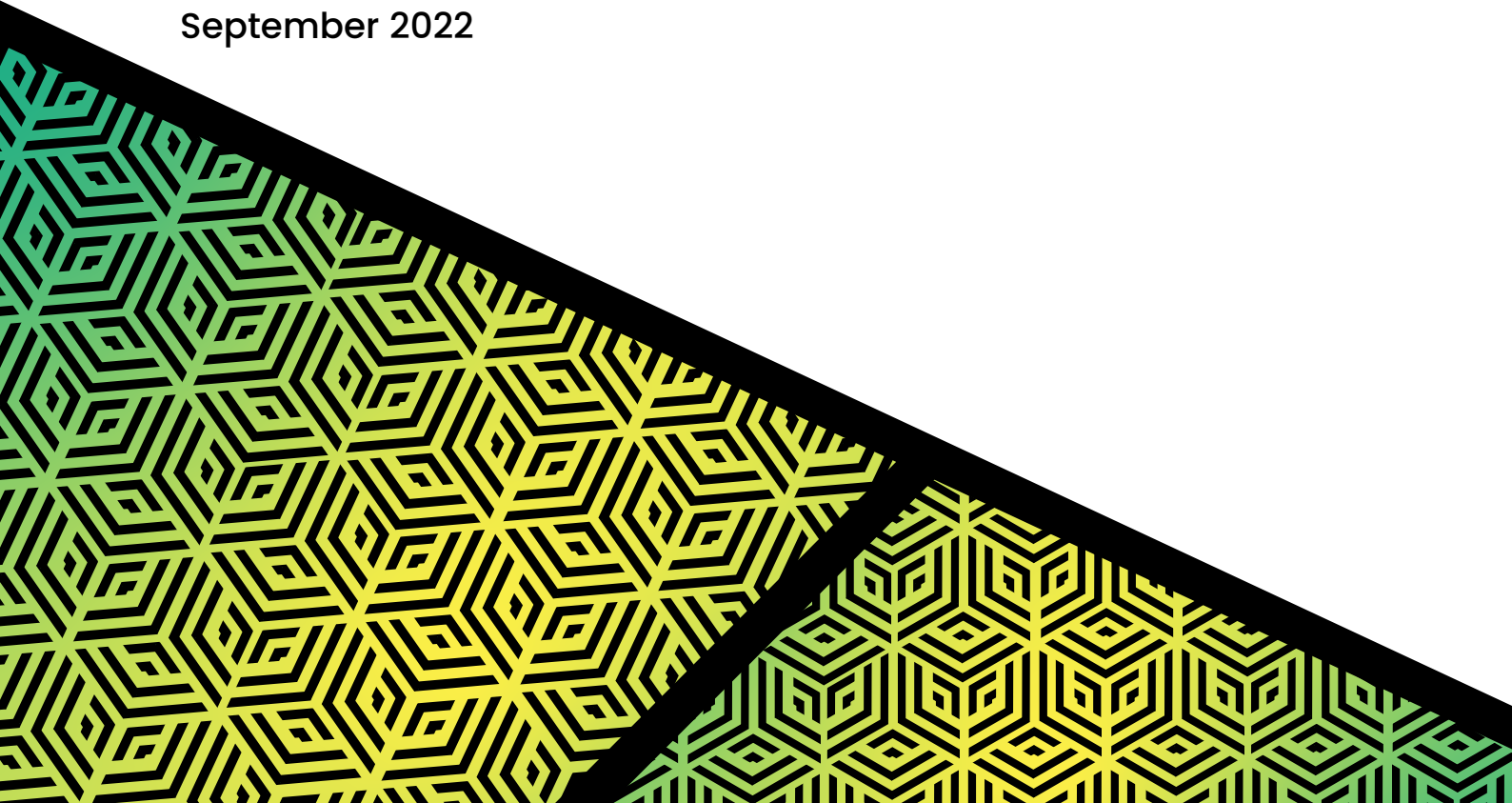
Australian Law Reform Commission

INTERIM REPORT B – ADDITIONAL RESOURCES

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Prototype Legislation B Explanatory Note

September 2022



This document contains the **Explanatory Note** for Prototype Legislation B. The ALRC has prepared Prototype Legislation B to illustrate the application of several key proposals in **Interim Report B** of the Review of the Legislative Framework for Corporations and Financial Services Regulation. These proposals relate to a **proposed legislative model** (Proposals B1–B9) and **simplified use of offences** (Proposal B15). Prototype Legislation B comprises:

- simplified Act provisions focused on fundamental norms, obligations, and the imposition of significant penalties (Prototype Act);
- a ‘Scoping Order’ consolidating exclusions and exemptions, as well as detail to adjust the scope of the Act and its provisions (Prototype Scoping Order); and
- a thematic set of rules containing matters necessary to give effect to the Act in different regulatory contexts (Prototype Rules).

Other documents comprising Prototype Legislation B can be found on the [**ALRC Prototype Legislation webpage**](#).

Interim Report B is the second of three Interim Reports to be published as part of the ALRC’s Review of the Legislative Framework for Corporations and Financial Services Regulation.

[**View Interim Report B and the Summary Report**](#)

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PROTOTYPE LEGISLATION B EXPLANATORY NOTE

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Purpose of Prototype Legislation B

1. The ALRC has prepared Prototype Legislation B to illustrate the application of several key proposals in Interim Report B. These relate to a **proposed legislative model** (Proposals B1–B9) and **simplified use of offences** (Proposal B15). Prototype Legislation B comprises:

- simplified Act provisions focused on fundamental norms, obligations, and the imposition of significant penalties (Prototype Act);
- a ‘Scoping Order’ consolidating exclusions and exemptions, as well as detail to adjust the scope of the Act and its provisions (Prototype Scoping Order); and
- a thematic set of rules containing matters necessary to give effect to the Act in different regulatory contexts (Prototype Rules).

