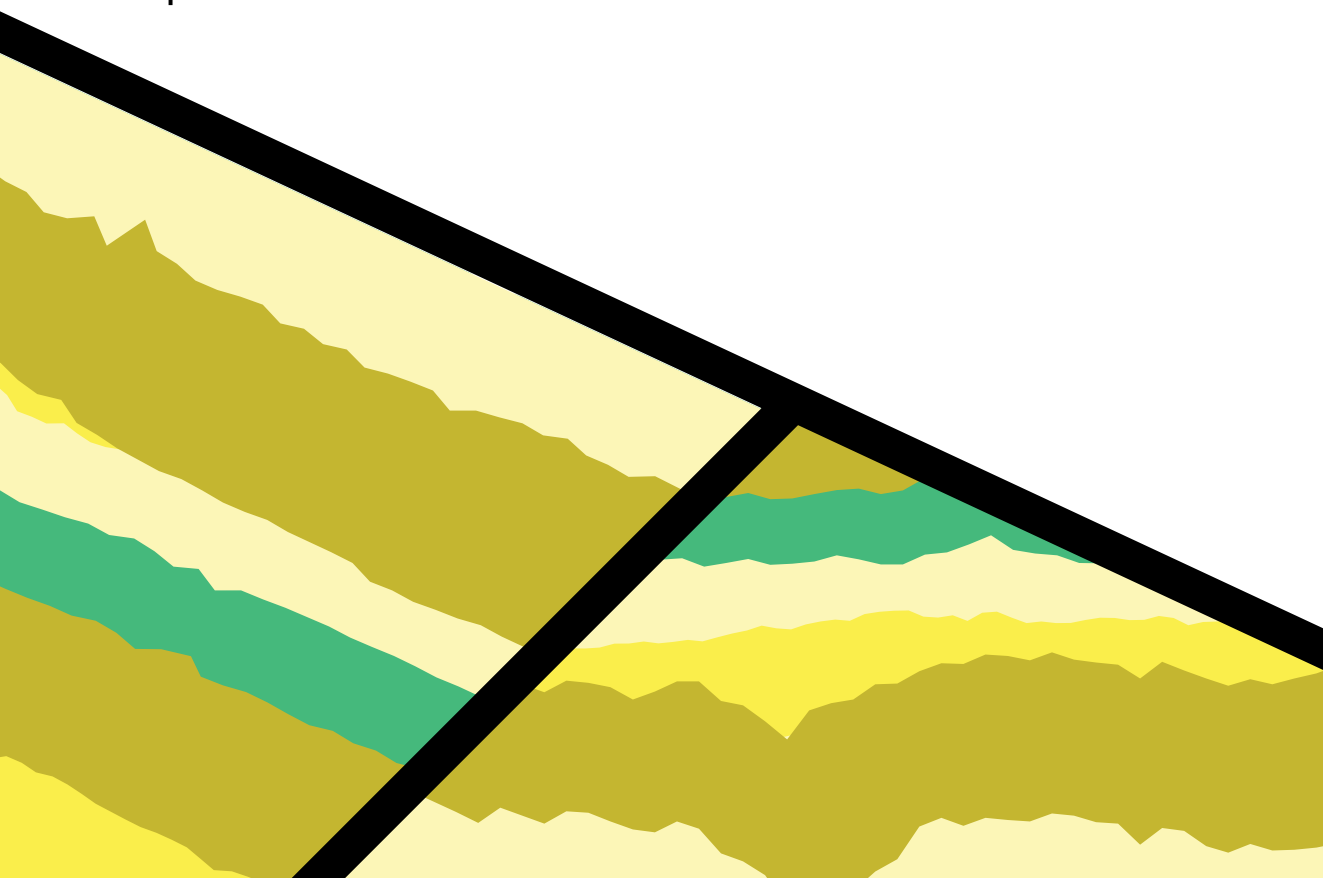
Australian Government
Australian Law Reform Commission

INTERIM REPORT B

FINANCIAL SERVICES LEGISLATION

ALRC Report 139
September 2022



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Australian Law Reform Commission

INTERIM REPORT B

FINANCIAL SERVICES LEGISLATION

ALRC Report 139

September 2022

This Interim 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 Government

Australian Law Reform Commission

The Hon Mark Dreyfus KC MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

30 September 2022

Dear Attorney-General

Review of the Legislative Framework for Corporations and Financial Services Regulation

On 11 September 2020, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into simplification of the legislative framework for corporations and financial services regulation. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996* (Cth), I am pleased to present you with the second Interim Report on this reference (ALRC Report 139, 2022).

Yours sincerely,

The Hon Justice SC Derrington AM

President

Contents

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.

B. The coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards, to examine:

   - 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.

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Acknowledgements

The ALRC acknowledges the ongoing valuable assistance of the Law Division in the Department of the Treasury (Cth), under the leadership of First Assistant Secretary and Chief Counsel Mr Anthony Seebach (and his predecessor Mr Simon Writer), in unpacking the complexity of the legislative framework and exploring options for reform.

The ALRC also acknowledges the significant contributions made by the Australian Securities and Investments Commission, led by Chair Mr Joseph Longo and General Counsel Mr Chris Savundra, including the provision of data and robust discussions regarding reform possibilities.

In addition, the ALRC thanks the Corporations Committee of the Law Council of Australia for regular engagement at the Committee's meetings and conferences.

Finally, the ALRC acknowledges that its empirical analysis of legislation was enabled by the use of open access standards on websites operated by the Office of Parliamentary Counsel (Cth).

List of Recommendations

Chapter 7 Technical Simplification

Recommendation 14 Redundant and spent provisions in corporations and financial services legislation should be repealed, including:

a. spent transitional provisions;

b. spent legislative instruments;

c. redundant definitions;

d. cross-references to repealed provisions; and

e. redundant regulation-making powers.

Recommendation 15 The Department of the Treasury (Cth) and the Australian Securities and Investments Commission should establish an ongoing program to:

a. identify and facilitate the repeal of redundant and spent provisions; and

b. prevent the accumulation of such provisions.

Recommendation 16 Corporations and financial services legislation should be amended to address:

a. unclear or incorrect provisions;

b. outdated notes relating to ‘strict liability’; and

c. outdated references to ‘guilty of an offence’.

Chapter 8 Simpler Law Design

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

a. the prescribing of forms and other documents;

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

c. the publication of notices and instruments;

d. conditional exemptions;

e. infringement notices and civil penalties;

f. terms defined as having more than one meaning;

g. definitions containing substantive obligations; and

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

Recommendation 18 Generally applicable notional amendments to corporations and financial services legislation should be replaced with textual amendments to the notionally amended legislation.

Chapter 9 Enhancing Navigability

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).

List of Proposals and Questions

Chapter 2 A Legislative Model for Financial Services

Proposal B1 The legislative hierarchy of Chapter 7 of the *Corporations Act 2001* (Cth) should be amended, in a staged process, to implement a legislative model that incorporates Proposals B2–B9. The legislative hierarchy should comprise:

a. an Act legislating fundamental norms and obligations, and other provisions appropriately enacted only by Parliament;

b. a Scoping Order (a single consolidated legislative instrument) containing exclusions, class exemptions, and other detail necessary for adjusting the scope of the Act; and

c. thematic 'rulebooks' (consolidated legislative instruments) containing rules giving effect to the Act in different regulatory contexts as appropriate.

Proposal B2 Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to include a power to:

a. exclude classes of products and services or exempt classes of persons from provisions of Chapter 7 of the Act; and

b. set out detail that adjusts the scope of any provisions in Chapter 7 of the Act;

in the Scoping Order.

Proposal B3 Chapter 7 of the *Corporations Act 2001* (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').

Proposal B4 Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to require that:

a. every legislative instrument made under the power set out in Proposal B2; and

b. every notifiable instrument made under the power set out in Proposal B3;

must be accompanied by a statement explaining how the instrument is consistent with relevant objects within Chapter 7.

Proposal B5 Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to include a power to make 'rules'.

Proposal B6 Chapter 7 of the *Corporations Act 2001* (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.

Proposal B7 Rules made under Chapter 7 of the *Corporations Act 2001* (Cth) should not contain matters more appropriately enacted in primary legislation, particularly:

a. serious criminal offences, including offences subject to imprisonment, and significant civil penalties;

b. administrative penalties; and

c. powers enabling regulators to take discretionary administrative action.

Proposal B8 The powers set out in Proposal B2 and Proposal B5 should be vested in:

a. the Minister; and

b. the Australian Securities and Investments Commission.

A protocol between the Minister and the Australian Securities and Investments Commission should coordinate the exercise of the powers.

Proposal B9 Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to:

a. establish an independent 'Rules Advisory Committee'; and

b. 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 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 *Corporations Act 2001* (Cth) by regulation or other instrument should be repealed.

