



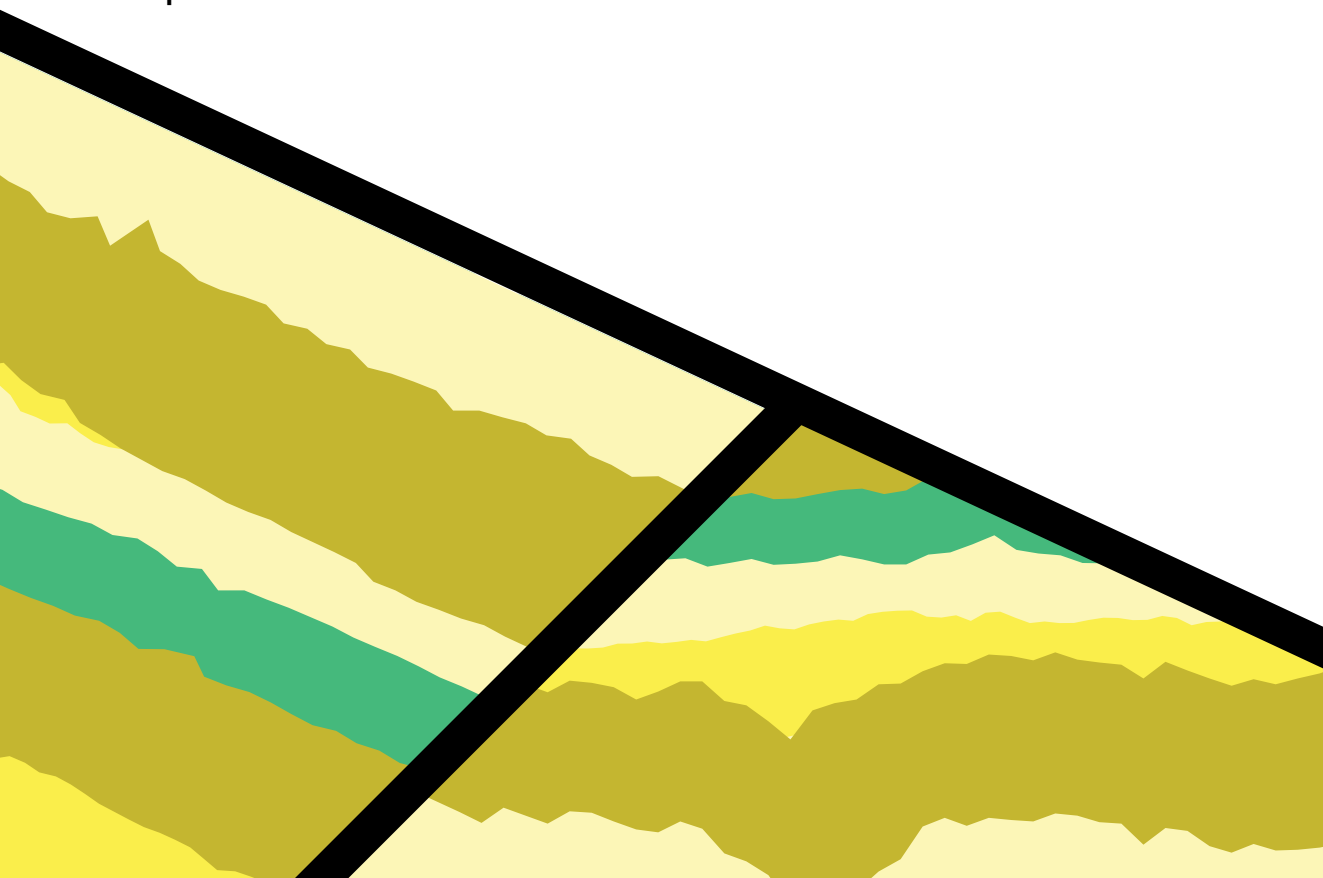
Australian Government

Australian Law Reform Commission

REPORT B: SUMMARY

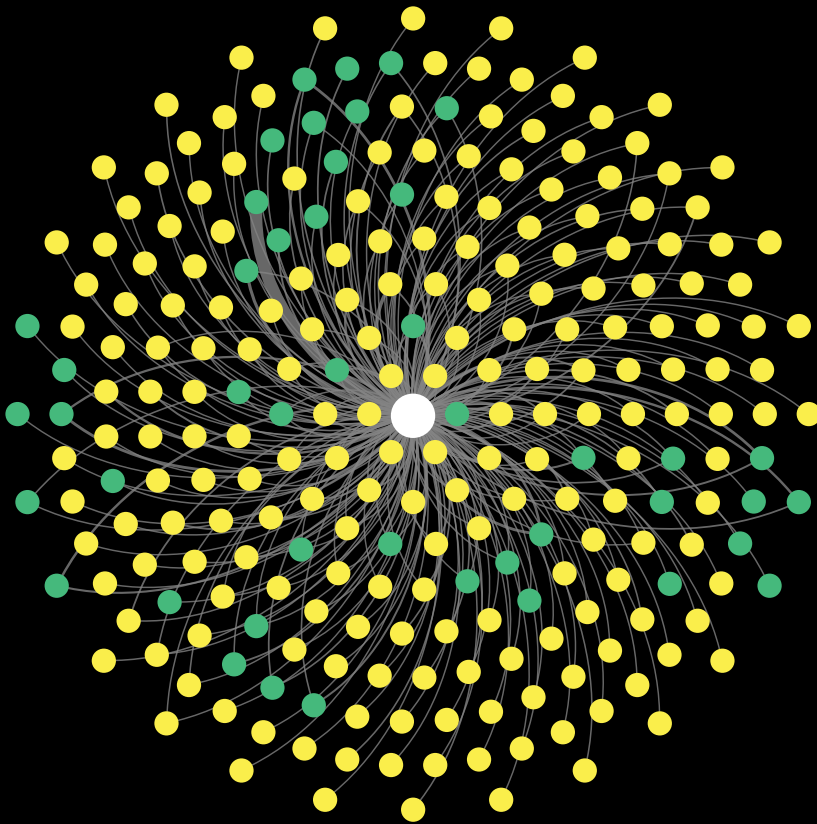
FINANCIAL SERVICES LEGISLATION

ALRC Report 139
September 2022



This visualisation highlights the complex interconnections between the *Corporations Act* and other statutes.

The ALRC's pioneering data collection has offered opportunities to visualise and understand legislative complexity in new and novel ways.



In this image, the central white dot is the *Corporations Act* and each other dot is an Act of Parliament that references or is referenced by the *Corporations Act*. Green represents financial services legislation and yellow represents other legislation. The thickness of each line reflects the number of references to and in each Act. The ALRC's proposals seek to address the complex interconnected nature of the Commonwealth statute book, and increase the navigability of the law.

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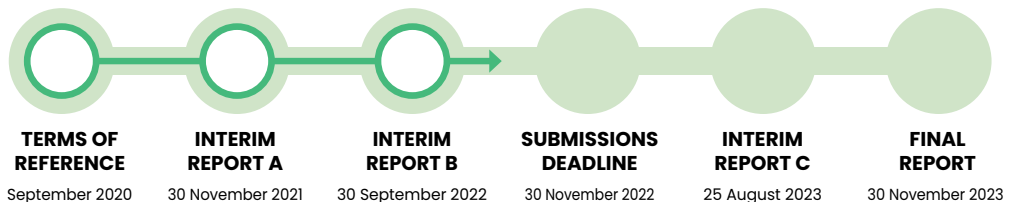
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INTRODUCTION

1. The focus of Interim Report B is the design choices relevant to determining where material is located within the legislative hierarchy, who makes regulation, and how the content of regulation is organised and structured. These issues are closely related to the aim of achieving an ‘adaptive, efficient and navigable legislative framework’. While such topics are relatively technical in nature, the ALRC’s view is that the legislative hierarchy is key to unlocking the byzantine complexity that currently afflicts corporations and financial services laws in Australia.¹

2. The Interim Report is primarily designed to elicit feedback from stakeholders on law reform ideas for the simplification of corporations and financial services laws, with a focus on the proposed legislative model set out in Chapter 2 of the Interim Report. **Submissions are invited until 30 November 2022.**

3. Submissions, together with further consultations, workshops, and seminars, will form part of the evidence base for Interim Report C and the Final Report due to the Attorney-General on 30 November 2023. Interim Report B also includes recommendations in a form that can be considered for immediate or staged implementation as appropriate.



Making a submission

4. The ALRC seeks stakeholder submissions on:

- 16 proposals for reform relating to a legislative hierarchy model and improvements to the design of legislation; and
- two questions in relation to draft guidance on the delegation of legislative power and the use of evidential provisions respectively.

1 For references to the ‘byzantine’ complexity of legislation in relation to corporations and other areas, see, for example, Sir Anthony Mason AC KBE GBM, ‘Corporate Law: The Challenge of Complexity’ (1992) 2(1) *Australian Journal of Corporate Law* 1; The Hon Justice Steven Rares, ‘Competition, Fairness and the Courts’ (Speech, Competition Law Conference, 24 May 2014); Jeannie Marie Paterson and Elise Bant, ‘In the Age of Statutes, Why Do We Still Turn to the Common Law Torts?: Lessons from the Statutory Prohibitions on Misleading Conduct in Australia’ (2016) 23(2) *Torts Law Journal* 139.