2. The ALRC’s proposed legislative model does not include notional amendments or regulations, and is therefore a ‘two-level’ legislative hierarchy consisting of the Act and thematic legislative instruments, in the form of the Scoping Order and rules. The Australian Securities and Investments Commission (‘ASIC’) and the Minister may make and amend legislative instruments in accordance with Proposal B8.

A shorter, simpler law

3. In addition to demonstrating the flexible and adaptive nature of the ALRC’s proposed legislative model, Prototype Legislation B exemplifies the benefits of ambitious and significant legislative simplification within existing policy settings — the redrafted provisions are easier to read, navigate, and understand. Table 1 shows the length of the existing *Corporations Act 2001* (Cth) (‘*Corporations Act*’) disclosure-related provisions that are replaced by Prototype Legislation B, and the equivalent length of their replacement provisions. Nonetheless, reviewing policy settings would bring further opportunities for simplification.¹

1 See [15].

Table 1: Existing disclosure law and Prototype Legislation B

Existing law	Prototype Legislation B
Act	
<i>Corporations Act</i> : ~36,612 words	Prototype Act: 12,171 words
Delegated legislation	
ASIC legislative instruments: ~5,000 words	Prototype Scoping Order: 6,620 words
<i>Corporations Regulations</i> : ~11,500 words	Prototype Rules: 17,325 words
Total: ~53,112 words	Total: 36,116 words

Overview of Prototype Legislation B

4. Prototype Legislation B illustrates how securities and financial product disclosure provisions in Chapter 6D and Part 7.9 of the *Corporations Act* can be simplified under the ALRC’s proposed legislative model. Prototype Legislation B also includes updated provisions from Prototype Legislation A,² including the definitions of financial product and financial service, as well as obligations relating to financial services licensing. The following section provides a high-level summary of the content and structure of Prototype Legislation B.

Prototype Act

Part 1.2 and Part 7.1 (Definitions)

- These parts include selected definitions for the Prototype Act. The definitions of financial product and financial service in Part 7.1 reflect Proposals A4 and A5 of Interim Report A.³ While the ALRC may further develop these definitions in response to stakeholder feedback, these definitions are included as they are important to understand Prototype Legislation B.
- The terms **securities** and **security** are not used in Prototype Legislation B and are therefore not defined. The Prototype Act provisions apply to all financial products, except where otherwise provided (for example, s 1145(1)). The Prototype Rules are structured so that the definition of securities is unnecessary (see s 10-1).

Part 7.6 (Licensing financial service providers)

- This part includes provisions, updated since Interim Report A, for ss 911A and 911B. The provisions highlight the benefits of the Scoping Order, which would contain almost all exclusions and exemptions from ss 911A and 911B.⁴

Part 7.11A (Scoping orders, financial services rules, and specific exemptions)

- This part implements the architecture for:
 - **Proposals B2–B4, B8**: These provide for the making of scoping orders (**B2**), by ASIC or the Minister (**B8**), which must be accompanied by a statement of consistency with the objects of the Act (**B4**). Under the proposed legislative model, ASIC may grant exemptions to specific persons through a notifiable instrument (**B3**).

² Australian Law Reform Commission, ‘Prototype Legislation’ <<https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>>.

³ Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021).

⁴ Part 6 of the Implementation Order in Prototype Legislation A (which the ALRC suggests be re-labelled ‘Scoping Order’) illustrates how these exclusions and exemptions could be presented in a more navigable way than is presently the case.

- **Proposals B5–B6, B8:** These provide for the making of rules (**B5**), by ASIC or the Minister (**B8**), which must be accompanied by an explanation as to how any rule furthers relevant objects within the Act (**B6**) (although Prototype Legislation B currently adopts the same wording for ss 1097(2) and 1098(2)). The rules accommodate the prescriptive detail necessary for tailoring the regulatory regime to suit different products, services, industry sectors, and circumstances. Rules, consolidated in thematic rulebooks, enable the regulatory regime to be tailored in a more coherent and navigable way than is presently the case.
- **Proposal B9:** When exercising their powers to make scoping orders or rules, ASIC and the Minister must consult with the Rules Advisory Committee. Provisions relating to the establishment of this Committee have not been drafted (s 1098E of the Prototype Act).
- The Act includes a power for scoping orders to insert (or amend or repeal) notes into the Act, or another instrument made under it, highlighting the existence and effect of scoping orders (s 1097(6) of the Prototype Act). This improves the navigability of the regulatory framework.

Chapter 7A (Disclosure about financial products and financial services)

- Prototype Legislation B elevates disclosure to its own chapter in the Act, reflecting the size of disclosure-related law and providing greater thematic consistency. Chapter 7A can create a clear statement of norms which underpin disclosure through an objects clause. The Chapter also embeds a consistent architecture for obligations, offences, and civil penalty provisions, in line with Interim Report B.