Proposal B11 As part of the staged implementation of the proposed legislative model, relevant existing powers to:

a. exclude products or services; and

b. exempt a person or class of persons;

from the operation of all or specified provisions of Chapter 7 of the *Corporations Act 2001* (Cth) by regulation or other instrument should be repealed.

Chapter 3 What Goes Where

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:

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; and

c. 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.

Chapter 5 Offences and Penalties

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?

Chapter 8 Simpler Law Design

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.

List of Background Papers

Background Paper Number	Title	Date
FSL1	**Initial Stakeholder Views**	June 2021
FSL2	**Complexity and Legislative Design**	October 2021
FSL3	**Improving the Navigability of Legislation**	October 2021
FSL4	**Historical Legislative Developments**	November 2021
FSL5	**Risk and Reform in Australian Financial Services Law**	March 2022
FSL6	**Reflecting on Reforms – Submissions to Interim Report A**	May 2022
FSL7	New Business Models, Technologies, and Practices	Forthcoming
FSL8	Post-Legislative Scrutiny	Forthcoming
FSL9	Unconscionability and Misleading or Deceptive Conduct	Forthcoming

Glossary

AFS Licence	Australian financial services licence (*Corporations Act 2001* (Cth) s 761A)
AFS Licensee	Holder of an Australian financial services licence
AFSL regime	Australian financial services licensing regime
AGD	Attorney-General's Department (Cth)
AGD Guide to Framing Offences	Attorney-General's Department (Cth), *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*
ALRC	Australian Law Reform Commission
AMSA	Australian Maritime Safety Authority
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
ATO	Australian Taxation Office
Australian Consumer Law	*Competition and Consumer Act 2010* (Cth) sch 2
Bills Scrutiny Committee	Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia
Corporations Act	*Corporations Act 2001* (Cth)
Corporations Regulations	*Corporations Regulations 2001* (Cth)
Delegated Legislation Scrutiny Committee	Senate Standing Committee for the Scrutiny of Delegated Legislation (formerly Senate Standing Committee on Regulations and Ordinances), Parliament of Australia
Draft Guidance	Draft Guidance set out in **Appendix E** of this Interim Report
FCA	Financial Conduct Authority (UK)
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
***FMC Act* (NZ)**	*Financial Markets Conduct Act 2013* (NZ)
***FSM Act* (UK)**	*Financial Services and Markets Act 2000* (UK)
FSR Act	*Financial Services Reform Act 2001* (Cth)

High Court	High Court of Australia
Legislation Act	*Legislation Act 2003* (Cth)
National Credit Code	*National Consumer Credit Protection Act 2009* (Cth) sch 1
Navigation Act	*Navigation Act 2012* (Cth)
NCCP Act	*National Consumer Credit Protection Act 2009* (Cth)
OPC	Office of Parliamentary Counsel (Cth), the agency responsible for drafting Commonwealth laws, publishing the authorised and up-to-date version of Commonwealth laws, and maintaining the Federal Register of Legislation.
PDS	Product Disclosure Statement
PM&C	Department of the Prime Minister and Cabinet
proposed legislative model	Legislative model proposed by the ALRC in **Chapter 2** of this Interim Report
Prototype Legislation B	Prototype legislative drafting available on the ALRC website
Senate Scrutiny Committees	Senate Standing Committee for the Scrutiny of Bills, and, Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia
Treasury	Department of the Treasury (Cth)
UK	United Kingdom
Wallis Inquiry	1996 Financial System Inquiry chaired by Stan Wallis AC

Figures and Tables

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1. Introduction

Contents

Overview

Scope of this Interim Report

1.1 The focus of this Interim Report is on 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'.[1] 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.[2]

1.2 This 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**.

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1 See the **Terms of Reference** for this Inquiry.

2 For references to 'byzantine' complexity of legislation in relation to corporations and other areas, see, for example, The Hon 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.

1.3 The ALRC seeks written submissions in response to the proposals and questions contained in this Interim Report until 30 November 2022. Submissions, together with further consultations, workshops, and seminars, will form part of the evidence base for Interim Report C and the Final Report. This Interim Report also includes recommendations that are in a form that can be considered for immediate or staged implementation as appropriate.

Making a submission

1.4 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.

1.5 The ALRC seeks submissions from a broad cross-section of the community, as well as those with a special interest in the Inquiry. Submissions are crucial in assisting the ALRC to develop its recommendations.

1.6 Submissions made using the form on the ALRC website are preferred. Alternatively, submissions may be emailed (ideally in PDF format) to financial.services@alrc.gov.au. Stakeholders are welcome to comment on other issues that they consider relevant, and that may not be addressed by particular proposals or questions in this Interim Report.

1.7 Stakeholders can make a public or confidential submission to the Inquiry. Public submissions are ordinarily published on the ALRC website. Submissions that are public are preferred.

Consultation

1.8 For the purposes of this Interim Report, the ALRC has undertaken 74 consultations (meetings and roundtables on individual and group bases), including with key participants in the financial services industry, government agencies, the legal profession, non-profit legal services, consumer groups, and academics.

1.9 **Appendix A** to this Interim Report provides an outline of the consultations conducted from November 2021 to August 2022.

Impetus for reform

1.10 This Inquiry has come at a critical juncture. 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.[3] As significant and frequent amendments to the law continue to be made, the level of complexity will only continue to grow in the coming years.[4] Consequently, the sooner reforms can be made to the regulatory architecture, the easier such reforms will be to implement. Conversely, the longer 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 accumulates.

1.11 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',[5] to which the ALRC would add that the steadily *increasing* size of the task shows why it must be tackled *now*. This will require the Australian Government to commit resources and invest political capital if it is to succeed. Commitment to complete the task, and not to permit parallel regimes to co-exist indefinitely, will also be required.

1.12 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. For example, there are significant existing costs in relation to:

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

1.13 Inevitably, there will be transition costs in any reforms to 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 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 financial product disclosure and licensing obligations, and will continue to address issues of prioritisation and staged implementation in future reports.

1.14 The ALRC believes the costs of transition can be managed appropriately. It is possible, however, that a gap will remain between the expectations of stakeholders

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3 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021).

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

5 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 495.

(in terms of the extent and pace of reforms) and practical realities (in terms of the government resources available to achieve reforms of this magnitude).The ALRC therefore invites stakeholders to continue to engage closely with the Inquiry and to assist in making the case for comprehensive reforms as and when appropriate.

Context

1.15 This is the second interim report that responds to Terms of Reference received on 11 September 2020.[6] The Terms of Reference ask the ALRC to consider whether the *Corporations Act* and the *Corporations Regulations* could be simplified and rationalised, particularly in relation to:

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

1.16 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 (including Acts, regulations, class orders, other instruments, and guidance documents) can be undertaken within the context of existing policy settings.

1.17 Under the Terms of Reference, the questions to be examined in this Interim Report are as follows:

- 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.

1.18 An overarching principle identified by the ALRC in Interim Report A is that legislative design should promote meaningful compliance with the substance and intent of the law. Interim Report A introduced a model for dealing with exclusions, exemptions, and notional amendments. This Interim Report builds on this model in terms of the legislative hierarchy.

1.19 This Interim Report is significantly more targeted than Interim Report A. In particular, this Interim Report focuses exclusively on regulatory design and hierarchy. Many of the broader issues in relation to the substantive content of corporations and

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6 The first interim report, Interim Report A, was published in November 2021 and examined the use of definitions in corporations and financial services legislation: Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021).

financial services laws, raised in Interim Report A, are not addressed in this narrower Interim Report. However, these issues continue to be relevant and will be taken up in Interim Report C and the Final Report.

1.20 As noted in Interim Report A, the ALRC is mindful of the potential for changes to occur in the financial advice sector following the Quality of Advice Review being conducted by Treasury with the support of an independent reviewer. Such changes may result in a significant shift in government policy concerning the regulation of the advice sector. Given that the final report of the Quality of Advice Review is due on 16 December 2022, the ALRC does not explore the issue of advice further in this Interim Report. The ALRC has consulted closely with the Quality of Advice Review and will take its recommendations into account in Interim Report C and the Final Report.

Overarching principles

1.21 Interim Report A set out a number of overarching principles.[7] These principles are based upon the Terms of Reference for the Inquiry as a whole. The ALRC anticipates these principles will be reflected in its ultimate recommendations.

Principle One: It is essential to the rule of law that the law should be clear, coherent, effective, and readily accessible.

Principle Two: Legislation should identify what fundamental norms of behaviour are being pursued.

Principle Three: Legislation should be designed in such a manner as to promote meaningful compliance with the substance and intent of the law.

Principle Four: Legislation should provide an effective framework for conveying how the law applies.

Principle Five: The legislative framework should be sufficiently flexible to address atypical or unforeseen circumstances, and unintended consequences of regulatory arrangements.