5. Submissions made using the form on the ALRC website are preferred. Alternatively, submissions may be emailed to financial.services@alrc.gov.au (ideally in PDF format).

6. The ALRC also welcomes input from stakeholders on any additional matters relevant to the Terms of Reference for this Inquiry, including challenges in understanding obligations and entitlements in the provision of financial products and services, and matters relevant to Interim Report C.

Context

7. On 11 September 2020, the ALRC received Terms of Reference to consider whether the *Corporations Act 2001* (Cth) (*'Corporations Act'*) and the *Corporations Regulations 2001* (Cth) (*'Corporations Regulations'*) could be simplified and rationalised, particularly in relation to:

- A. the use of definitions in corporations and financial services legislation;
- B. the coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards; and
- C. how the provisions in Chapter 7 of the *Corporations Act* and the *Corporations Regulations* could be reframed or restructured.

8. Significantly, the Terms of Reference do not direct the ALRC to consider whether the substantive law by which corporations and financial services are regulated requires reform. Rather, the focus of the Inquiry is the extent to which reform of the existing regulatory framework can be undertaken within the context of existing policy settings.

9. The ALRC's task is not simply to 'tidy up' the legislative framework in service of theoretical objectives. **At the core of this Inquiry is the importance of ensuring the law is fit for purpose**, recognising the dynamic nature of the financial services sector and its significant contribution to the Australian economy. Further, the regulatory framework must meet the needs of consumers of financial products and services when navigating the law to understand their legal entitlements.

10. The Inquiry is set against the background of the Australian Government's response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('the Financial Services Royal Commission') and, in particular, the Government's acceptance of the Commission's call for simplification of the law so that its intent is met.² The Financial Services Royal Commission

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

emphasised in its Final Report that the ‘more complicated the law, the harder it is to see unifying and informing principles and purposes’.³

11. The Terms of Reference for this Inquiry require the ALRC to survey the gamut of corporations and financial services legislation and make recommendations for simplification, with the aim of promoting meaningful compliance with the substance and intent of the law, and laying the foundations for an adaptive, efficient, and navigable legislative framework.

12. This is the second Interim Report for this Inquiry. In many respects, **this is the most critical Interim Report and comes at an important juncture in the Inquiry**. There is a level of consensus among stakeholders that the law has become unmanageably and unnecessarily complex, and there is significant appetite and impetus for change.⁴ As significant and frequent amendments to the law continue to be made, the level of complexity will only continue to grow in coming years.⁵ Consequently, the sooner reforms can be made to the regulatory architecture, the easier they will be to implement. Conversely, **the longer that the existing ad hoc legislative design choices remain entrenched, the more difficult, time-consuming, and expensive it will become to untangle the complexity that inevitably accretes**. Accordingly, there is an urgent need to create a legislative structure that is fit for purpose and that can accommodate future policy initiatives. The Financial Services Royal Commission observed that ‘the very size of the [simplification] task shows why it must be tackled’.⁶ The steadily and ever-increasing size of the task shows why it must be tackled sooner rather than later.

13. While it is difficult to estimate with any precision the true cost of the current complexity of the regulatory regime, there is no dispute that costs are daunting, and increasing, in relation to:

- compliance for regulated entities;
- administration for government agencies; and
- advice and representation for those seeking to understand and uphold their rights.

14. Inevitably there would be transition costs in any reforms to the regulatory architecture, including government investment in legislative amendments, and the time required for users of the legislation to adjust to new arrangements. However, these **costs may be effectively managed over time by staggering the implementation of reforms**. Reform should be prioritised for relatively discrete

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

4 Australian Law Reform Commission, ‘Initial Stakeholder Views’ (Background Paper FSL1, June 2021).

5 See, for example, *Corporate Collective Investment Vehicle Framework and Other Measures Act 2022* (Cth), which recently added 200 pages to the *Corporations Act*.

6 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 3) 495.

and standalone topics of regulation that might reap the greatest benefits from simplification. The ALRC has identified some priority topics in Chapter 7 of the *Corporations Act*, such as disclosure and licensing obligations, and will continue to address issues of prioritisation and staged implementation in future reports.

Unpacking the problem

15. On a variety of complexity metrics, such as structural intricacy, obligations, conditional statements, potentially duplicative provisions, prescription, language, and thematic diversity, the *Corporations Act* often stands in a class of its own.⁷

16. **Many stakeholders have identified navigability of the law as a key concern** — it is too difficult to locate relevant parts of the law, and even experienced lawyers cannot always be confident that they are taking into account all relevant provisions and instruments on a particular issue without ‘missing something’.

17. The reform recommendations, proposals, and questions in the Interim Report have been developed following consultations with stakeholders, as well as empirical and comparative research. Rigorous data-based empirical research has been undertaken to explore different approaches to law design and legislative hierarchies across the Commonwealth statute book. Wide-ranging comparative research has explored approaches taken in other comparable jurisdictions.

18. The empirical research situates the law design choices evident in corporations and financial services legislation within the broader body of Commonwealth law, with particular regard to how primary legislation and delegated legislation are used. The research suggests that **particular design choices made in relation to the *Corporations Act* are significant sources of complexity. Alternative approaches to law design, which preserve flexibility and adaptability, would reduce the complexity of corporations and financial services legislation while improving navigability.**

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

19. The key takeaways from the ALRC's empirical research are that:


- **The *Corporations Act* uses delegated legislation in unusual ways, creating unnecessary complexity**, particularly through notional amendments and proliferating, but often unused, powers.
- **The *Corporations Act* lacks a coherent legislative hierarchy** in its placement of provisions in the Act, delegated legislation, administrative instruments, or regulatory guidance.
- The *Corporations Act*, *National Consumer Credit Protection Act 2009* (Cth), and *Australian Securities and Investments Commission Act 2001* (Cth) use less delegated legislation (as a percentage of the primary legislation) than a range of other regulatory regimes in which technical expertise, flexibility, and adaptability are similarly important, such as civil aviation, maritime regulation, and prudential regulation. **Accordingly, there is scope to make more effective use of delegated legislation.**
- **Law design practices have struggled to cope with the complexity of the *Corporations Act***, and reforms are often designed and implemented over very short timeframes. As a result, subsequent amendments (often notional) and exemptions are frequently required to clarify the law and fix potential problems.
- Corporations and financial services primary legislation contains a large number of offence and penalty provisions, while delegated legislation includes few, relative to other areas of Commonwealth law. **The legislative hierarchy may be more principled and coherent if, for example, the *Corporations Act* were less prescriptive, and low penalty unit offences were in delegated legislation.**
- Parliamentary scrutiny committees' concerns may reflect a divergence between the expectations of Parliament and the Executive as to the appropriate design and use of delegated legislation. **Accordingly, there is a need to improve guidance on the design and use of delegated legislation.**

20. The data presented in the Interim Report represents the first comprehensive analysis of all Commonwealth delegated legislation. The work has been influenced by quantitative and qualitative analysis undertaken in the United Kingdom ('UK'),⁸ and updates and enhances some of the earlier accounts of Australian delegated legislation offered by the former Senate Standing Committee on Regulations and Ordinances.⁹

8 Edward C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Hart Publishing, 2001).

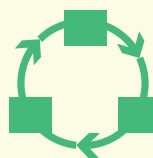
9 Dennis Pearce AO and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5th ed, 2017) 16–17.

RECOMMENDATIONS

Technical Simplification		
Chapter 7		
Recommendation	14	<p>Redundant and spent provisions in corporations and financial services legislation should be repealed, including:</p> <ul style="list-style-type: none">a. spent transitional provisions;b. spent legislative instruments;c. redundant definitions;d. cross-references to repealed provisions; ande. redundant regulation-making powers.
Recommendation	15	<p>The Department of the Treasury (Cth) and the Australian Securities and Investments Commission should establish an ongoing program to:</p> <ul style="list-style-type: none">a. identify and facilitate the repeal of redundant and spent provisions; andb. prevent the accumulation of such provisions.
Recommendation	16	<p>Corporations and financial services legislation should be amended to address:</p> <ul style="list-style-type: none">a. unclear or incorrect provisions;b. outdated notes relating to 'strict liability'; andc. outdated references to 'guilty of an offence'.

Simpler Law Design

Chapter 8



Recommendation	17	<p>Unnecessarily complex provisions in corporations and financial services legislation should be simplified, with a particular focus on provisions relating to:</p> <ul style="list-style-type: none">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; andh. definitions that contain the phrase 'in relation to'.
Recommendation	18	<p>Generally applicable notional amendments to corporations and financial services legislation should be replaced with textual amendments to the notionally amended legislation.</p>

Enhancing Navigability

Chapter 9



Recommendation

19

The Australian Securities and Investments Commission should publish additional freely available electronic materials designed to help users navigate the legislation it administers. Such materials should include annotated versions of the *Corporations Act 2001* (Cth), *National Consumer Credit Protection Act 2009* (Cth), and *Australian Securities and Investments Commission Act 2001* (Cth).