Part 7A.2 (Disclosure about financial products)

- Div 1 (Introduction)
 - This division includes provisions for determining the application of Part 7A.2. As a result of merging Chapter 6D and Part 7.9 of the *Corporations Act*, there is no exclusion for securities as currently in Part 7.9.
- Div 2 (When disclosure document must be given)
 - This division provides for circumstances in which a person must prepare and provide financial product disclosure (ss 1111–1115 of the Prototype Act). These obligations are principally placed on issuers of financial products, and in some circumstances sellers of financial products. Provisions requiring disclosure include offences for a failure to prepare and provide disclosure, consistent with a clearer offence architecture.
 - Div 2 includes structural exemptions that apply to both securities and other financial products (ss 1116–1119 of the Prototype Act).
 - Disclosure obligations placed on persons other than an issuer or seller (such as for personal advice, or offering advice recommending a particular product) could be contained in Part 7A.3, which has not been drafted by the ALRC.

- Div 3 (Form and content of disclosure document)
 - This division mandates the core principles for disclosure documents required under Part 7A.2 (s 1125 of the Prototype Act). In particular, disclosure documents must include information required by the Act or the financial services rules, as well as certain other types of information. The core principles also determine the standards to which disclosure must be made. For example, it is unnecessary to include information where it would not be reasonable for a person to expect to find the information in a disclosure document.
 - The division includes provisions establishing the scope of financial services rules relating to financial product disclosure (ss 1126–1130).
- Div 4 (Penalties and remedies for defective disclosure documents)
 - This division includes the definition of **defective** (s 1135) as well as offences and civil penalties for providing defective disclosure (ss 1136–1140).
- Div 5 (Further obligations)
 - This division includes miscellaneous obligations for people who prepare or give disclosure documents under Part 7A.2 — for example, obligations in relation to lodgement of disclosure documents and record keeping.

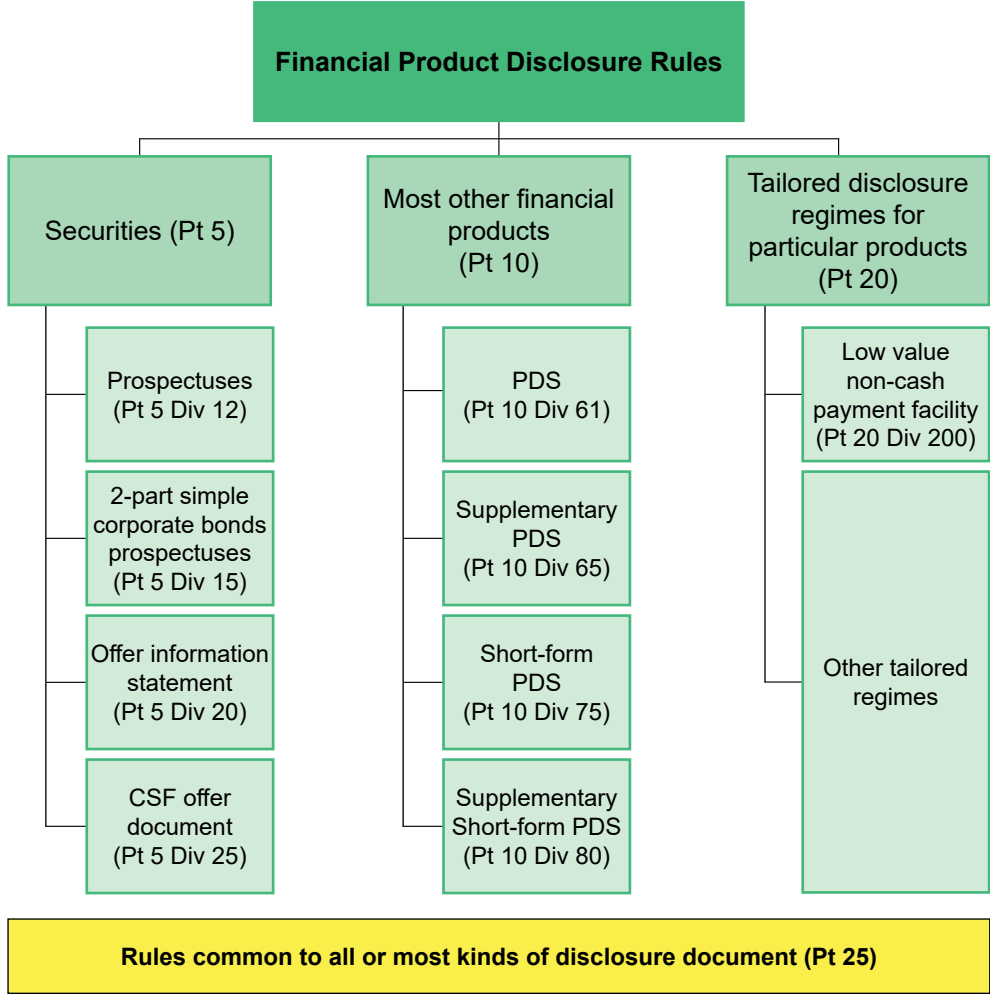
Prototype Scoping Order

- The Prototype Scoping Order is a single, consolidated legislative instrument which contains exclusions and class exemptions from provisions of Chapter 7 and Chapter 7A of the Prototype Act (Disclosure about financial products and financial services), as well as other detail used to adjust the scope of the regulatory regime. The Prototype Scoping Order currently includes general exclusions and exemptions from Chapter 7 of the Prototype Act, and placeholders for exclusions and exemptions from financial services licensing in Part 7.6. The Prototype Scoping Order includes selected exclusions and exemptions from Part 7A.2 of the Prototype Act (Disclosure about financial products).
- The retail client definition has partly been converted into several exemptions in the Prototype Scoping Order, particularly in Part 3 Subdiv 35-D.