1.22 The proposals, questions, and recommendations in this Interim Report speak to the following principles:

Proposals/Questions	Principles
Proposals B1–**B11** in respect of the proposed legislative model	Principles One, Two, Three, Four, and Five

7 Ibid [1.37]–[1.65].

Proposals/Questions	Principles
Proposal B12, **Proposal B14**, and **Question B13** in respect of guidance on the delegation of legislative power and best practice legislative design	Principles One and Four
Proposal B15 in respect of the consolidation of offence and penalty provisions, **Proposal B17** that offences and civil penalty provisions should be identifiable from the text of the provision itself, and **Proposal B18** that offence provisions should specify any applicable fault element.	Principles One, Two, Three and Four
Question B16 in respect of the use of evidential provisions	Principles Two, Three and Four
Recommendations 14, **15**, and **16** in respect of technical simplification, and **Recommendation 18** on replacing generally applicable notional amendments with textual amendments	Principles One and Four
Recommendation 17 to simplify unnecessarily complex provisions	Principles One, Two, Three, Four, and Five
Recommendation 19 on publishing materials to enhance navigability	Principle One

Foundations for Interim Report C

1.23 Interim Report C will consider how the provisions contained in Chapter 7 of the *Corporations Act* and the *Corporations Regulations* could be reframed or restructured.

1.24 Interim Report A identified a number of issues relevant to Interim Report C. These include the following:

- whether the provisions of Chapter 7 of the *Corporations Act* should be incorporated into other legislation or into a standalone Act, and whether the regulation of credit and of financial products and financial services should be consolidated, and to what extent;[8]

8 Ibid [1.35], [7.84], [12.83].

- whether the complexity created by s 5(2) of the *ASIC Act* could be reduced if Part 2 Div 2 of the *ASIC Act* were merged with Chapter 7 of the *Corporations Act*;[9]
- whether the AFSL regime and the credit licensing regime should be consolidated;[10]
- whether achieving greater alignment of the definition of 'retail client' in the *Corporations Act* with 'consumer' in the *ASIC Act* would be desirable from the perspective of reducing unnecessary inconsistencies between related terms across the Commonwealth statute book;[11]
- whether rationalisation of aspects of the disclosure regimes in Parts 7.9 and 6D.2 of the *Corporations Act* would be feasible and desirable;[12]
- whether an objects clause could be included at the beginning of a new part of Chapter 7 of the *Corporations Act* to draw together and rationalise conduct obligations that are currently scattered across various parts of Chapter 7 of the *Corporations Act* and in other legislation affecting financial services providers;[13]
- whether an expanded objects clause for Chapter 7 of the *Corporations Act*, in general or for discrete aspects of financial services law, could strengthen the expressive power of the law and improve compliance;[14] and
- how an appropriate balance between general law and statutory regulation can be achieved, and whether greater clarity or expressive power can be provided by either codifying or signposting the existence of some general law obligations.[15]

1.25 The ALRC welcomes comments on issues relevant to Interim Report C.

Key concepts

1.26 This section sets out relevant aspects of a number of key concepts that underpin and frame the analysis in this Interim Report.

1.27 This Interim Report focuses on the 'coherence of the regulatory design and hierarchy of laws'.[16] Regulatory design and the hierarchy of laws are important because they significantly influence how policies are made into laws, how laws are communicated to the public, and how the public navigates the law. Consultees have emphasised the critical importance of these concepts in relation to the overall goals

9 Ibid [4.54].
10 Ibid [8.85], [8.89].
11 Ibid [12.83].
12 Ibid [9.140].
13 Ibid [13.40]–[13.41].
14 Ibid.
15 Ibid [13.42].
16 See the **Terms of Reference** for this Inquiry.

of this Inquiry, particularly in terms of achieving 'an adaptive, efficient and navigable legislative framework for corporations and financial services'.[17]

Legislative power

1.28 Legislative power is the power to make laws by statute. Under the *Australian Constitution*, legislative power is vested only in Parliament.[18] Legislative power is often contrasted with executive power, exercisable by the Executive Government,[19] and judicial power, vested in the Judiciary.[20] While there is no bright line between legislative and executive power, the distinction

> is essentially between the creation or formulation of new rules of law having general application [legislative power] and the application of those general rules to particular cases [executive power].[21]

1.29 The principle that legislative power should not be inappropriately delegated to the Executive can be derived from the 'separation of powers' in the *Australian Constitution*.[22]

Delegated legislative power

1.30 Parliaments may delegate their ability to make laws by delegating legislative power to the executive.[23] An Act that delegates legislative power is referred to as 'enabling' or 'authorising' legislation. The process of exercising delegated legislative power can be referred to as 'executive law-making'.[24]

1.31 The history of delegated legislation in Westminster-style parliaments stretches back centuries.[25] Arguably, modern parliaments would be unable to function without

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17 Ibid.
18 *Australian Constitution* s 1.
19 Ibid ch II.
20 Ibid ch III.
21 *Minister of Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325, 331. This distinction is also reflected in the definition of 'legislative instrument' in the *Legislation Act 2003* (Cth) s 8(4).
22 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2016) [17.1]–[17.2].
23 The term 'executive' is used here in its broad sense to capture the spectrum of entities that comprise executive government. In Australia, this includes ministers, government departments and agencies, statutory authorities, and regulators. This Interim Report does not examine the special case of court rules, which arguably represent a delegation of legislative power to the judiciary. See, eg, *Federal Court of Australia Act 1976* (Cth) s 59(4).
24 See, eg, Stephen Argument, 'Australian Democracy and Executive Law-Making: Practice and Principle (Part I)' in *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and Other Papers* (Department of the Senate, Parliament of Australia, Papers on Parliament No 66, October 2016) 21; Cheryl Saunders AO, 'Australian Democracy and Executive Law-Making: Practice and Principle (Part II)' in *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and Other Papers* (Department of the Senate, Parliament of Australia, Papers on Parliament No 66, October 2016) 71.
25 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (n 22) [17.14]; The Rt Hon Lord Judge, 'Ceding Power to the Executive; the Resurrection of Henry VIII' (Speech, King's College London, 12 April 2016).

being able to delegate their law-making powers.[26] In addition, if a parliament were not permitted to delegate legislative power, that prohibition would itself act as a limitation on parliamentary sovereignty.[27]

Primary legislation

1.32 Throughout this Interim Report, the term 'primary legislation' is used synonymously with 'Acts of Parliament' to identify legislation that is passed by Parliament.[28]

Delegated legislation

1.33 Delegated legislation is the product of executive law-making. Throughout this Interim Report, 'delegated legislation' is used in preference to the synonymous expressions 'secondary legislation' and 'subordinate legislation'. In particular, the term 'subordinate' is avoided because it potentially conveys that the legislation is of lesser importance than an Act of Parliament, when in reality delegated legislation has the same legal effect as an Act of Parliament. It is this legal effect that distinguishes delegated legislation from 'soft law', such as regulatory guidance. Soft law, even when issued by the executive, does not have the force of law.[29]

Rule of law

1.34 The rule of law is an important overarching principle relevant to the design and simplification of legislation.[30] As noted above, the rule of law has particular relevance in the context of legislative hierarchy and the delegation of legislative power.

1.35 Professor Stack has identified five principles that 'provide a framework for an account of the rule of law's demands of administrative [or executive] governance':[31]

- **Authorisation**: Authorisation requires 'a positive law source that grants power to the government to act', and requires that officers act only within the scope of that power.[32]
- **Notice**: It is essential to the rule of law that the law is 'knowable and public'.[33]

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26 See generally **Chapter 4** [4.8]–[4.11].
27 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (n 22) [17.20].
28 'Primary legislation' is distinguished from the term 'primary law' as defined by the *Legislation Act 2003* (Cth). The latter term has a wider meaning, and is not otherwise used in this Report.
29 Soft law and regulatory guidance are discussed further in **Chapter 3**.
30 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [1.37].
31 Kevin Stack, 'An Administrative Jurisprudence: The Rule of Law in the Administrative State' (2015) 115(7) *Columbia Law Review* 1985, 1985.
32 Ibid 1992.
33 Ibid.

- **Justification**: Justification requires 'practices of reason-giving and processes for argumentation', and helps to protect against the arbitrary exercise of power.[34] An obligation to explain and justify is essential to accountability.[35]
- **Coherence**: The law can be viewed as 'a system in which norms fit together'; namely, the norms that underpin and provide the rationale for rules form part of a whole and must be viewed accordingly.[36] Coherence is important because to understand their obligations, people look to 'the whole environment, not a disordered collection of fragmentary, isolated, mutually independent pieces'.[37]
- **Procedural fairness**: Procedural fairness is usually concerned with unbiased and fair procedures for determining one's rights.[38] In the context of delegated legislation, the dictates of procedural fairness may be quite different from those that apply in the case of administrative decision-making.[39]

1.36 These principles provide a useful guide for understanding the safeguards that should be placed on delegated legislative power. They are also consistent with the overarching principles that should guide choices between using primary legislation or delegated legislation, discussed further in **Chapter 3**.