PROPOSALS AND QUESTIONS

The Proposed Legislative Model

Chapter 2



Proposal	B1	<p>The legislative hierarchy of Chapter 7 of the <i>Corporations Act 2001</i> (Cth) should be amended, in a staged process, to implement a legislative model that incorporates Proposals B2–B9. The legislative hierarchy should comprise:</p> <ol style="list-style-type: none"> an Act legislating fundamental norms and obligations, and other provisions appropriately enacted only by Parliament; a Scoping Order (a single consolidated legislative instrument) containing exclusions, class exemptions, and other detail necessary for adjusting the scope of the Act; and thematic ‘rulebooks’ (consolidated legislative instruments) containing rules giving effect to the Act in different regulatory contexts as appropriate.
Proposal	B2	<p>Chapter 7 of the <i>Corporations Act 2001</i> (Cth) should be amended to include a power to:</p> <ol style="list-style-type: none"> exclude classes of products and services or exempt classes of persons from provisions of Chapter 7 of the Act; and set out detail that adjusts the scope of any provisions in Chapter 7 of the Act; <p>in the Scoping Order.</p>
Proposal	B3	<p>Chapter 7 of the <i>Corporations Act 2001</i> (Cth) should be amended to include a power vested in the Australian Securities and Investments Commission to exempt a person from provisions of Chapter 7 of the Act by notifiable instrument (commonly known as ‘individual relief’).</p>

The Proposed Legislative Model

Chapter 2



Proposal	B4	<p>Chapter 7 of the <i>Corporations Act 2001</i> (Cth) should be amended to require that:</p> <ol style="list-style-type: none">every legislative instrument made under the power set out in Proposal B2; andevery notifiable instrument made under the power set out in Proposal B3; <p>must be accompanied by a statement explaining how the instrument is consistent with relevant objects within Chapter 7.</p>
Proposal	B5	<p>Chapter 7 of the <i>Corporations Act 2001</i> (Cth) should be amended to include a power to make 'rules'.</p>
Proposal	B6	<p>Chapter 7 of the <i>Corporations Act 2001</i> (Cth) should be amended to require that the explanatory statement accompanying every legislative instrument made under the power in Proposal B5 must address explicitly how the instrument furthers relevant objects within Chapter 7.</p>
Proposal	B7	<p>Rules made under Chapter 7 of the <i>Corporations Act 2001</i> (Cth) should not contain matters more appropriately enacted in primary legislation, particularly:</p> <ol style="list-style-type: none">serious criminal offences, including offences subject to imprisonment, and significant civil penalties;administrative penalties; andpowers enabling regulators to take discretionary administrative action.

The Proposed Legislative Model

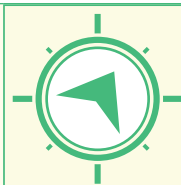
Chapter 2



Proposal	B8	<p>The powers set out in Proposal B2 and Proposal B5 should be vested in:</p> <ol style="list-style-type: none"> the Minister; and the Australian Securities and Investments Commission. <p>A protocol between the Minister and the Australian Securities and Investments Commission should coordinate the exercise of the powers.</p>
Proposal	B9	<p>Chapter 7 of the <i>Corporations Act 2001</i> (Cth) should be amended to:</p> <ol style="list-style-type: none"> establish an independent 'Rules Advisory Committee'; and require the Minister and ASIC to consult the Rules Advisory Committee and the public before making or amending any provisions of the Scoping Order or rules.
Proposal	B10	<p>As part of the staged implementation of the proposed legislative model, existing powers to omit, modify, or vary relevant provisions of Chapter 7 of the <i>Corporations Act 2001</i> (Cth) by regulation or other instrument should be repealed.</p>
Proposal	B11	<p>As part of the staged implementation of the proposed legislative model, relevant existing powers to:</p> <ol style="list-style-type: none"> exclude products or services; and exempt a person or class of persons; <p>from the operation of all or specified provisions of Chapter 7 of the <i>Corporations Act 2001</i> (Cth) by regulation or other instrument should be repealed.</p>

What Goes Where

Chapter 3



Proposal	B12	The Attorney-General's Department (Cth), in consultation with the Office of Parliamentary Counsel (Cth) and the Department of the Prime Minister and Cabinet, should publish and maintain consolidated guidance on the delegation of legislative power.
Question	B13	Does the Draft Guidance included in this Interim Report: <ul style="list-style-type: none">a. adequately capture the principles that should guide the design of provisions that delegate legislative power;b. adequately capture the extent to which it is appropriate for delegated legislation to specify the content of offences or civil penalty provisions otherwise created by an Act; andc. express the applicable principles with sufficient clarity?
Proposal	B14	In order to support best practice legislative design, the Office of Parliamentary Counsel (Cth) should establish and support a Community of Practice for those involved in preparing legislative drafting instructions, drafting legislative and notifiable instruments, and associated roles.

Offences and Penalties

Chapter 5



Proposal

B15

In order to implement Proposal B1, offence and penalty provisions in corporations and financial services legislation should be consolidated into a smaller number of provisions covering the same conduct.

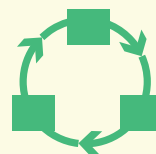
Question

B16

Should rulebooks contain 'evidential provisions' that are not directly enforceable but, if breached or satisfied, may evidence contravention of, or compliance with, specified rules or provisions of primary legislation?

Simpler Law Design

Chapter 7



Proposal

B17

The *Corporations Act 2001* (Cth) should be amended so that each offence and civil penalty provision, and the consequences of any breach, are identifiable from the text of the provision itself.

Proposal

B18

Offence provisions in corporations and financial services legislation should be amended to specify any applicable fault element.

ANALYSIS

A legislative model for financial services

21. In Chapter 2 of the Interim Report, the ALRC sets out 11 law reform proposals which, taken together, further develop a legislative model for corporations and financial services laws first introduced in Interim Report A. This model could be implemented in stages, reflecting the scale of the reform task.

22. A principled legislative hierarchy — such as the proposed legislative model — would better manage legislative complexity, maintain regulatory flexibility, and address unforeseen circumstances or unintended consequences of regulatory arrangements.

Overview of the proposed legislative model

23. The legislative model proposed by the ALRC comprises the following elements:

- a de-cluttered Act of Parliament, which contains key obligations, prohibitions, powers, serious offences, significant civil penalties, and other provisions appropriately enacted only by Parliament — so as to embody the core policy of the regulatory regime;
- a single, consolidated legislative instrument ('Scoping Order') containing the vast majority of exclusions and exemptions from the Act (these are currently spread across the legislative hierarchy) and other detail necessary for adjusting the scope of the Act;¹⁰ and
- thematically consolidated rules, which for convenience may be labelled 'rulebooks', containing prescriptive detail (also currently spread across the legislative hierarchy).

24. This legislative model enables significant simplification of the *Corporations Act*, which currently contains large amounts of prescriptive detail, and creates a coherent and navigable legislative hierarchy. Importantly (particularly given the requirement for this Inquiry to proceed 'within existing policy settings'), the model accommodates the following key characteristics that currently underpin the regulatory architecture for financial products and services:

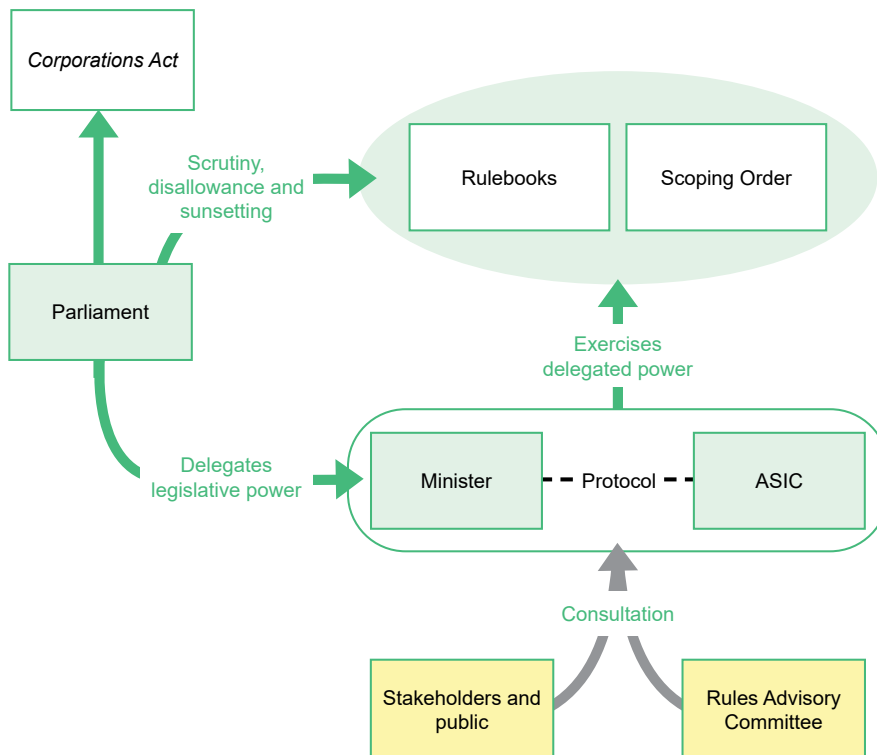
- the fundamental policy flowing from the Wallis Inquiry that a wide range of functionally equivalent financial products and services should be regulated in an equivalent way;

10 In Interim Report A, this instrument was identified as an 'Implementation Order'. As explained in Chapter 2 of Interim Report B, however, a more appropriate label may be a 'Scoping Order'.