Prototype Rules

- Figure 1 shows the general structure of the Prototype Rules. The Prototype Rules currently cover the default form and content requirements for disclosure documents relating to securities (for example, prospectuses) and other financial products (for example, Product Disclosure Statements ('PDSs') and supplementary PDSs). The Prototype Rules also:
 - determine how disclosure is to be provided;
 - provide for various procedural requirements, such as for lodging documents with ASIC or keeping records; and
 - contain some specific requirements for certain financial products or circumstances.
- The Prototype Rules are highly flexible, establishing an architecture to create tailored disclosure regimes for certain financial products, or for creating product-specific rules in relation to existing disclosure documents such as PDSs and prospectuses.

Figure 1: Structure of the Rules in Prototype Legislation B



What is the reverse concordance table?

5. The reverse concordance table (RCT) allows readers of Prototype Legislation B to determine whether and where provisions of Chapter 6D and Part 7.9 of the *Corporations Act* appear in the prototype legislation. The RCT also includes specific detail as to whether and where offences and civil penalties appear in the prototype.

6. The RCT is a table that matches provisions of the existing legislation with the provisions of Prototype Legislation B. The RCT comprises a table of all provisions in Chapter 6D and Part 7.9 of the *Corporations Act*, as well as relevant definitions sections such as ss 9 and 761A. The table includes all regulations and ASIC legislative instruments that affect disclosure provisions. Where a provision of the Act is affected by delegated legislation, additional rows have been added to the table. For each existing disclosure provision, the RCT indicates whether there is an equivalent in Prototype Legislation B. Many provisions are outside the scope of Prototype Legislation B, while others have been rendered unnecessary (such as provisions to make notional amendments). Where an existing provision from Chapter 6D and Part 7.9 of the *Corporations Act* has an equivalent provision in Prototype Legislation B, the RCT indicates where this is to be found.

7. The RCT is available on the ALRC’s Prototype Legislation webpage.⁵ The RCT only covers disclosure-related provisions and therefore does not cover all provisions of Prototype Legislation B. Some provisions in Prototype Legislation B have no equivalent provision in the existing law, while others are not related to disclosure, such as ss 911A and 911B.

Focus on disclosure

8. The ALRC selected disclosure provisions as a priority area for simplification based on stakeholder feedback and ALRC analysis. Disclosure provisions are among the most complex and least coherent provisions in the *Corporations Act*, making extensive use of over 600 notional amendments, dozens of conditional exemptions, and overly prescriptive provisions in the Act. Disclosure also accounts for over 12% of words in substantive provisions of the *Corporations Act*. Reform to disclosure provisions could bring immediate and lasting benefits to a constantly evolving area of law affecting regulated persons, consumers, and investors.

Creating a disclosure chapter of the Corporations Act

9. Prototype Legislation B combines disclosure provisions in Chapter 6D and Part 7.9 of the *Corporations Act* into a single chapter within the Prototype Act for financial product disclosure. In particular, provisions in the *Corporations Act* relating to prospectuses and other forms of securities disclosure have been combined with provisions relating to PDSs.

10. The ALRC adopted this approach because there is significant overlap in the core obligations and principles for securities and other financial product disclosure, even though each is subject to different objectives and considerations. Creating a single disclosure chapter has allowed the ALRC to test how the proposed legislative model reduces overlap and unnecessary inconsistency in legislation,⁶ while preserving flexibility in how the law applies to particular products and persons. Flexibility is preserved through the use of rules, which tailor the form and content of disclosure for securities and other financial products, and preserve different disclosure document types such as prospectuses and PDSs.

Existing policy settings and Prototype Legislation B

11. Prototype Legislation B is broadly intended to reflect the *Corporations Act* and its underlying policy settings as at 21 June 2022. However, Prototype Legislation B sometimes departs from existing policy settings because the policy choices underlying securities disclosure can differ from those underlying other types of financial product disclosure. In limited cases, the ALRC has harmonised the policy settings between Chapter 6D and Part 7.9 of the *Corporations Act*. This has meant, for example, standardising some offences and penalties where similar or identical conduct is subject to different offences and penalties under Chapter 6D and Part 7.9.

12. **The harmonised policy settings in Prototype Legislation B are not intended to be definitive.** The fact that the ALRC has harmonised a provision between securities and other financial product disclosure does not mean the ALRC suggests the policy needs to be changed in this way. For this reason, penalties are presented in square brackets. Policy differences could be preserved in the Act, at the cost of greater complexity in creating tailored provisions, or policy differences could be harmonised in ways different to those presented in Prototype Legislation B.

13. The ALRC has harmonised some policy settings because doing so was necessary in consolidating the Act-level architecture of securities and other financial product disclosure. In

⁵ Australian Law Reform Commission (n 2).

⁶ For example, consolidation has identified the inconsistent approaches taken to disclosure for securities versus other financial products. Minimising these inconsistent approaches would further reduce the need to tailor disclosure provisions for securities compared to other financial products.

most cases, Prototype Legislation B preserves major policy differences through rules and scoping orders, such as in the different forms of disclosure document.⁷

Examples of harmonised or adjusted policy settings in Prototype Legislation B

14. A person preparing a PDS generally need only have regard to the information needs of a person acquiring a product as a retail client.⁸ In contrast, a person preparing a prospectus must consider the needs of both investors and their professional advisers in determining the type of information required for a prospectus.⁹ Prototype Legislation B resolves this policy difference by requiring that persons preparing any type of disclosure document, including PDSs, consider the needs of a person's professional advisers in addition to the client/investor.¹⁰ Standardising the policy appears reasonable given the potential importance of financial advisers to a person's decision whether to acquire a financial product, including products other than securities.