Regulatory design

1.37 For the purposes of this Interim Report, the ALRC has understood the term 'regulation' to denote 'any system that seeks to direct or control conduct'.[40] In the context of this Inquiry, the ALRC understands 'regulatory design' to refer to the way in which the system that seeks to direct conduct in relation to corporations and financial services is planned and made. The focus of this Inquiry is the system as established by the State through its institutions (Parliament, the Executive and the Judiciary), rather than as established by private actors in the form of self-regulation or industry codes.[41]

1.38 At its broadest, the concept of regulatory design can refer to choices regarding:

- ***whether*** to regulate (identifying whether the anticipated benefits of regulation are likely to outweigh the anticipated costs and other externalities of regulation);

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34 Ibid 1992–3.

35 Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, 450.

36 Stack (n 31) 1993, citing Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43(1) *Georgia Law Review* 1, 32–6.

37 Stack (n 31) 1993, citing Peter Strauss, 'On Resegregating the Worlds of Statute and Common Law' [1994] *Supreme Court Review* 429, 442.

38 Stack (n 31) 1993.

39 Saunders (n 24) 77.

40 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 53, Table 2.1.

41 Nevertheless, the appropriate roles and activities of private actors are relevant factors to consider when designing the system established by the State. Such regulation can be referred to as 'soft law' when not legally binding. See the discussion of soft law in **Chapter 3**.

- ***why*** regulation should be introduced (identifying the particular risks to be addressed, and the goals of regulation, against which its effect might be assessed);
- ***who*** should regulate (identifying the respective roles of Parliament, the Judiciary, and the many arms of the Executive — including ministers, administrative decision makers, statutory regulators, and police — as well as the role of self-regulation and private regulatory arrangements);
- ***what*** should be regulated (identifying the subject matter of regulation and demarcating the regulatory perimeter);
- ***where*** regulation should be located (identifying the appropriate distribution of regulatory material between different sources of regulation, such as legislation, rulings, licences, exemption instruments, and guidance materials); and
- ***how*** the subject matter should be regulated (identifying the substantive content of regulation, as well as how that content is formulated, organised, presented, and structured).[42]

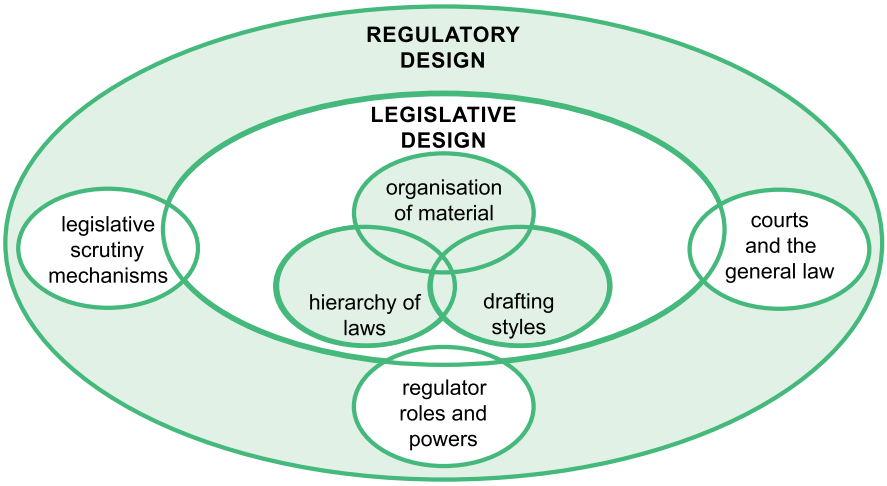
1.39 The core focus of this Interim Report is *legislative* design (which is effectively a subset of regulatory design — see **Figure 1.1**), consistent with the centrality of the legislative framework in the Terms of Reference generally. Nevertheless, choices regarding the appropriate design of legislation inevitably influence, and are influenced by, other aspects of regulatory design. Accordingly, this Interim Report necessarily broaches topics beyond the strict ambit of legislative design where relevant. For example, in examining ways to maintain regulatory flexibility, **Chapter 2** of this Interim Report considers appropriate roles for actors such as ministers and regulators in exercising delegated legislative powers — questions regarding *who* should regulate.

1.40 **Figure 1.1** below represents how some focus topics in this Inquiry fit within the conceptual framework of regulatory design and legislative design. In the centre of the Figure are three topics which, in the ALRC's view, fit squarely within the scope of legislative design: the organisation of material in legislation; the allocation of legislative material across the hierarchy of laws; and legislative drafting styles (such as the use of definitions and the way in which provisions are structured and expressed generally). Each of these topics intersects and interrelates with the others, and accordingly the bubbles in which they are contained in the Figure overlap with each other. Further from the centre of the Figure are three topics with some relevance to legislative design (such that their respective bubbles overlap with the legislative

42 In March 2022, the ALRC hosted a webinar with experts on the design of corporations and financial services legislation in the UK, Singapore, Hong Kong, and New Zealand. Professor Black CBE observed that, fundamentally, there are two types of regulatory design decisions: what types of rules are to be made (for example, whether legally binding or not, with what consequences for breach); and what kind of institutional framework will accompany the rules (for example, who authors the rules and who enforces them). See Australian Law Reform Commission, 'Recording: What Goes Where? A Comparative Discussion of the Legislative Puzzle' <www.alrc.gov.au/news/recording-what-goes-where/>. See also Australian Law Reform Commission, 'Comparative frameworks for promoting good legislative design' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Comparative-frameworks-for-legislative-design.pdf>.

design bubble), but with greater significance to regulatory design more generally (such that the majority of their respective bubbles sit outside the legislative design bubble): legislative scrutiny mechanisms; regulator roles and powers; and courts and the general law.

Figure 1.1: Regulatory design and focus topics in this Inquiry



1.41 A constraint in the Terms of Reference for this Inquiry is that any reform proposals must fit 'within existing policy settings'. Consequently, this Inquiry does not focus on the '*whether*', '*why*', and '*what*' questions outlined above.

1.42 The relationship between policy and law is complex;[43] however, many of the regulatory design choices listed above involve significant policy considerations. For example, the ALRC has not been asked to re-examine whether corporations and financial services should be regulated at all, nor which financial products should be regulated, nor whether the Twin Peaks model of regulation remains appropriate.[44] Instead, the focus of this Inquiry is on design choices that may best achieve simplification and coherence of the existing law. In particular, this Interim Report focuses on choices regarding *where* regulation is located, *who* makes regulation, and *how* the content of regulation is organised and structured. These issues are closely related to the 'hierarchy of laws', and to the aim of achieving an 'adaptive, efficient and navigable legislative framework'.[45]

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43 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) ch 2, especially [2.50]–[2.70].

44 For a description of Twin Peaks financial regulation, see, eg, Andrew Godwin and Andrew Schmulow, *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press, 2021). In summary, under the Twin Peaks model regulatory functions are split between prudential regulation and market conduct regulation. In Australia, the former is vested in APRA, and the latter in ASIC.

45 See the **Terms of Reference** for this Inquiry.

1.43 In addition to considering the distribution of material across the legislative hierarchy, this Inquiry also examines the organisation of material within each individual level of the legislative hierarchy. This Interim Report considers issues relevant to the organisation of material in the context of, for example, proposed 'rulebooks' that would be structured thematically.[46] The organisation of material across related pieces of legislation, such as the *Corporations Act* (Chapter 7), the *ASIC Act*, the *NCCP Act*, and the *Australian Consumer Law*, will be a key focus of Interim Report C.

1.44 Some relevant aspects of the organisation of material, which may make the law more accessible, include consideration of whether in a particular case:

- provisions that relate to similar subject matter, or that are similar in nature, should be grouped together;
- closely related provisions that overlap or are based on unnecessary distinctions should be consolidated;
- material should be ordered in such a way as to achieve a logical flow of ideas and concepts;
- the most important ideas (such as key concepts, obligations, and prohibitions) should be located upfront or otherwise in a prominent position; and
- using legislative blueprints, simplified outlines, diagrams, and other legislative features might help drafters to structure material logically, and might communicate to readers how legislation has been structured, and the norms that inform the rules.[47]

Good legislative design

1.45 Professor Rubin has suggested that insufficient scholarly attention has been paid to 'the way to draft effective statutes', in contrast to the academic focus placed on statutory interpretation, or on policy issues.[48]

1.46 The Productivity Commission has suggested that 'good regulation' should: 'serve clearly identified policy goals, and be effective in reaching those goals'; 'promote innovation through … goal-based approaches'; and 'be clear, simple, and

46 See **Proposal B5** and **Chapter 2**.

47 For a discussion about the tools by which legislation might articulate norms and draw explicit connections between rules and norms, including the use of simplified outlines, see Andrew Godwin and Micheil Paton, 'Social Licence, Meaningful Compliance, and Legislating Norms' (2022) *Company and Securities Law Journal* (forthcoming). See also Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [88]–[110].