- the use of delegated legislation to manage the over-inclusiveness that has resulted from the adoption of functional definitions in pursuing that fundamental policy, for example by using delegated legislation to tailor aspects of the regime as appropriate; and
- the ability to accommodate the regulation of new and emerging products and services.¹¹

25. Each of the model's features is discussed below. Figure 1 gives a simplified, visual overview of the proposed legislative model.

Figure 1: The proposed legislative model



11 For a description of some of these issues and related issues, see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.12].

Applying the model to financial product disclosure

26. The ALRC has prepared prototype legislation ('Prototype Legislation B'), available on the [ALRC website](#), to illustrate how the proposed legislative model could be applied in relation to financial product disclosure. It shows how large parts of the current law relating to financial product disclosure could be reframed and restructured, within existing policy settings.

27. Prototype Legislation B demonstrates a more principled allocation of material between the different 'layers' of the legislative hierarchy than is presently the case ('vertical' coherence). Prototype Legislation B also illustrates how the proposed legislative model can accommodate 'horizontal' integration (across different parts of legislation) where the fundamental policy of different regulatory regimes is similar, but some level of tailoring is necessary to accommodate particular products and industries. It does this by showing how the currently distinct regulatory disclosure regimes in the *Corporations Act*, established by each of Chapter 6D (corporate fundraising through the issue of securities) and Part 7.9 (financial product disclosure), could be integrated and simplified.¹² Figure 2 demonstrates how Prototype Legislation B accommodates the overlap and divergences between those two regimes.

28. A Reverse Concordance Table published on the [ALRC website](#) enables readers to identify the existing statutory provisions that are reflected in Prototype Legislation B. The Table also indicates the respects in which Prototype Legislation B differs from the existing law in a way that may affect underlying policy. This may occur, for example, where the maximum penalties for similar offences under the respective Chapter 6D and Part 7.9 regimes presently differ, but have been made consistent in Prototype Legislation B.

29. Other suitable themes for reform and thematic rulebooks would include: the Australian financial services ('AFS') licensing regime;¹³ financial advice; and conduct requirements relating to client property and financial records.¹⁴ Figure 3 below illustrates how the proposed legislative model could be applied to the AFS licensing regime. The reframing and restructuring of provisions relating to financial advice could coincide with any substantive reforms arising out of the Quality of

12 For discussion of the disclosure regimes in Chapter 6D and Part 7.9 of the *Corporations Act* see Phoebe Tapley and Andrew Godwin, 'Disclosure (Dis)Content: Regulating Disclosure in Prospectuses and Product Disclosure Statements' (2021) 38 *Company and Securities Law Journal* 315.

13 *Corporations Act 2001* (Cth) pt 7.6. As discussed in Interim Report A, Prototype Legislation A demonstrates how the obligation to hold an AFS licence and a large range of exemptions from that obligation can be simplified under the ALRC's proposed legislative model: see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.115]–[10.122].

14 *Corporations Act 2001* (Cth) pt 7.8.

Advice Review currently being undertaken by the Department of the Treasury (Cth) ('Treasury') with the support of an independent reviewer.

Figure 2: Integration of disclosure regimes

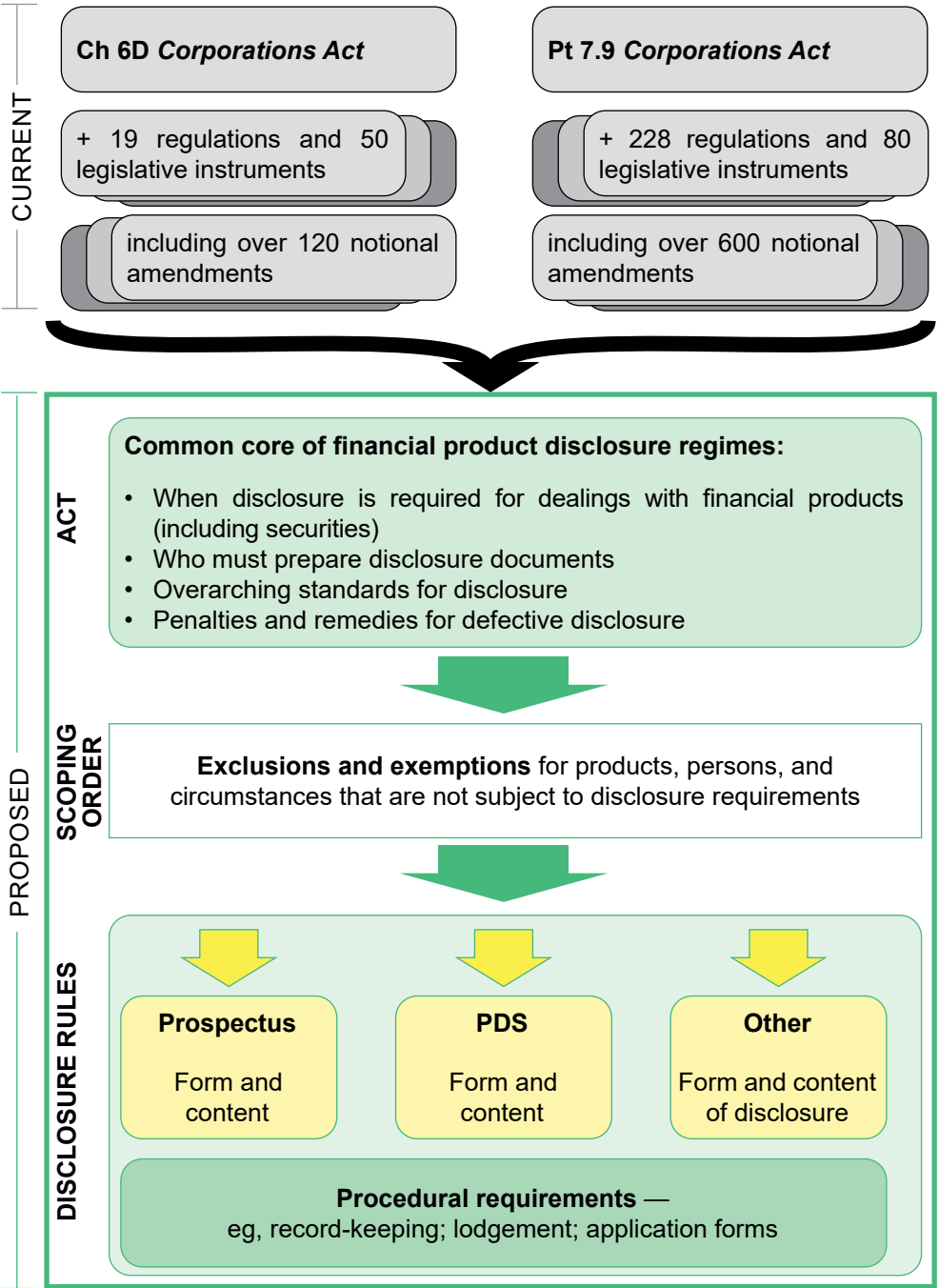
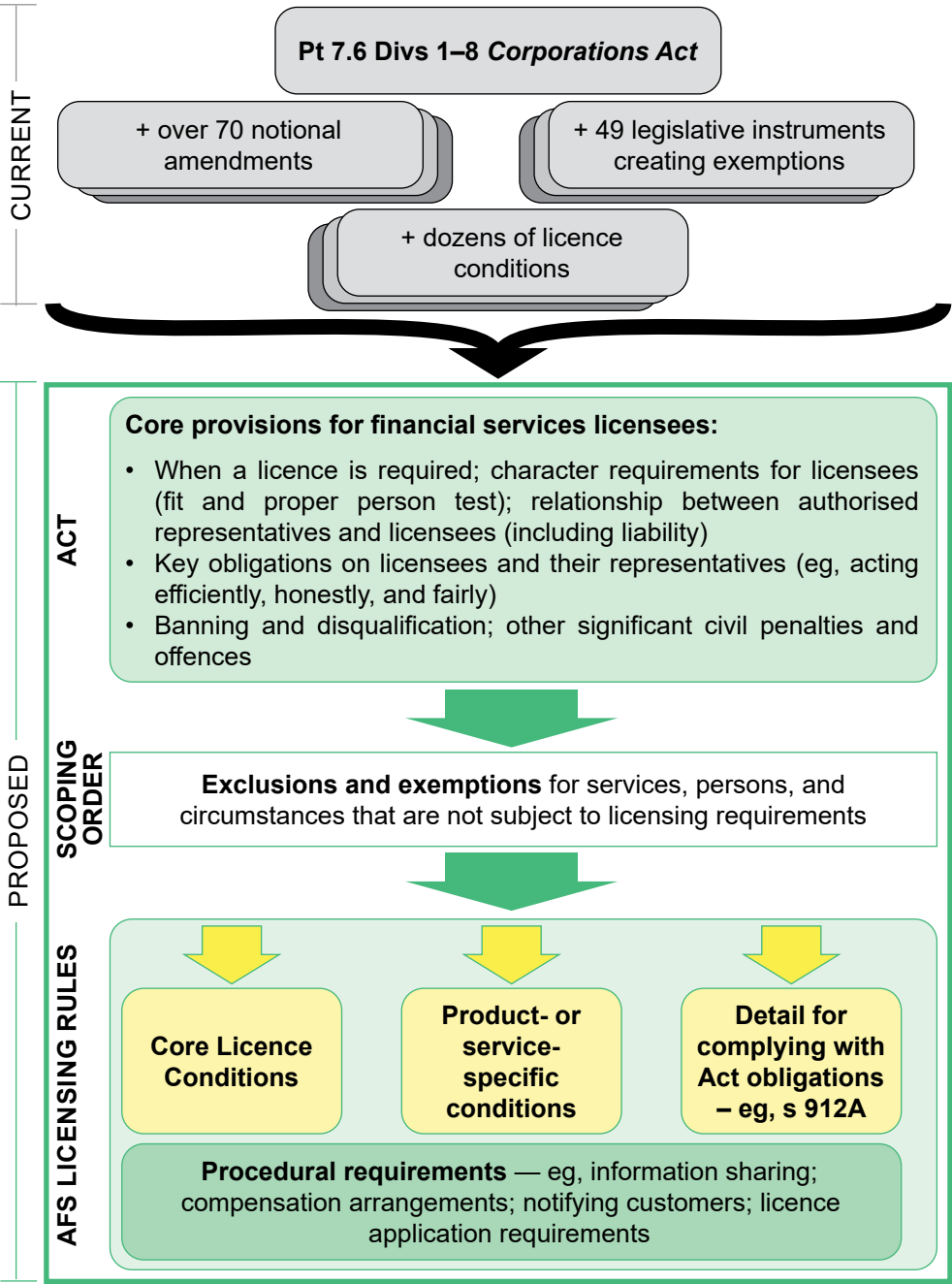