15. Prototype Legislation B removes redundant policy choices. For example, provisions relating to 'profile statements', a type of disclosure document for securities, have been removed. The profile statement provisions are unused to date,¹¹ but could be reintroduced through rules made by the Minister or ASIC under the proposed legislative model.

Preserving policy settings

16. In some cases, Prototype Legislation B shows how different policy settings can be managed through the proposed legislative model. For example, the consequences for failing to lodge a disclosure document differ significantly between securities, where failure to lodge carries 15 years imprisonment,¹² and other financial products, where failure to lodge (where required) carries 2 years imprisonment.¹³ Section 1145 of the Prototype Act illustrates how such policy differences can be managed, alongside the inclusion of prescriptive requirements for lodging in ss 12-15, 15-15, 20-3, and 80-1 of the Prototype Rules. Preserving these differences comes at the cost of greater legal complexity. Further simplification could be achieved with targeted adjustments to policy settings.

17. Departure from existing policy in Prototype Legislation B is indicated in the RCT.

Interaction with Interim Reports

Prototype Legislation B and Interim Report C

18. The restructure of disclosure provisions in Prototype Legislation B foreshadows proposals in Interim Report C. Prototype Legislation B underlines the potential benefits that restructuring and reframing the law could have for the readability and navigability of the *Corporations Act*, particularly where the Act can be structured more thematically. Restructuring has also presented opportunities to reduce inconsistency and overlap.

Interaction with other Interim Report B proposals and recommendations

19. Prototype Legislation B does not implement all Interim Report B proposals and recommendations. For example, the ALRC has not indicated the fault element for all offences in

7 For example, Prototype Legislation B preserves the different disclosure documents applicable to securities, such as prospectuses, and other financial products, which are generally subject to a requirement to prepare a PDS.

8 *Corporations Act 2001* (Cth) s 1013D(1).

9 *Ibid* s 710(1).

10 Prototype Act s 1125(3)–(4).

11 Profile statements can only presently be used for offers of securities where ASIC has approved their use for the kind of offers of securities: *Corporations Act 2001* (Cth) s 709(3). ASIC has not approved any offers to date.

12 *Corporations Act 2001* (Cth) s 727(1).

13 *Ibid* s 1015B(1).

the provision creating the offence (Proposal B18). Instead, Prototype Legislation B is focused on showing the benefits of the proposed legislative model and the simplification that can flow from restructuring and reframing parts of the *Corporations Act*.

20. Prototype Legislation B does not cover all provisions in Chapter 6D and Part 7.9 of the *Corporations Act*. Instead, Prototype Legislation B presents a sample of provisions that demonstrate how the ALRC's proposals could be implemented, such as by moving certain content into rules or the Scoping Order to implement Proposals B1 and B7, and replacing notional amendments consistent with Proposal B10.

Interim Report B proposals in Prototype Legislation B

21. The ALRC's Interim Report B proposals generally relate to Chapter 7 of the *Corporations Act*. However, Prototype Legislation B moves disclosure provisions into a new Chapter 7A, titled 'Disclosure about financial products and financial services'. Prototype Legislation B therefore implements proposals as though references to Chapter 7 were instead references to the new Chapter 7A.

22. Prototype Legislation B includes provisions to implement:

- Proposal B2, related to powers to exclude classes of products and services or exempt classes of persons from provisions of Chapter 7A of the Act, and to set out detail that determines the scope of any provisions of Chapter 7A of the Act;
- Proposal B3, related to a power for ASIC to exempt particular persons from provisions of Chapter 7A of the Act;
- Proposal B5, related to a power to make 'rules' within thematically organised legislative instruments;
- Proposals B4 and B6, related to a requirement that exercises of power under Proposals B2, B3, and B5 should be accompanied by an explanation relating to the objects of Chapter 7A of the Act; and
- Proposal B9, related to the establishment of a 'Rules Advisory Committee' to provide advice on delegated legislation made under Chapter 7A of the Act, and a requirement for the Minister and ASIC to consult this Committee when making rules and scoping orders.

23. Consistent with Proposal B8, Prototype Legislation B provides that powers to make rules and scoping orders would be exercisable by both the Minister and ASIC.

Interim Report A proposals in Prototype Legislation B

24. Prototype Legislation B includes some provisions that were drafted based on proposals in Interim Report A. For example, the definition of **financial product** has been drafted consistent with Proposals A4–A6. Prototype Legislation B removes the concept of **responsible person** for a disclosure document, consistent with Proposal A7.

Scope of Prototype Legislation B

25. Prototype Legislation B focuses on prospectuses and PDSs, as the most important forms of disclosure for financial products. However, the structure of Chapter 7A of the Prototype Act aims to facilitate the creation of a consolidated disclosure chapter that could cover other disclosure documents and requirements. This could include, for example, Financial Services Guides ('FSGs'), short selling disclosure, Commonwealth Government Securities ('CGS') depository interest disclosure, and ongoing fee disclosure.¹⁴ A consolidated Chapter 7A of the Act, and accompanying

¹⁴ A question remains as to whether Statements of Advice would be most appropriately placed in a disclosure chapter or a dedicated set of provisions relating to financial advice.

rules and scoping orders, would consolidate notional amendments and other prescriptive detail that is presently spread across hundreds of regulations and ASIC legislative instruments.