48 Edward Rubin, 'Legislative Methodology' (Paper, Canadian Institute for the Administration of Justice, 10 September 2012) 2.

practical for users'.[49] Regulatory design can help to achieve these goals and improve the quality of regulation, irrespective of the particular policy it pursues.[50]

1.47 According to the Productivity Commission, sound regulatory design should be based on evidence gathered by evaluating the impacts of regulation on the risk sought to be reduced. The Commission identified a number of post-law-making mechanisms that could contribute to the evidence base, such as: post-implementation reviews; embedded statutory reviews; public regulation stocktakes; cross-jurisdictional principle-based reviews; benchmarking; and in-depth reviews.[51]

1.48 General principles of 'design' are increasingly being applied in a diverse range of professional fields. Accordingly, general principles of design may be useful to consider when approaching questions of legislative design.[52]

The hierarchy of laws

1.49 The Terms of Reference provide that the scope of the hierarchy of laws includes 'primary law provisions, regulations, class orders, and standards'. The ALRC interprets this as incorporating reference to all types of legislation: primary legislation comprising Acts of Parliament; and regulations, class orders, and standards being types of delegated legislation (legislative instruments).[53]

1.50 This Interim Report focuses on the allocation of material within and between primary and delegated legislation. Although each type of legislation has equal effect as binding law, they can be described as forming a 'hierarchy' because, to be valid, the content of delegated legislation must fall within the scope set out in the primary legislation that delegates power.[54] In the event of an inconsistency between primary legislation and delegated legislation, the provisions in primary legislation prevail on the basis of the doctrine of parliamentary sovereignty.[55] In this context, the current extensive use of delegated legislation to notionally amend corporations and financial services primary legislation arguably undermines the concept of legislative hierarchy.

1.51 The Terms of Reference do not explicitly refer to other elements of the overall regulatory hierarchy, such as the *Australian Constitution*, exercises of administrative power, the general law developed by the courts, and soft law. However, legislation

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49 Productivity Commission, *Identifying and Evaluating Regulation Reforms* (Research Report, December 2011) 10, citing OECD, *Guiding Principles for Regulatory Quality and Performance* (OECD, 2005).

50 Cristie Ford, *Innovation and the State: Finance, Regulation, and Justice* (Cambridge University Press, 2017) 6.

51 Productivity Commission (n 49).

52 Commonly cited design principles include: the 80/20 rule; the principle of accessibility; the principle of consistency; the principle of hierarchy; and the flexibility-usability trade-off. See, eg, William Lidwell, Kritina Holden and Jill Butler, *Universal Principles of Design, Revised and Updated* (Quarto Publishing Group, 2010).

53 As defined in the *Legislation Act 2003* (Cth) s 8 (legislative instruments), s 10(1)(a) (regulations).

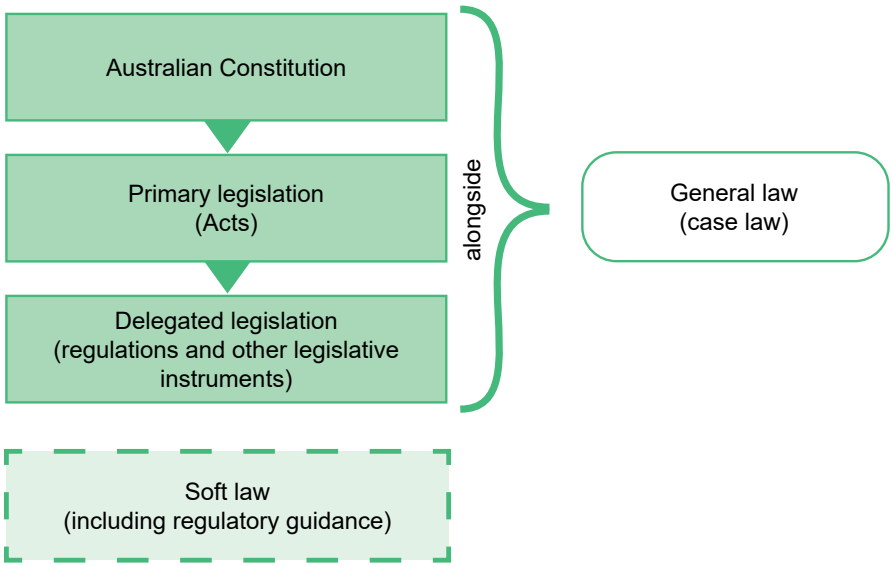
54 See **Chapter 3**.

55 Kathleen Hall and Claire Macken, *Legislation and Statutory Interpretation* (LexisNexis Butterworths, 2020) 13.

interacts in important and complex ways with each of these other elements of the regulatory ecosystem, and the ALRC has been mindful of these interactions in considering optimal legislative design. Each of these elements is explored briefly in turn.

1.52 **Figure 1.2** below sets out, in a simplified and visual way, the key elements of the hierarchy of laws in relation to Commonwealth legislation in Australia.

Figure 1.2: The hierarchy of Commonwealth legislation



1.53 The *Australian Constitution* forms the apex of the Commonwealth hierarchy of laws. Legislation must comply with any constitutional limitations. Constitutional considerations have featured in the ALRC's investigation of the appropriate structure of corporations and financial services legislation.[56]

1.54 As discussed above at [1.28], the *Australian Constitution* establishes an important distinction between the legislative power of Parliament and the administrative powers of the Executive. The definition of 'legislative instrument' in the *Legislation Act* suggests two criteria that, combined, indicate when a power may be legislative in nature. First, a power may be legislative if it is a power to determine or alter the content of the law, rather than determining particular circumstances in which the law is to apply. In addition, a power may be legislative if it has the effect of 'affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right'.[57]

56 See, eg, Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021).

57 *Legislation Act 2003* (Cth) s 8(4).

1.55 Exclusions and exemptions from a regulatory regime may represent a 'borderline case' as to whether they are properly categorised as an exercise of legislative power. For example, there may be some debate regarding the extent to which existing exclusions and exemptions from corporations and financial services legislation determine or alter the content of the law, such that they would satisfy the first criterion set out in the *Legislation Act*. A key factor may be the breadth of the scope of the particular exclusion or exemption and the nature and extent of any associated conditions or requirements.

1.56 The *Legislation Act* additionally provides for the making of 'notifiable instruments' and also other types of instruments that are not legislative in nature.[58] Examples of administrative power exercised in the context of the regulation of corporations and financial services would include conditions placed by ASIC on an AFS Licence or credit licence, and decisions by ASIC to ban individuals from holding a position as a director of a company.[59]

1.57 The general law developed by the courts forms a separate body of law from legislation, and is applied 'as modified by the Constitution and by the statute law in force'.[60] Consistent with the doctrine of parliamentary sovereignty, statutory laws prevail over case law, and courts can only strike down, or declare invalid, legislation on very narrow grounds, such as constitutional incompatibility.[61] Instead, the primary role of courts is to interpret the meaning and effect of legislation in the context of disputes brought before them.[62]

1.58 The term 'soft law' refers to the wide range of material that seeks to (or in fact does) direct or influence conduct, but that is not directly legally binding. Examples may include Regulatory Guides issued by ASIC, and codes of conduct developed by industry that are not given legal effect by statute or incorporated as contractual provisions. Soft law materials therefore sit outside the formal hierarchy of laws relative to the other materials discussed here. However, in considering what kind of material should be located within the legislative hierarchy, the ALRC has also considered what kind of material should be contained in soft law.[63]

1.59 Emeritus Professor Pearce AO and Argument suggest that 'there is a difficulty in stating, with any certainty, what should and should not be dealt with by delegated legislation'.[64] Nevertheless, guidance on the appropriate use of legislative hierarchy

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58 See especially ibid s 11.

59 For a discussion of the implications of banning individuals by way of administrative decision-making, see Jasper Hedges, George Gilligan and Ian Ramsay, 'Banning Orders: An Empirical Analysis of the Dominant Mode of Corporate Law Enforcement in Australia' (2017) 39(4) *Sydney Law Review* 501.

60 *Judiciary Act 1903* (Cth) s 80.

61 See, eg, Hall and Macken (n 55) [2.5].

62 See, eg, *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [13.108]–[13.120].

63 See **Chapter 3**, especially [3.74]–[3.78].

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

has been issued by a number of bodies in Australia and overseas.[65] Proposals regarding the application and potential enhancement of such guidance in the context of Australian corporations and financial services legislation are contained in **Part One** of this Interim Report.