Figure 3: Applying the model to the AFS licensing regime



Primary legislation

30. The ALRC proposes that primary legislation should address the following critical matters, which are currently contained in Chapter 7 of the *Corporations Act* and various pieces of delegated legislation made under the Act:

- Key obligations and prohibitions, as well as the consequences of non-compliance — such as the obligation to hold an AFS licence (s 911A), the best interests obligation (s 961B), design and distribution obligations (Part 7.8A Divs 2 and 3), obligations not to mislead or deceive, and other prohibited conduct (for example, Part 7.10 Div 2 which includes ss 1041A–1041K).
- Serious offence provisions, significant civil penalty provisions, administrative penalty provisions, and coercive powers — discussed in greater detail in Chapter 5 of the Interim Report.
- Other (non-coercive) regulatory powers¹⁵ — for example, powers of the Australian Securities and Investments Commission ('ASIC') in relation to:
 - the AFS licensing regime (such as ss 913B, 914A, 915A, and 915B);
 - product intervention orders (s 1023D); and
 - granting individual (as opposed to class-based) relief.
- Powers to prescribe detail that supports the operation of the Act and its key obligations (as discussed below, the power to make rules performs this role in the proposed legislative model). Examples of powers that should generally appear in primary legislation, but currently appear in regulations, include regs 7.9.19A and 7.9.19B of the *Corporations Regulations*, which enable ASIC to determine the form in which certain information must be disclosed.
- Key defined terms — for example, the definitions of 'financial product' and 'financial service'.

Scoping Order and individual relief

31. The *Scoping Order* is proposed to be a single, consolidated legislative instrument which contains exclusions and class exemptions from the financial services regulatory regime, as well as other detail that is used to adjust the scope of the regulatory regime. **The *Scoping Order* would adjust the regulatory perimeter in a navigable and coherent way by consolidating the relevant detail in one instrument.**

15 Noting that ASIC's powers and functions more generally are set out in the *Australian Securities and Investments Commission Act 2001* (Cth), as well as the *National Consumer Credit Protection Act 2010* (Cth). Interim Report C will consider, in more detail, how the various powers in these Acts and the *Corporations Act* may be rationalised or consolidated.

Exclusions and exemptions

32. The ALRC does not intend that all existing exclusions and exemptions would simply be relocated to the *Scoping Order*, because the ALRC anticipates that **fewer exclusions and exemptions would be required under the proposed legislative model**. This is illustrated by Table 1, which contains examples of current exemptions from the *Corporations Act* that have been omitted in Prototype Legislation B because they are not required, and the underlying reasoning.

Table 1: Exemptions no longer required under the proposed legislative model

Example redundant exemptions	Reason for redundancy
<i>Corporations Regulations</i> regs 7.9.15D, 7.9.15F, 7.9.15A–7.9.15C	Prescriptive detail in the <i>Corporations Act</i> that necessitated these exemptions would be moved to tailored rules under the proposed legislative model.
<ul style="list-style-type: none"> • <i>Corporations Act</i> ss 703B, 1010A • <i>ASIC Class Order — Offers of CHESS Depository Interests</i> (CO 14/827) (Cth) s 5 	These exemptions manage the boundaries between Chapter 6D and Part 7.9 of the <i>Corporations Act</i> , and that boundary would no longer exist under an integrated disclosure regime in the proposed legislative model.

33. The ALRC’s model for accommodating exclusions and exemptions from Chapter 7 of the *Corporations Act* could be implemented in the following sequence:

- examining the current range of exclusions and class exemptions from the regulatory regime, and considering the extent to which they could be consolidated and rationalised;
- identifying existing exclusions or class exemptions that are ‘structural’ in nature — those that give effect to key policies within the regulatory regime and which affect a substantial proportion of the regulated population and consumers — for inclusion in primary legislation;
- identifying the remaining exclusions and class exemptions, and locating them within a single legislative instrument (the *Scoping Order*); and
- enacting (in the *Corporations Act*) appropriately circumscribed powers to create exclusions and to grant exemptions on both class and individual bases. ‘Class relief’, as it is commonly called, would be implemented by instruments which amend the *Scoping Order*, while individual relief would continue to be implemented by notifiable instruments (as is generally the case presently).

34. Sections 303DB and 303DC of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provide an example of a power to prescribe matters (in that case, exemptions) within a single, consolidated legislative instrument. The *List of Exempt Native Species Instrument 2001* (Cth) is the product of that power.

35. **Proposal B4** would require the Minister or ASIC to explain how the grant of any exclusion or exemption is consistent with the objects of Chapter 7 of the *Corporations Act*.¹⁶ The purpose of this requirement is to provide transparency and normative guidance regarding the creation of exceptions to generally applicable legislation. In respect of class relief, a statement of consistency with the objects of Chapter 7 of the Act could be incorporated into the explanatory statements that already accompany legislative instruments.¹⁷

36. The appropriate form for statements of consistency in relation to individual relief would need to be considered further, but the explanation required by Proposal B4 would be more limited in scope than a statement of reasons. While the requirement to prepare an explanation in respect of individual relief may have modest resource implications, the ALRC anticipates these would be offset by a reduced need for individual relief under the proposed legislative model (see [42] below).

37. The ALRC does not propose that a failure to comply with the requirement to provide adequate explanation should affect the validity of a legislative instrument.

Sunsetting and review

38. In accordance with the principles and guidance discussed in Chapter 4 of the Interim Report, contents of the *Scoping Order* should be subject to a 10-year sunset period. Sunsetting aims to ensure that delegated legislation is ‘kept up to date and continue[s] to be fit-for-purpose’.¹⁸ It also ensures that parliamentary oversight, particularly in respect of exclusions and exemptions from primary legislation, is maintained.

Other scoping provisions

39. In addition to exclusions and exemptions, a number of other provisions that affect the scope and operation of the regulatory regime are presently contained in the *Corporations Regulations*. **To achieve the greatest simplification, and to limit the number of locations a person must look to understand their rights and**

16 Submissions in response to Interim Report A identified guiding criteria for the exercise of power as being important to the power’s design: Australian Law Reform Commission, ‘Reflecting on Reforms — Submissions to Interim Report A’ (Background Paper FSL6, May 2022) [140].

17 Any requirement to give an explanation as to consistency with the Act’s objects can be contrasted with a statutory limitation that exemptions may only be created for particular purposes. See, for example, s 7 of the draft *Conduct of Financial Institutions Bill* (South Africa) appended to A Schmulow and S Dreyfus, *Submission 56*. Section 7 provides, for example, that exemptions may be made ‘to promote the proportional application’ of that Act ‘for developmental, financial inclusion and transformation objectives in order to facilitate the progressive or incremental compliance’ with that Act, and ‘in order to provide scope for innovation, the development and investment in innovative technologies, processes, and practices’.