26. At a high level, Prototype Legislation B covers:

- most provisions in Chapter 6D of the *Corporations Act* and *Corporations Regulations 2001* (Cth);
- most provisions in Divs 1 and 2 of Part 7.9 of the *Corporations Act*;
- some provisions in Divs 1 and 2 of Part 7.9 of the *Corporations Regulations 2001* (Cth), including the notional amendments relating to Short-Form PDSs and Supplementary Short-Form PDSs;
- most offence provisions in Div 7 of Part 7.9 of the *Corporations Act* relating to a failure to give disclosure and defective or incomplete disclosure;
- several disclosure-related ASIC legislative instruments, including:
 - *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211*;
 - *ASIC Corporations (Top-up Product Disclosure Statements Relief) Instrument 2016/1054*;
 - *ASIC Corporations (Compromises or Arrangements) Instrument 2015/358*;
 - *ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669*; and
 - *ASIC Corporations (Foreign Small-Scale Offers) Instrument 2015/362*.

Offences in Prototype Legislation B

27. Prototype Legislation B seeks to simplify offences (Proposal B15) while implementing the proposed legislative model. In particular, Prototype Legislation B reflects Proposal B7 in providing that all serious criminal offences, including offences subject to imprisonment, and significant civil penalties are included in the Act rather than delegated legislation. A number of important offences, such as those related to defective disclosure and lodgement of disclosure documents with ASIC, are therefore contained in the Prototype Act.

Simplifying offences

28. The following section discusses how Prototype Legislation B illustrates Proposal B15 relating to the consolidation of offence and penalty provisions. It summarises and supplements further discussion in Chapter 5 of Interim Report B.¹⁵

29. Prototype Legislation B consolidates a number of existing disclosure-related offence and civil penalty provisions into a smaller number of provisions covering the same conduct.¹⁶ For example, in relation to the giving of defective disclosure documents, a total of four provisions in the Prototype Act (three offence provisions and one civil penalty provision) replace seven existing provisions in the *Corporations Act* (five offence provisions and two civil penalty provisions from Chapter 6D and Part 7.9).¹⁷ This is achieved by using the same overarching provisions to cover both securities and other financial products, and by consolidating multiple offence provisions (directed at giving disclosure information to different parties for different purposes) into a smaller number of offences that cover the same range of conduct.

15 See, in particular, Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.30]–[5.39].

16 See, eg, Prototype Legislation B, Act, ss 1136–40.

17 Sections 1136(1), 1137(1), and 1138(4), (6) of the Act in Prototype Legislation B would replace *Corporations Act 2001* (Cth) ss 728(3)–(4), 1021D(1)–(2), 1021E(5), (8), 1021F(1).

30. Two additional sections in Prototype Legislation B criminalise giving defective disclosure information orally in advance of providing a disclosure document.¹⁸ These offence provisions are specified at a more general level than equivalent existing provisions,¹⁹ and the Prototype Act provides the framework for rules to specify circumstances in which such information may be given.²⁰ This results in a more flexible and transparent structure than currently exists for the giving of disclosure information orally under the *Corporations Act*, the detail of which has in any event been substituted by notional amendment.²¹ Prototype Legislation B allows further tailoring for different products or contexts in rules if required.

31. In some cases, consolidation requires reconciling or accommodating different penalties or types of liability currently applicable to the same types of conduct in different contexts.²² This highlights another benefit of the proposed legislative model: it promotes consistency in criminal and civil consequences attaching to the same kinds of conduct.²³ Where differential treatment in different contexts is desired as a matter of policy (for example, creating an offence subject to imprisonment in one context, and a strict liability offence with a low monetary penalty in another), this would be transparently addressed in the Act or Scoping Order.²⁴

32. In achieving consolidation, Prototype Legislation B has not always retained distinctions in knowledge elements or defences for criminalisation of similar conduct concerning different products. For example, s 728(3) of the *Corporations Act* (under Chapter 6D) criminalises the giving of defective disclosure in relation to securities, subject to 15 years imprisonment, but:

- s 731 provides a due diligence defence for prospectuses;
- s 732 provides a lack of knowledge defence for offer information statements and profile statements; and
- s 733 provides a general defence of reasonable reliance on information given by someone else.

33. On the other hand, s 1021D (under Part 7.9) criminalises a preparer *knowingly* giving a defective disclosure document or statement, subject to 15 years imprisonment. A separate offence without a knowledge element (s 1021E) has a penalty of two years imprisonment, and is subject to an exception where due diligence is exercised (s 1021E(3)). These various distinctions are not uniformly reflected in the prototype drafting of consolidated provisions in the Act: see, for example, ss 1136 (knowingly giving defective disclosure, subject to 15 years imprisonment), and 1138 (giving defective disclosure, with an exception where due diligence is exercised, subject to two years imprisonment). If the distinctions were to be maintained, a separate offence with particular defences could be created.

18 Prototype Legislation B, Act, ss 1139–40.

19 *Corporations Act 2001* (Cth) ss 1021FA(1)–(2), 1021FB(1)–(3), (6).

20 Prototype Legislation B, Act, s 1127(4). See further Prototype Legislation B, Rules, s 61–53.

21 Sections 1021FA(1)–(2), and 1021FB(1)–(3), (6) of the *Corporations Act* relate to defective disclosure of information under s 1012G of the *Corporations Act*, which has been substituted with new wording by reg 7.9.15H of the *Corporations Regulations 2001* (Cth).

22 See, for example, Prototype Legislation B, Act, ss 1136, 1138, reflecting offences in ss 728(3) (15 years imprisonment), 1021D(1), (2) (15 years imprisonment), and 1021E(5) (2 years imprisonment) of the *Corporations Act*, with different knowledge elements and defences.