Regulatory coherence and flexibility

1.60 The Terms of Reference for this Inquiry require the ALRC to focus on the 'coherence' of the regulatory design and hierarchy of laws. The ALRC considers that the design of a regulatory framework will be coherent if its elements fit together and are mutually supportive, rather than being disjointed or inconsistent.[66] Accordingly, there are strong links between coherent regulatory design and the 'navigability' and 'accessibility' of law. In addition, the coherence of regulatory design will be significantly influenced by the level of coherence in the policies underpinning the law. Corporations and financial services legislation has been a vehicle for a number of differing policy objectives over the years.[67] The ALRC has designed reform proposals regarding legislative design to take into account this trend, which is likely to continue into the future. For example, the principles relating to use of the legislative hierarchy in **Chapter 2** have been designed for flexibility, and to accommodate changes in policy over time.[68]

1.61 The need to 'maintain regulatory flexibility' is emphasised in the Terms of Reference for the purposes of clarifying 'technical detail', addressing 'atypical or unforeseen' circumstances, and addressing any 'unintended consequences'. The importance of these features has loomed large in the ALRC's consultations. Increasingly complex financial products, services, and industry practices require a level of technical detail in the law. Several consultees perceive that delegated legislation has to date been relied upon to address such anomalies, in effect to 'fix up the Act', rather than fixing the text of the Act directly through legislative amendment. Some have speculated that this has been a particular driver behind the proliferation of delegated legislation, and of the sometimes ad hoc nature of the design of regulation which affects its navigability.

1.62 Design choices regarding the allocation of material between levels of the legislative hierarchy may affect the speed and ease with which aspects of the law can be changed. For example, passing and amending primary legislation through Parliament ordinarily requires a longer time and a more involved process than making

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65 See, for example, the sources referred to in Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.133]–[2.162].

66 Ibid 56, citing Ken Kress, 'Coherence' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2nd ed, 2010) 521.

67 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 63, citing; The Hon Murray Gleeson AC, 'Statutory Interpretation' (Justice Hill Memorial Lecture, Taxation Institute of Australia, Sydney, 11 March 2009).

68 For a discussion about the need to accommodate changes in policy caused by technological innovation, see Australian Law Reform Commission, 'New Business Models, Technologies, and Practices' (Background Paper FSL7, forthcoming).

and amending delegated legislation. Making and amending regulations through the Federal Executive Council ordinarily takes longer and is more involved than making and amending other instruments. Accordingly, there may be good reason to locate more prescriptive rules in delegated legislation, rather than in primary legislation.

1.63 Even legislative instruments can require substantial periods of time to draft. According to the recent report of the 2021–2022 Review of the *Legislation Act 2003*, 'the longer and more complex an instrument is, the longer it will take to review and remake'.[69] The report notes that

> for relatively straightforward replacement instruments OPC requires approximately six weeks to draft a 10 page instrument; six months for a 50 page instrument; 12 months for a 100 page instrument and 2 years for a 200 page instrument. Where an instrument is not being remade in substantially the same form and requires amendments, OPC requires additional drafting time.[70]

1.64 Design choices regarding legislative hierarchy also affect the nature and level of accountability and scrutiny that is involved. Parliamentary accountability for, and scrutiny of, delegated legislation is less direct than in the case of primary legislation. As a result, there may be competing considerations in a particular case in determining whether a matter should ideally be dealt with in primary or delegated legislation. The Draft Guidance endeavours to reflect the relevant principles and competing considerations that may arise.

Responsive regulation

1.65 Regulators have limited resources and need to make choices about how most effectively to deploy them. Responsive regulation

> recognises that it is not possible for any regulatory agency to detect and enforce every contravention of the law it administers and provides insights into how regulatory compliance can be achieved effectively.[71]

1.66 According to responsive regulation theory, regulators should draw on a range of responses to promote compliance, utilising both persuasion and punishment.[72] These responses are conceptualised as an 'enforcement pyramid', with regulator action escalating from persuasive measures (at the bottom) to coercive measures (at the top) 'only when less interventionist measures have failed to produce

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

70 Ibid 45 n 102.

71 Vicky Comino, 'Towards Better Corporate Regulation in Australia' (2011) 26(1) *Australian Journal of Corporate Law* 6, 7.

72 Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (Final Report, June 2014) [4.10]. Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) ch 2.

compliance'.[73] In Australia, coercive measures may include civil penalties, criminal penalties, and shutting down of operations. The theory posits that:

> Methods for promoting voluntary compliance, such as persuasion and education, are made more effective as a result of the credible sanctions of escalating severity available to the regulator that it can threaten to utilise or pursue.[74]

1.67 For responsive regulation to be effective, it is important that the regulator is able and willing to escalate the level of sanctions to secure compliance.[75]

1.68 The enforcement pyramid is reflected in the range of penalties and other potential regulatory responses available in financial services legislation. It is recognised as having been particularly influential in the introduction of civil penalty provisions in corporations and financial services law, providing regulators with an intermediate step between persuasive measures and criminal sanctions.[76] The theory of responsive regulation is also said to justify the choice that legislation often gives to regulators to pursue either criminal or civil penalty proceedings for substantially the same conduct — referred to as 'dual-track' regulation.[77] Often, the same conduct may also be dealt with through an infringement notice.[78]

1.69 The application of enforcement theories, and the design of offences and civil penalties, including their appropriate location in the legislative hierarchy, is discussed further in **Chapter 5**.

Navigating Interim Report B

1.70 Having regard to the foregoing analysis, this Interim Report is divided into two parts:

- Part One: A Principled Legislative Hierarchy; and
- Part Two: Maintenance.

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73 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) [3.32] ('*Principled Regulation*'). See also Australian Law Reform Commission, *Corporate Criminal Responsibility* (ALRC Report No 136, 2020) [5.10]–[5.12].

74 Senate Economics References Committee, Parliament of Australia (n 72) [4.10].

75 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (Volume 1, 2018) 287, citing Ayres and Braithwaite (n 72) 38. See also Australian Prudential Regulation Authority, *Enforcement Strategy Review: Final Report* (2019) 15–16.

76 Australian Law Reform Commission, *Principled Regulation* (n 73) [2.60].

77 See Australian Law Reform Commission, *Corporate Criminal Responsibility* (n 73) [5.24]–[5.26]. The ALRC has expressed concerns about dual-track regulation in a number of reports. See, eg, Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (n 22) [8.171]; Australian Law Reform Commission, *Corporate Criminal Responsibility* (n 73) [5.17]–[5.26].

78 Australian Law Reform Commission, *Corporate Criminal Responsibility* (n 73) [5.110]–[5.129].

1.71 The analysis in this Interim Report is further underpinned by a series of Background Papers.[79]

Part One: A Principled Legislative Hierarchy

1.72 Part One contains **Chapters 2**–**6**.

1.73 **Chapter 2** sets out a proposed legislative model for corporations and financial services laws. The model further develops the legislative hierarchy model that was introduced in Interim Report A.[80] The proposed legislative model is underpinned by the analysis and principles discussed in the following four chapters, which consider: 'what goes where' in the legislative hierarchy (**Chapter 3**); the design of delegated legislative powers (**Chapter 4**); particular issues presented by offences, penalties, and enforcement (**Chapter 5**); and how the law is currently allocated between primary and delegated legislation (**Chapter 6**).

1.74 The proposed legislative model discussed in **Chapter 2** is reflected in **Proposals B1**–**B11**. In summary, the proposed legislative model for the material currently contained in Chapter 7 of the *Corporations Act* and associated delegated legislation comprises the following elements:

- a de-cluttered Act of Parliament, containing 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 Scoping Order (a single, consolidated legislative instrument) 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;[81] and
- thematically consolidated rules, which for convenience may be labelled 'rulebooks', containing prescriptive detail (also currently spread across the legislative hierarchy).

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79 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021); Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021); Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021); Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021); Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022); Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022); Australian Law Reform Commission, 'New Business Models, Technologies, and Practices' (Background Paper FSL7, forthcoming); Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, forthcoming); Australian Law Reform Commission, 'Unconscionability and Misleading or Deceptive Conduct' (Background Paper FSL9, forthcoming).

80 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) ch 10.

81 In Interim Report A, this instrument was identified as the Implementation Order: ibid [10.45]. As explained further in **Chapter 4**, however, a more appropriate label may be the Scoping Order.

1.75 **Chapter 2** is supported by Prototype Legislation B (available on the ALRC website) which demonstrates the application of these principles in respect of financial product disclosure.[82]

1.76 **Chapter 3** examines 'what goes where' in the legislative hierarchy in terms of the appropriate allocation of matters between primary legislation and delegated legislation. It sets out four overarching principles that guide decisions about legislative hierarchy and how delegated powers should be designed.[83] The ALRC proposes Draft Guidance to assist with the implementation of the proposed legislative model (see **Question B13** and **Appendix E**). Prototype Legislation B exemplifies how the ALRC's proposals could be implemented in practice.