18 Legislation Act Review Committee, Attorney-General’s Department (Cth), *2021–2022 Review of the Legislation Act 2003* (2022) 45.

obligations, the ALRC proposes that all detail necessary for determining the scope of the Act be contained within the *Scoping Order*.

40. Provisions of the *Corporations Regulations* that contain detail suitable for inclusion in the *Scoping Order* include:

- procedures, such as regs 5C.1.01 and 5C.1.02 in relation to registering and changing the name of a managed investment scheme;
- monetary thresholds, such as reg 1.0.02B which prescribes thresholds in relation to proprietary companies; and
- detail relating to definitions, such as the definition of 'credit facility' in reg 7.1.06 (noting the principles outlined in Interim Report A tend against such an approach to the use of definitions).

41. Section 766A(4) of the Act in Prototype Legislation B exemplifies how the *Scoping Order* could accommodate detail presently allocated to regulations. That provision performs an equivalent role to the current s 766A(1B) of the *Corporations Act*, which allows for the prescription of detail in relation to traditional trustee company services.

A reduced need for individual relief

42. The ALRC envisages a reduced need for ASIC to grant individual relief under the proposed legislative model. This is because prescriptive detail currently in the *Corporations Act* would be removed from the Act and replaced by readily adaptable rules. ASIC's ability to grant individual relief is nonetheless retained in the proposed legislative model because it is a means to address atypical or unforeseen circumstances. Stakeholders have indicated that this is an important feature of the regulatory regime.

Rules and rulebooks

43. Presently, significant complexity in the financial services regulatory regime is created by the:

- spread of prescriptive detail across the legislative hierarchy;
- use of notional amendments in regulations and ASIC legislative instruments; and
- creation of alternative regulatory regimes by way of exemptions contained in regulations and ASIC legislative instruments.

44. This complexity is partly attributable to both the underlying policy that all functionally equivalent financial products should be regulated in a like manner, and the inclusion of prescriptive detail in primary legislation.

45. The purpose of rules is to accommodate much of the prescriptive detail necessary for tailoring the regulatory regime to suit different products, services, industry sectors, and circumstances that Chapter 7 of the *Corporations Act* presently regulates. **The use of rules, consolidated in thematic rulebooks, would enable the regulatory regime to be tailored in a more coherent and navigable way.**

46. Rules, unlike conditional exemptions and notional amendments, would permit the creation of self-contained legislative instruments that can be understood without needing to be read alongside the Act or another legislative instrument. Rules therefore facilitate an adaptive, efficient, and navigable legislative framework. Submissions in response to Interim Report A strongly supported the introduction of a power to make thematically consolidated legislative instruments in the form of rules.¹⁹

47. The proposed rule-making power is limited in five key respects:

- The power may only be exercised in relation to matters required or permitted by a provision of the Act. In other words, the power is only ‘turned on’ when the Act specifies. This allows for the scope of the power to be adjusted as necessary to suit different subject matters.
- The power may not be used to create serious criminal offences and significant civil penalties (discussed further in Chapter 5 of the Interim Report).
- Any rules made using the power must be accompanied by an explanation as to how they further the objects of Chapter 7 of the *Corporations Act*.
- Exercise of the power is subject to a prescribed consultation requirement.
- Rules made under the power are subject to sunset.

48. Section 1126 of the Act in Prototype Legislation B illustrates the types of matters that, in the context of financial product disclosure, would appropriately be dealt with in rules under the proposed legislative model. These include, for example:

- the content and form of different disclosure documents, such as a prospectus or Product Disclosure Statement (‘PDS’);
- who must prepare a disclosure document; and
- information that must be given to ASIC.

19 Australian Law Reform Commission, ‘Reflecting on Reforms — Submissions to Interim Report A’ (Background Paper FSL6, May 2022) [146].

Sunsetting and review

49. Like the *Scoping Order*, rules should be subject to a 10-year sunset period. Acknowledging the sunset regime is resource-intensive, the ALRC suggests that each rulebook should have its own (generally different) sunset date.²⁰

Matters not to be contained in rules

50. Because of their impact on individual rights, the ALRC has consistently supported clear limits on the extent to which certain matters — including criminal offences, civil and administrative penalties, and coercive powers — should be created in delegated legislation.²¹ Existing parliamentary guidance on these issues reflects an appropriate balancing of important considerations including democratic accountability, personal rights and liberties, navigability, flexibility, and adaptability. The ALRC does not propose any significant departures from this guidance and puts forward in the Interim Report a number of principles for accommodating offences and civil penalties under the proposed legislative model.

The law-making roles of the Minister and ASIC

51. **Proposal B8** is that the scoping power (see Proposal B2) and rule-making power (see Proposal B5) be granted concurrently to the Minister and ASIC. Proposal B8 is underpinned by three key considerations:

- First, **it is appropriate and consistent with existing policy settings that the Minister and ASIC be concurrently responsible for making delegated legislation that regulates corporations and financial services**. Each has access to different, and potentially complementary, information and expertise that supports their respective law-making capacity.
- Secondly, Chapter 7 of the *Corporations Act* reflects a policy that, in most areas, delegated law-making powers are allocated concurrently to both the Minister (exercisable by way of regulations made by the Governor-General in Council) and ASIC (in the form of ASIC instruments). The proposed legislative model adopts this as the default position.
- Thirdly, the proposed legislative model makes it possible for different law-makers — such as Parliament, the Minister, and ASIC — to make laws for a single regulatory regime without creating unnecessary complexity or poor navigability.

20 See, eg, Legislation Act Review Committee, Attorney-General's Department (Cth) (n 18) 45. See also Attorney-General's Department (Cth), *Guide to Managing the Sunsetting of Legislative Instruments* (2020).

21 See, eg, Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002); Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2016). Criminal offences, and civil and administrative penalties, are discussed further in Chapter 5 of the Interim Report. See more generally Australian Law Reform Commission, *Corporate Criminal Responsibility* (ALRC Report No 136, 2020), Chapter 5, on a principled approach to the imposition of corporate criminal responsibility.

52. Under the proposed legislative model, the *Corporations Act* would confer the scoping power and rule-making power on both the Minister and ASIC.²² The ALRC proposes that a protocol or other administrative arrangement between the Minister and ASIC be used to coordinate concurrent law-making functions. **Administrative arrangements are one way of accommodating the nebulous boundaries between policy-making, law-making, and regulating, and help to maintain flexibility and adaptability in the regulatory regime.** The authority and legitimacy of both the Minister and ASIC as law-makers, and the level of public confidence that this instils, may best be maintained through sensible cooperation rather than rigid boundaries.

53. A protocol or other arrangement could deal with matters such as:

- consultation and coordination between the Minister and ASIC;
- any informal division of law-making responsibilities; and
- administrative arrangements to maintain coherence and navigability in the *Scoping Order* and rulebooks.

54. The ALRC envisages that a protocol or other arrangement would not be enforceable as between the Minister and ASIC. Adherence to the protocol and a cooperative working relationship would be mutually beneficial to both the Minister and ASIC, as well as important for maintaining public confidence in the regulatory system. If it were thought necessary, a legal fall-back mechanism could be included in the *Corporations Act* to provide certainty in the rare event that differences could not be resolved through other means. Adherence or non-adherence to any protocol would not affect the validity of any delegated legislation.

Prescribed consultation

55. Recognising the potential significance of the proposed scoping and rule-making powers, **Proposal B9** builds in an enhanced consultation mechanism compared to the standard consultation regime established by the *Legislation Act 2003* (Cth). **Consultation is an important safeguard in respect of the exercise of delegated legislative power.** Proposal B9 is modelled on pre-existing specific consultation requirements contained in Chapter 7 of the *Corporations Act*.

56. The ALRC proposes that an advisory committee be established by the *Corporations Act* which must be consulted by the Minister or ASIC (as the case may be) — in addition to the public — before new scoping orders or rules are made. Such a body, which the ALRC has presently labelled the ‘Rules Advisory Committee’, could comprise representatives from industry groups, consumer groups, and legal experts such as practitioners and academics. Recognising the complexity of financial products, services and markets, the Rules Advisory Committee should possess sufficient technical expertise to effectively assist the Minister and ASIC in

22 Prototype ss 1097 and 1098 of the Act in Prototype Legislation B illustrate how this would be given effect.

their delegated law-making functions. The committee's composition and appointment processes should facilitate sufficient independence from the Government.

57. Consultation (or lack of consultation) with the Rules Advisory Committee and the public should not affect the validity of delegated legislation. This reflects the present position under the *Legislation Act 2003* (Cth) and other existing requirements in the *Corporations Act*. Rather, consultation should act as a normative constraint on delegated law-making power, as well as providing transparency and enhancing scrutiny of the law-making process.²³

58. Combined with sunseting, a requirement to consult the Rules Advisory Committee would facilitate a form of expert consultation each time that provisions of scoping orders or rules are proposed to be remade upon sunseting. Such consultation could address matters of policy as well as whether the substance of any scoping orders or rules should be moved to primary legislation.