23 An aim encouraged by, for example, the ASIC Enforcement Review: Australian Government, *ASIC Enforcement Review Taskforce Report* (2017) 59–68.

24 See, for example, Prototype Legislation B, Act, s 1146, relating to ss 723(1) (strict liability, 20 penalty units) and 1016A (600 penalty units) of the *Corporations Act*.

Low level offences and penalties in rules

34. At the same time, the proposed legislative model can accommodate particularised offences with low penalties being set out in rules.²⁵

35. In line with the proposals in Interim Report B, rules may create offences (including offences of strict liability) and civil penalties, but any penalties are limited to a maximum of 50 penalty units for an individual or 500 penalty units for a body corporate. The inclusion of this power is broadly consistent with the existing powers in the *Corporations Act* for delegated legislation to create offences.²⁶

36. The Prototype Rules contain several offences that replicate the existing effect of the law. For example, s 35-1 of the Prototype Rules includes a strict liability offence to replicate the existing offence for breaching s 725 of the *Corporations Act*. Under the *Corporations Act*, an infringement notice can be given for a strict liability offence.²⁷ If this position was to be retained, the *Corporations Act* would need to be amended to allow infringement notices to be given for strict liability offences created in rules.²⁸

Specifying the content of offence and penalty provisions in rules

37. Additionally, some offences in Chapter 7A of the Prototype Act rely at least in part on rules to specify their content. For example, the prototype Act provides that certain breaches of rules may be an offence.²⁹

38. To assist navigability, and avoid the risk that behaviour is inadvertently criminalised, some offences only apply to conduct in the Prototype Rules where a rule expressly provides as such. For example, a person will only contravene s 1145 if a rule specifically provides that s 1145 applies to the rule.³⁰ This design approach, in which rules must specify the application of an Act offence, was used where the offence in the Act could not be sufficiently well defined and scoped.

39. On the other hand, as defined in s 1135 of the prototype Act, disclosure will be 'defective' if it does not include particular material required by financial services rules, without requiring that a specific rule explicitly engage s 1135 or associated provisions. This reflects the current law,³¹ and the wide delegation of content is justified because the same section includes a threshold of materiality for failure to include in a disclosure document information required by the rules. This limits the risk that rules will inadvertently create an offence and ensures that breach of a relevant rule has to be meaningful. Technical rules, such as a requirements to lodge a document, will more often need to clearly indicate where the Act makes their breach an offence. For further discussion of relevant considerations when including the content of offence or civil penalty provisions in rules, see Interim Report B [5.40]–[5.52].

25 See, eg, Prototype Legislation B, Rules, ss 35–1(8) (Obligations of issuer or seller), 61–15(4) (Title to be used), 61–20(3) (PDS must be dated).

26 *Corporations Act 2001* (Cth) s 1364(2)(w).

27 See *Corporations Act 2001* (Cth) s 1317DAN.

28 As discussed further in Chapter 5 of Interim Report B, it may be appropriate for additional safeguards to be in place for the creation of strict liability offences in rules: see especially [5.39].

29 See, eg, Prototype Legislation B, Act, ss 1135 (defective disclosure), 1145 (lodgement), 1152 (record-keeping).

30 See, eg, Prototype Legislation B, Rules, s 85-1(7).

31 See *Corporations Act 2001* (Cth), ss 711(8), 728(1)(b), 1013C(1)(a)(i), 1013D(k), 1021B(1).

Implementing the model

40. Fully implementing the ALRC's proposed legislative model across all remaining disclosure-related provisions in Chapter 6D, Part 7.7, and Part 7.9 would be a significant task. Prototype Legislation B covers approximately 20% of Chapter 6D and Part 7.9.

41. There are advantages to applying the proposed legislative model to the remaining disclosure provisions as part of a single reform program, which would 'repeal and replace' the disclosure provisions at one time. Such a program would better identify inconsistent policy and law design choices between different disclosure regimes, such as for securities and other financial products, and could achieve more significant simplification by reducing or eliminating these differences.

42. Alternatively, it would be possible to replace existing disclosure provisions in the *Corporations Act* and delegated legislation in stages, as follows:

- First, implement the model for Chapter 6D, ensuring that there are equivalent provisions for all provisions in the Act, regulations, and ASIC legislative instruments in the new Chapter 7A, Scoping Order, or Rules. This would need to be done with a view to ensuring an Act architecture that is also appropriate for Part 7.9 provisions. A key challenge would be reconciling the offences architecture in Chapter 6D with that in Parts 7.7 and 7.9. This stage should see the development of an Act-level architecture for offences, civil penalties, and civil action that would apply for all disclosure made under a new Chapter 7A and associated rules.
- Secondly, implement the model for Part 7.9 provisions relating to PDSs, including provisions in regulations and delegated legislation. This stage could be further broken down by product type. Many provisions, including notional amendments, relate to superannuation and managed investment schemes.
- Thirdly, implement the model for Part 7.9 provisions relating to more specific disclosure documents, such as periodic statements and CGS information statements.
- Fourthly, implement the model in relation to other Part 7.9 disclosure obligations, such as MySuper dashboards and disclosure under s 1017DA and Part 7.9 Div 5B of the *Corporations Act*.
- Fifthly, implement the model for miscellaneous other provisions that currently appear in Part 7.9, such as advertising of financial products, cooling-off periods, and unsolicited offers to purchase financial products off-market. Some provisions may not be characterised as relating to 'disclosure' and therefore not be moved to a new Chapter 7A or associated rules. Instead, they could be part of a new Chapter or Part relating to consumer rights or obligations on distributors of financial products.