1.77 **Chapter 3** contains two proposals and one question (**Proposals B12** and **B14**, **Question B13**) concerning guidance in respect of the delegation of legislative power and supporting best practice legislative design.

1.78 **Chapter 4** examines issues concerning the appropriate delegation of legislative powers, particularly the legal and institutional safeguards that help to maintain the rule of law and ensure appropriate accountability. This chapter addresses the Terms of Reference which require the ALRC to consider 'how delegated powers should be expressed in legislation, consistent with maintaining an appropriate delegation of legislative authority'.

1.79 **Chapter 5** examines how the proposed legislative model could be implemented with respect to offences and penalties. This chapter demonstrates that the proposed approach to legislative design and hierarchy for offence and penalty provisions could bring significant benefits to regulated communities, regulators, and the public at large.

1.80 Offences and penalties have generally been considered an area appropriate for consideration by Parliament, and are best located in primary legislation. This is principally because of the impact of offences and penalties on individual rights and liberties. Existing guidance, which the ALRC has consistently endorsed, is clear that only minor offences and penalties are appropriate for inclusion in delegated legislation. The proposed legislative model seeks to uphold this guidance in substance.

1.81 **Chapter 5** contains one proposal and one question. **Proposal B15** is to consolidate offence and penalty provisions in corporations and financial services legislation into a smaller number of provisions covering the same conduct. **Question B16** asks whether evidential provisions might play a helpful role in the legislative hierarchy, for example by facilitating the effective legislative expression of the relationship between fundamental obligations and prescriptive detail.

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82 Australian Law Reform Commission, 'Prototype Legislation B' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Prototype-Legislation.pdf>.

83 The four principles relate to the following: democratic accountability and legitimacy; durability and flexibility; clarity and predictability; and coherence and navigability. See [3.48]–[3.57].

1.82 **Chapter 6** provides the problem analysis which underpins the proposed legislative model set out in **Chapter 2**. **Chapter 6** examines how the law is allocated between primary and delegated legislation and the extent to which the allocation of law departs from existing law design guidance. Particular design choices made in relation to the *Corporations Act* are significant sources of its complexity. Alternative approaches to law design, which preserve flexibility and adaptability in the law, would reduce the complexity of corporations and financial services legislation while improving its navigability.

1.83 Three key findings arise from the ALRC's data analysis in **Chapter 6**. First, the *Corporations Act* lacks a coherent legislative hierarchy in terms of the allocation of material between the Act and delegated legislation. Secondly, the *Corporations Act* is not realising the potential benefits of delegated legislation in achieving 'regulatory flexibility to clarify technical detail and address atypical or unforeseen circumstances and unintended consequences of regulatory arrangements' as expressed in the Terms of Reference. Thirdly, notional amendments in corporations and financial services law, particularly in areas such as disclosure, have far exceeded their original role as a tool for embedding flexibility and 'fleshing out detail',[84] resulting in a blurring of the roles of primary and delegated legislation. This area of Commonwealth law has been notionally amended more than any other.

1.84 **Chapter 6** also outlines the prevalence of offences and civil penalties in legislative instruments, the penalties imposed for breaches, and the extent to which corporations and financial services law is an outlier in this regard.

Part Two: Maintenance

1.85 Part Two contains **Chapters 7**–**9**. These chapters explore ways to make targeted and significant improvements to aid navigability, findability, and the overall quality of the law. The recommendations are stand-alone and their implementation could start immediately.

1.86 **Chapter 7** contains three technical recommendations to simplify corporations and financial services legislation as follows:

- repeal redundant and spent provisions in corporations and financial services legislation (**Recommendation 14**);
- establish an ongoing program to identify and facilitate the repeal of redundant provisions and to prevent their accumulation (**Recommendation 15**); and
- amend corporations and financial services legislation to address unclear, incorrect, and outdated provisions (**Recommendation 16**).

1.87 **Chapter 8** contains two recommendations and two proposals to reduce the complexity of corporations and financial services legislation, particularly the *Corporations Act*, through simpler approaches to law design:

84 See [6.29].

- simplify unnecessarily complex provisions (**Recommendation 17**);
- amend the *Corporations Act* so that each offence and civil penalty provision is identifiable from the text of the provision and clearly specifies the consequences of breach (**Proposal B17**);
- replace generally applicable notional amendments with textual amendments (**Recommendation 18**); and
- amend offence provisions in corporations and financial services legislation to indicate any applicable fault element (**Proposal B18**).

1.88 In **Chapter 9** the ALRC recommends that ASIC publish additional materials that help users navigate the legislation that it administers (**Recommendation 19**). Such materials could include annotated versions of the *Corporations Act*, *NCCP Act*, and *ASIC Act*.

PART ONE: A PRINCIPLED LEGISLATIVE HIERARCHY

2. A Legislative Model for Financial Services

Contents

Introduction

2.1 This chapter shows how a principled legislative hierarchy — comprising an Act, a consolidated legislative instrument containing detail necessary for adjusting the scope of the Act, and thematically consolidated rulebooks — could be used to manage legislative complexity, maintain regulatory flexibility, and address unforeseen circumstances or unintended consequences of regulatory arrangements. In Interim Report A, the ALRC identified the incoherent use of the legislative hierarchy as a key source of complexity in corporations and financial services legislation. That Interim Report included a model for corporations and financial services legislation that would simplify and bring coherence to the law. This chapter further develops that model, and also discusses the role of individual exemptions as well as regulatory guidance published by ASIC.

2.2 This chapter 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 aim to explain how legislative power may be delegated in a manner consistent with the principles of democratic accountability and the rule of law. **Chapter 6** uses data and specific examples to explore the different approaches to law design and legislative hierarchies across the Commonwealth statute book, and the extent to which the legislative hierarchy in corporations and financial services law departs from existing law design guidance.

2.3 This chapter explains how the principles in **Chapters 3**–**5** may be applied so as to create an adaptive, efficient, and navigable legislative framework for the regulation of financial services. In particular, the prototype legislation discussed in this chapter and available on the ALRC website ('Prototype Legislation B') demonstrates how the model may be applied so as to reframe and restructure significant parts of the legislation relating to financial product disclosure.[1]

The model in overview

Proposal B1 The legislative hierarchy of Chapter 7 of the *Corporations Act 2001* (Cth) should be amended, in a staged process, to implement a legislative model that incorporates Proposals B2–B9. The legislative hierarchy should comprise:

a. an Act legislating fundamental norms and obligations, and other provisions appropriately enacted only by Parliament;

b. a Scoping Order (a single consolidated legislative instrument) containing exclusions, class exemptions, and other detail necessary for adjusting the scope of the Act; and

c. thematic 'rulebooks' (consolidated legislative instruments) containing rules giving effect to the Act in different regulatory contexts as appropriate.

1 Australian Law Reform Commission, 'Prototype Legislation B' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Prototype-Legislation.pdf>.

Scoping Order and individual relief

Proposal B2 Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to include a power to:

a. exclude classes of products and services or exempt classes of persons from provisions of Chapter 7 of the Act; and

b. set out detail that adjusts the scope of any provisions in Chapter 7 of the Act;

in the Scoping Order.

Proposal B3 Chapter 7 of the *Corporations Act 2001* (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').

Proposal B4 Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to require that:

a. every legislative instrument made under the power set out in Proposal B2; and

b. every notifiable instrument made under the power set out in Proposal B3;

must be accompanied by a statement explaining how the instrument is consistent with relevant objects within Chapter 7.

Rules and rulebooks

Proposal B5 Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to include a power to make 'rules'.

Proposal B6 Chapter 7 of the *Corporations Act 2001* (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.

Proposal B7 Rules made under Chapter 7 of the *Corporations Act 2001* (Cth) should not contain matters more appropriately enacted in primary legislation, particularly:

a. serious criminal offences, including offences subject to imprisonment, and significant civil penalties;

b. administrative penalties; and

c. powers enabling regulators to take discretionary administrative action.

The law-making roles of the Minister and ASIC

Proposal B8 The powers set out in Proposal B2 and Proposal B5 should be vested in:

a. the Minister; and

b. the Australian Securities and Investments Commission.

A protocol between the Minister and the Australian Securities and Investments Commission should coordinate the exercise of the powers.

Proposal B9 Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to:

a. establish an independent 'Rules Advisory Committee'; and

b. 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.

Steps to implementation

Proposal B10 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 *Corporations Act 2001* (Cth) by regulation or other instrument should be repealed.

Proposal B11 As part of the staged implementation of the proposed legislative model, relevant existing powers to:

a. exclude products or services; and

b. exempt a person or class of persons;

from the operation of all or specified provisions of Chapter 7 of the *Corporations Act 2001* (Cth) by regulation or other instrument should be repealed.