Steps to implementation

59. **Proposals B10 and B11** are consequent on Proposals B1–B9. The proposed legislative model presents a way to maintain flexibility and adaptability in the financial services regulatory regime without the need for notional amendments. As a legislative design feature, **notional amendments have significant downsides for navigability and transparency, as well as challenging the principles of democratic accountability and the rule of law**. Where an alternative design can avoid those problems, it should be preferred.²⁴

Staged transition

60. Implementing Proposals B1–B9 with the goal of simplifying the law would involve a significant program of work.

61. Any significant reform program carries implementation risks. For example, an insufficient allocation of resources or lack of sustained political will may result in a reform project commencing but not finishing. This risks leaving the law in an unimproved, or potentially even more complex state. A similar observation has been made to the ALRC in respect of the unfinished Taxation Laws Improvement Project.²⁵

62. The proposed legislative model could be implemented in stages by focusing sequentially on particular themes of regulation in Chapter 7 of the *Corporations Act*.

23 Section 1098C of the Act in Prototype Legislation B illustrates how, for the sake of clarity, consultation with the Rules Advisory Committee may be dispensed with in emergencies.

24 The ALRC recognises, however, that there may be a limited role for notional amendment powers in the case of emergencies. See, for example, s 1362A of the *Corporations Act* introduced in response to the COVID-19 pandemic.

25 For a brief discussion of the Taxation Laws Improvement Project, see David Smith and Grant Richardson, 'The Readability of Australia's Taxation Laws and Supplementary Materials: An Empirical Investigation' (1999) 20(3) *Fiscal Studies* 321.

The ALRC suggests that financial product disclosure would make a suitable first candidate for reform. Prototype Legislation B illustrates how that process could be commenced.

63. Although it would be sub-optimal if the proposed legislative model were applied to only some areas of regulation — such as financial product disclosure — the reformed and pre-existing law would be capable of co-existing to the extent necessary. The present use of rulebooks in particular areas of Chapter 7 of the *Corporations Act*, for example, illustrates how different models of legislative design may co-exist.

Principles underpinning the legislative model

64. The legislative model proposed in Chapter 2 of the Interim Report is underpinned by the analysis and principles discussed in the subsequent three chapters, which consider: ‘what goes where’ in the legislative hierarchy (Chapter 3); the design of delegated legislative powers (Chapter 4); and particular issues presented by offences, penalties, and enforcement (Chapter 5). Those chapters explain how legislative power may be delegated in a manner consistent with the principles of democratic accountability and the rule of law.

What goes where

65. Chapter 3 of the Interim Report focuses on the appropriate allocation of matters between primary and delegated legislation, which is critical to coherence in regulatory design and the hierarchy of laws, as well as ensuring an appropriate delegation of legislative authority. **The question of ‘what goes where’ is both technical and normative** — technical because it involves techniques of legislative design, and normative because it invokes fundamental constitutional principles, such as democracy and the rule of law.

66. To address ‘what goes where’, Chapter 3 discusses existing guidance and legislative practice regarding the use of the legislative hierarchy. Such guidance is one aspect of the institutional framework supporting key stakeholders — including Parliament and its members, government departments, policy-makers, legislative drafters, and drafting instructors.

67. Presently, guidance relating to the use of delegated legislation is spread across multiple sources and is published by different entities. **Proposal B12** and **Question B13** reflect that there would be value in rationalising that guidance and creating a central resource relating to the delegation of legislative power. As the department with responsibility for upholding the rule of law and the integrity of the law-making process, the Attorney-General’s Department (Cth) (‘AGD’) is most appropriately placed to publish and maintain consolidated guidance. This function

should be performed in consultation with the Office of Parliamentary Counsel (Cth) ('OPC') and the Department of the Prime Minister and Cabinet, as both play important coordinating roles in the preparation of Commonwealth laws.

68. Existing guidance largely focuses on examples, rather than principles, and does not accommodate the wide variety of current legislative practice. Chapter 3 considers how guidance may be improved to better assist those tasked with designing legislation and how it may better reflect legislative practice. This would be achieved by more **clearly focusing on key principles, and by helping those who design legislation to develop their skills in applying those principles.**

69. **Appendix E** to Interim Report B contains draft guidance which could be adopted by AGD in implementing Proposal B12. Question B13 seeks stakeholder feedback on the draft guidance in Appendix E.

70. **Proposal B14** is intended to complement improved guidance by supporting those who regularly work in the area of legislative design. It aims to further enhance the institutional framework supporting key stakeholders in the legislative process.

71. Proposal B14 arose out of an ALRC consultation with members of a range of agencies responsible for delegated legislation. Several participants noted that, while many large departments have their own legislative design resources, there are few opportunities to share ideas, experiences, and skills across departments. Those working in smaller departments and agencies generally have more limited resources. **A Community of Practice would help to foster high-quality law design and drafting across the Commonwealth through training, workshops, resource dissemination, and information-sharing.**

72. Given the obligation placed on First Parliamentary Counsel to encourage high standards in the drafting of legislative instruments and notifiable instruments, OPC is the agency best placed to support a Community of Practice for legislative designers.

Delegating legislative power

73. The Terms of Reference for Interim Report B require the ALRC to consider 'how delegated powers should be expressed in legislation, consistent with maintaining an appropriate delegation of legislative authority'. Chapter 4 of the Interim Report discusses the following (inter-related) questions:

- Why delegate legislative power?
- To whom should legislative power be delegated?
- What safeguards should be placed on delegated legislative power?

74. Delegated legislation has long been recognised as both a necessary and desirable part of the legislative hierarchy. However, the appropriate delegation of Parliament's legislative power requires a balance between expediency and principle. Chapter 4 examines the legal and institutional safeguards that help to maintain the

rule of law and ensure appropriate accountability when legislative power is delegated. In particular, Chapter 4 focuses on the basis on which Parliament delegates law-making power to the Executive Government — which includes departments, agencies, and other statutory bodies for which the Government is responsible — and the design of empowering (or enabling) provisions in an Act.

Offences and penalties

75. Chapter 5 of the Interim Report considers offences and penalties in corporations and financial services legislation and discusses potential issues that may arise in relation to the proposed legislative model. Chapter 5 concludes that **application of the proposed legislative model to offences and penalties is not only practicable, but that the proposed structured approach to legislative design and hierarchy could bring significant benefits to regulated communities, regulators, and the public at large.**

76. Numerous provisions in existing corporations and financial services legislation set out consequences for breach of the legislation, with more than 1,100 such provisions in the *Corporations Act* alone. A large proportion of these provisions create criminal offences carrying penalties including imprisonment or a fine. Others allow for the imposition of significant civil penalties. Other provisions give ASIC and the Australian Prudential Regulation Authority the power to prohibit a person or company from operating in the regulated area, or to impose conditions on a licence.

77. Offences and penalties have generally been considered an area appropriate for consideration by Parliament, and best located in primary legislation. This is principally because of the impact of offences and penalties on individual rights and liberties. Clear principles guide the delegation of legislative power and legislative drafting in this area, and penalty and offence provisions in delegated legislation are subject to significant scrutiny. Existing guidance, which the ALRC has consistently endorsed, is clear that only minor offences and penalties are appropriate for inclusion in delegated legislation.

78. In the context of current corporations and financial services legislation, the principles in existing guidance may appear to pose a dilemma for the proposed legislative model. The high level of prescription in existing legislation is matched by a large number of individual offence and civil penalty provisions attached to individual obligations and prohibitions. If detail in the Act were moved to delegated legislation, the wholesale transfer of associated offence and penalty provisions to the same level of delegation would be inconsistent with existing guidance, and risk a lack of appropriate parliamentary oversight.

79. On the other hand, academic commentary, stakeholder consultations, and data analysis suggest that:

- having a large number of very detailed, sometimes overlapping, penalty and offence provisions does not lead to better compliance or more effective enforcement; and
- the existing allocation of penalty and offence provisions across the legislative hierarchy leads to significant problems with navigability and democratic accountability.