43. Having implemented the model in a new Chapter 7A (covering Chapter 6D and Part 7.9 of the *Corporations Act*), the model could then be extended to Part 7.7 (Financial services disclosure). As a result, Chapter 7A would cover the two central disclosure regimes for financial products and services. This could also be implemented in further stages, as follows:

- First, implement the model in relation to FSGs, ensuring that there are equivalent provisions for all provisions in the Act, regulations, and ASIC legislative instruments in the new Chapter 7A, Scoping Order, or Rules.
- Secondly, implement the model in relation to Statements of Advice, records of advice, and Cash Settlement Fact Sheets.
- Thirdly, implement the model for miscellaneous other provisions, such as general advice warnings, and specified disclosure regimes in regulations and ASIC legislative instruments, such as under s 949B of the *Corporations Act*.

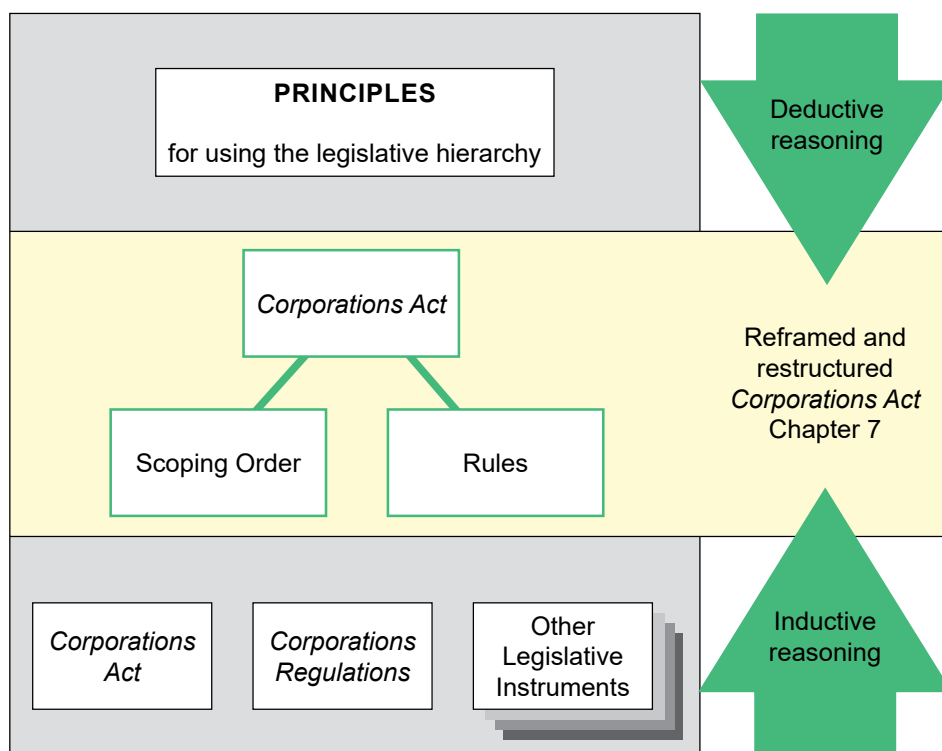
44. The model could also be extended to bring together disclosure provisions in other corporations and financial services Acts in the new Chapter 7A. This could include the Key Facts Sheets regime in the *Insurance Contracts Act 1984* (Cth) and the deferred sales model information statement made under s 12DP of the *Australian Securities and Investments Commission Act 2001* (Cth).

A methodology for implementation

45. As discussed in Chapter 2 of Interim Report B, by applying the proposed legislative model to financial product disclosure and preparing Prototype Legislation B, the ALRC has developed a methodology for restructuring and reframing Chapter 7 of the *Corporations Act*. Figure 2 below illustrates that methodology, showing how deductive (or ‘top-down’) and inductive (or ‘bottom-up’) analysis are used together. In the context of financial product disclosure, this has involved examining the existing law under Chapter 6D and Part 7.9 of the *Corporations Act* to consider how it may best be restructured or reframed, and simultaneously applying a principled approach to using the legislative hierarchy.

46. This methodology could be applied to other aspects of Chapter 7 of the *Corporations Act* to implement Proposals B1–B9. Inevitably, judgement must be exercised in making design choices and in drafting, but this is true of most (if not all) legislative drafting.³² In the ALRC’s view, the methodology outlined here would help to make better-informed and principled judgements about using the legislative hierarchy, resulting in a more coherent legislative scheme.

Figure 2: A methodology for applying the proposed legislative model



32 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.16], [6.107].

Miscellaneous design issues and choices

47. The following issues are also relevant to Prototype Legislation B:

- **Modernising Business Registries:** Legislation due to commence on or before 1 July 2026 will replace many references to ASIC in the *Corporations Act* with references to the Registrar. This would significantly affect Prototype Legislation B. The prototype retains references to ASIC.
- **CSF provisions:** Prototype Legislation B does not include all provisions relating to crowd-sourced funding in Part 6D.3A of the *Corporations Act*. These would need to be included in the Act and rules. Some provisions may be more appropriate for another rulebook, such as provisions relating to cooling-off periods and restrictions on advertising and publicity.
- **Short-form PDS regime:** The Prototype Rules do not include all amendments necessary to fully implement the notional amendments to establish the short-form PDS regime. For example, s 85-15 in the Prototype Rules would need to be extended to short-form PDSs.