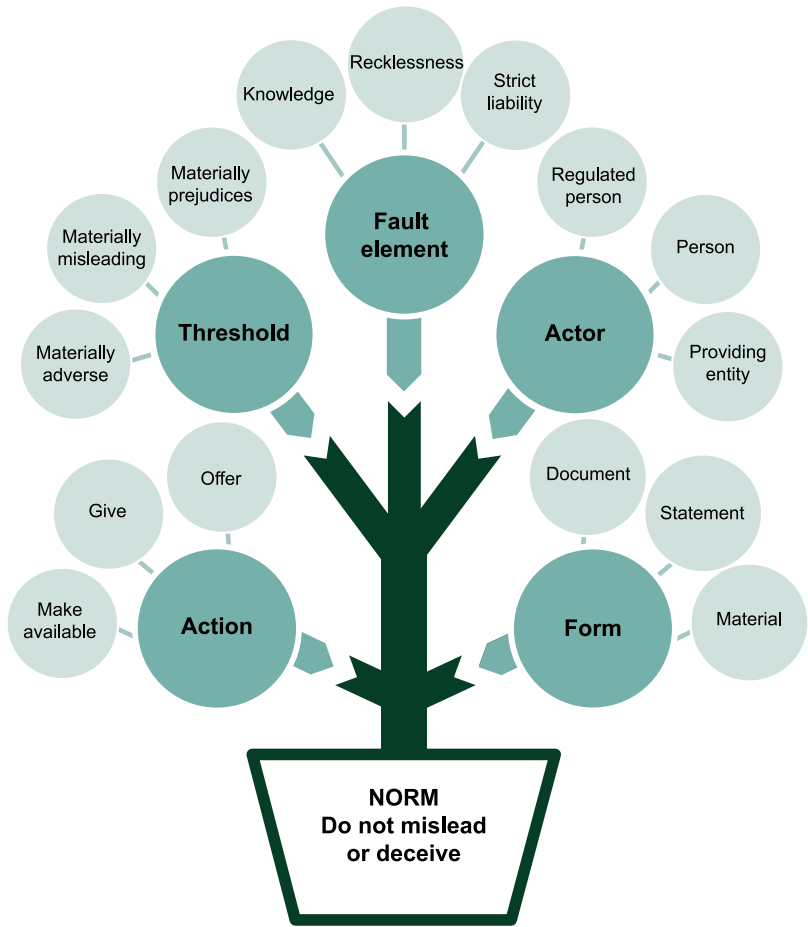
80. This analysis suggests that, rather than posing a dilemma, the proposed legislative model provides an opportunity to streamline penalty and offence provisions within existing policy settings. **Proposal B15** provides for consolidation of offence and civil penalty provisions. Consolidation does not mean removing existing penalties from any conduct. It is aimed instead at ensuring that the offence and civil penalty provisions capture the essence of the obligation or prohibition concerned, rather than seeking to prescribe the myriad ways in which such conduct might manifest in different contexts.

81. A fundamental cause of overlap involves the ‘grafting’ of particulars onto a core prohibition over time.²⁶ For example, in relation to defective disclosure, there are particulars that enunciate the conduct proscribed, actors to whom obligations apply, forms of disclosure, fault elements, and threshold requirements. Examples of these ‘graft-ons’ to the norm of misleading or deceptive conduct in the context of defective disclosure are visualised in Figure 4 below.

82. In addressing overlap by consolidating offence and penalty provisions, there will be circumstances in which it is preferable to create a general obligation in the Act with consequences attached for contravention, supplemented by detail as to how to comply with that obligation in the relevant rulebook. A key issue for implementation of the proposed legislative model is therefore the extent to which the content of offence and civil penalty provisions created in the *Corporations Act* may appropriately be delegated to the rules. As set out in [69] above, the ALRC has developed draft guidance for the delegation of legislative power. The draft guidance generally reflects existing guidance relating to offences and penalties in delegated legislation. It has been updated so as to more clearly address issues relating to civil penalties, delegation of the content of offence and civil penalty provisions, and the role of legislative instruments other than regulations. **Question B13** asks whether the draft guidance relating to delegation of the content of offence and civil penalty provisions adequately captures the appropriate principles.

26 See Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 3) 495.

Figure 4: Particularisation of misleading or deceptive conduct



83. Under the proposed legislative model, much of the prescriptive detail of obligations to which regulated individuals are subject would be found in thematic rulebooks. The question arises as to what consequences would attach to any breach of those obligations. **Question B16** asks whether there is a role in the proposed legislative model for ‘evidential provisions’ that are not directly enforceable, but if breached or satisfied, may evidence contravention of, or compliance with, specified rules or provisions of primary legislation. Such an approach is used in the *Financial Services and Markets Act 2000* (UK).²⁷

27 See *Financial Services and Markets Act 2000* (UK) s 138C. The glossary of the Financial Conduct Authority’s Handbook defines ‘evidential rules’ as: ‘a rule, contravention of which does not give rise to any of the consequences provided for by other provisions of the Act; and which provides, in accordance with section 138C of the Act, that: (a) contravention may be relied on as tending to establish contravention of such other rule as may be specified; or (b) compliance may be relied on as tending to establish compliance with such other rule as may be specified; or (c) both (a) and (b)’.

84. Evidential provisions allow for prescription that goes beyond mere guidance, but stops short of attracting directly enforceable consequences. Such provisions have the potential to more clearly link detailed rules with the primary norm of conduct (as urged by the Financial Services Royal Commission),²⁸ and would avoid the need for multiple (and potentially significant) penalty provisions to be contained in rules. On the other hand, if used extensively, such provisions might be seen to add unnecessary volume and prescription to rules, and to perpetuate a tick-the-box approach to compliance. The ALRC invites feedback on whether such provisions could play a helpful role for regulators and regulated communities under the proposed legislative model.

Maintaining coherence in the legislative hierarchy

85. Part Two of Interim Report B (Chapters 7–9) explores ways to improve the coherence, navigability, findability, and overall quality of the law.

86. Chapter 7 contains three recommendations to improve technical aspects of corporations and financial services legislation. These recommendations address mistakes in the law (such as incorrect cross-references) and problems such as redundant provisions. The issues identified in that chapter are **symptoms of the overwhelming and increasing complexity of corporations and financial services law, and are likely to become more extensive if not addressed**. The problems identified reveal the need to improve the processes for maintaining the law and the extent to which the pace of reforms to corporations and financial services legislation has created challenges. The pace of legislative change has meant that longstanding issues, such as incorrect cross-references dating back decades, have remained unaddressed. Chapter 7 identifies opportunities for immediate simplification as well as making the case for a long-term focus on the ‘care and maintenance’ of the law.

87. Chapter 8 contains two recommendations and two proposals to reduce the complexity of corporations and financial services legislation through simpler approaches to law design. **Unnecessary complexity often stems from poor law design choices that hinder users of the legislation or fail to facilitate a clear understanding of rights and obligations under the law**. Treasury has undertaken a number of reform initiatives in recent years, such as the Modernising Business Registries and Modernising Business Communications programs. These have resulted in simpler provisions of the *Corporations Act*. Nevertheless, in a number of instances, unnecessarily complex law design could be simplified — the same policy outcomes could be achieved in a simpler way. Simpler law design would support

28 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 3) rec 7.4.

users in understanding the law, and minimise the work for Treasury and ASIC in administering corporations and financial services laws.

88. A particular focus of Chapter 8 is offence and civil penalty provisions. Clearly identifying offence and civil penalty provisions, so as to enhance their findability, should be a priority. The *Corporations Act* is unusual in using a schedule to identify most offences. The approach of using a definition — ‘civil penalty provision’ in s 1317E — to list civil penalties is also unnecessarily complex.

89. Chapter 9 contains a recommendation that Government enhance the navigability of three key pieces of corporations and financial services legislation in light of their particular complexity: the *Corporations Act*, the *National Consumer Credit Protection Act 2009* (Cth), and the *Australian Securities and Investments Commission Act 2001* (Cth). This would be achieved by Government, through ASIC, publishing enhanced versions of key corporations and financial services legislation. **It is appropriate for Government, through ASIC, to publish enhanced versions of the legislation given the complexity of such legislation.**

90. Ordinary publication practices, such as publishing legislation on the Federal Register of Legislation, are not sufficient for highly complex legislative frameworks, particularly those involving extensive regulator-made law. For example, the Financial Conduct Authority in the UK, and the Australian Taxation Office and Civil Aviation Safety Authority in Australia, publish enhanced versions of the legislation they administer, in addition to the ordinary regulatory guidance they publish. ASIC has also published enhanced legislation on limited occasions, such as when notional amendments make understanding a provision particularly complex.

91. Corporations and financial services legislation is spread across hundreds of separate Acts and legislative instruments, all of which are closely interconnected. Government has made law design choices, such as using notional amendments and extensive regulations, which make the *Corporations Act* particularly difficult to navigate without further resources. Accordingly, Government should play a central role in enhancing the navigability of this legislation.

APPENDIX A

Terms of Reference

Review of the Legislative Framework for Corporations and Financial Services Regulation

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

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

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

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

INTERIM REPORT B	B. The coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards, to examine:
	<ul style="list-style-type: none">• how legislative complexity can be appropriately managed over time;• how best to maintain regulatory flexibility to clarify technical detail and address atypical or unforeseen circumstances and unintended consequences of regulatory arrangements; and• how delegated powers should be expressed in legislation, consistent with maintaining an appropriate delegation of legislative authority.

- C. How the provisions contained in Chapter 7 of the *Corporations Act 2001* (Cth) and the *Corporations Regulations 2001* (Cth) could be reframed or restructured so that the legislative framework for financial services licensing and regulation:
- is clearer, coherent and effective;
 - ensures that the intent of the law is met;
 - gives effect to the fundamental norms of behaviour being pursued; and
 - provides an effective framework for conveying how the law applies to consumers and regulated entities and sectors.

Scope of the reference

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

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

Consultation

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

Timeframe for reporting

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

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

This Summary Report reflects the law as at 30 June 2022.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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Australian Law Reform Commission

(07) 3052 4224

www.alrc.gov.au

info@alrc.gov.au

PO Box 12953

George Street QLD 4003



Australian Government

Australian Law Reform Commission