2.4 In summary, the proposed legislative model 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 containing the vast majority of exclusions and exemptions from the Act (these are currently spread across the legislative hierarchy) and other detail that is necessary for adjusting the scope of the Act;[2] and

2 In Interim Report A, this instrument was identified as an 'Implementation Order'. As explained further below, however, a more appropriate label may be 'Scoping Order'.

- thematically consolidated rules, which for convenience may be labelled ‘rulebooks’, containing prescriptive detail (also currently spread across the legislative hierarchy).

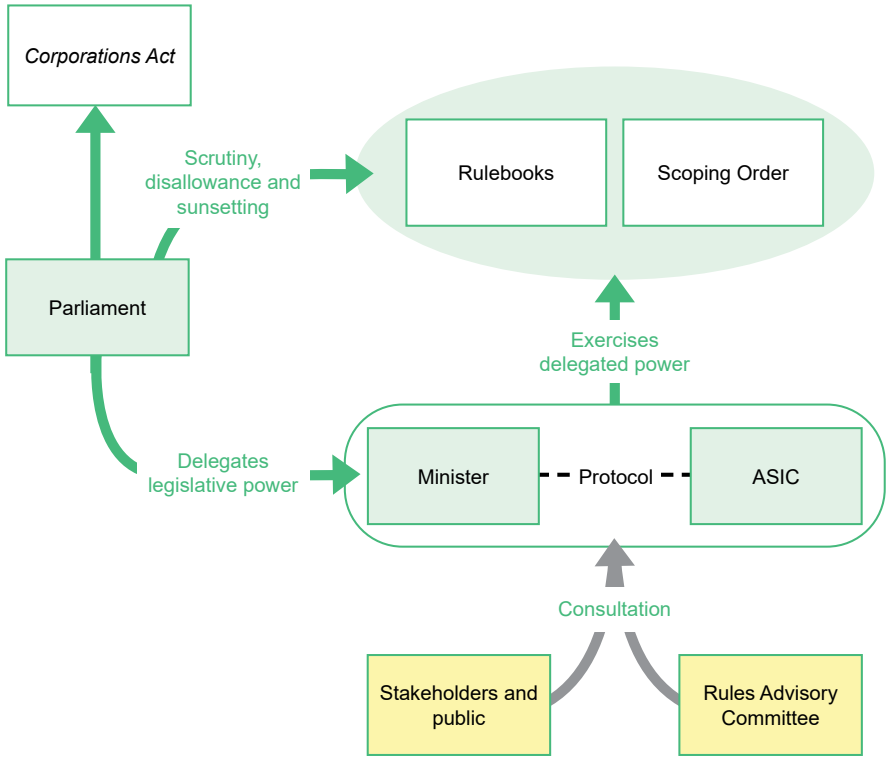
2.5 The proposed legislative model enables significant simplification of the Act, which currently contains large amounts of prescriptive detail. It also creates a coherent and navigable legislative hierarchy. Importantly (particularly given the requirement for this Inquiry to proceed ‘within existing 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;
- the use of delegated legislation to manage the over-inclusiveness that has resulted from the adoption of functional definitions in pursing 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.[3]

2.6 Each of the model’s features is discussed below. **Figure 2.1** gives a simplified visual overview of the proposed legislative model.

3 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.11]–[7.12], [7.20].

Figure 2.1: The proposed legislative model



Applying the model to financial product disclosure

2.7 Prototype Legislation B illustrates how **Proposals B1**–**B9** could be applied to financial product disclosure.[4] It attempts to show how large parts of the current law relating to financial product disclosure could be reframed and restructured, within existing policy settings, in accordance with the proposed legislative model.

4 Prototype Legislation B further develops an earlier prototype prepared for the purposes of Interim Report A ('Prototype Legislation A'), which is also available on the ALRC website: Australian Law Reform Commission, 'Prototype Legislation A' <www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-FSL-Prototype-Legislation.pdf>. Prototype Legislation A sought to illustrate the ALRC's proposals in relation to definitions and the legislative hierarchy, with an emphasis on: exclusions from the key concepts of 'financial product' and 'financial services'; exemptions from the obligation to hold an AFS Licence; and the potential role of 'rules' to consolidate prescriptive detail.

2.8 Prototype Legislation B demonstrates a more principled allocation of material between different 'layers' of the legislative hierarchy than is presently the case ('vertical' coherence). In Prototype Legislation B, the prescriptive detail necessary for tailoring disclosure requirements is contained in rules, rather than spread across the legislative hierarchy as it is currently. Consequently, the fundamental norms of disclosure — embodied in the obligations and prohibitions contained in the Act — can be expressed clearly and prominently.

2.9 The proposed legislative model is also able to 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. Prototype Legislation B shows 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.[5] **Figure 2.2** below demonstrates how Prototype Legislation B accommodates the overlap and divergences between those two regimes.[6]

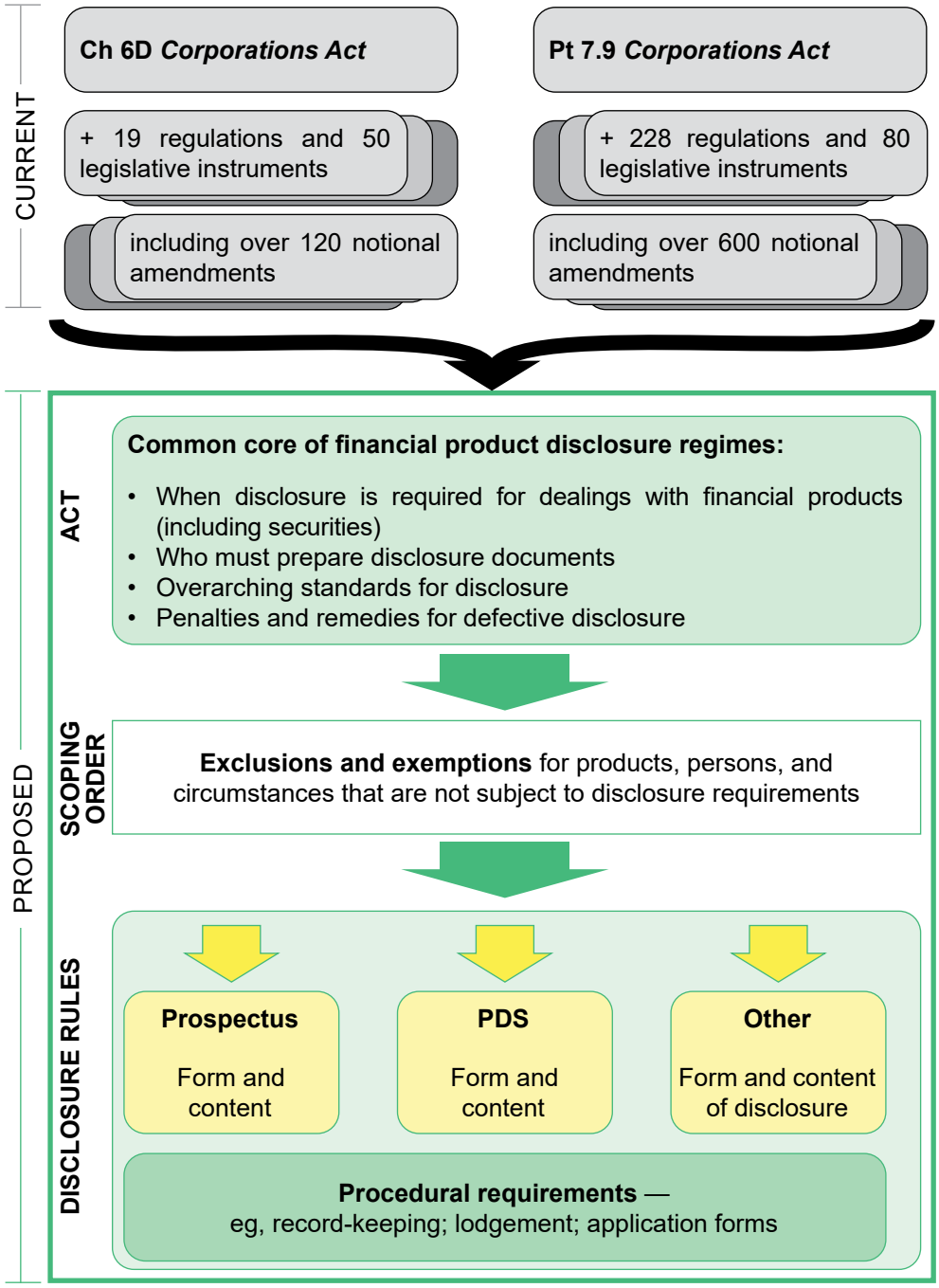
2.10 A Reverse Concordance Table published on the ALRC's website enables readers to identify the existing statutory provisions that are reflected in Prototype Legislation B.[7] The Table also indicates the respects in which Prototype Legislation B differs from the existing law in a way that may affect 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.

5 Noting that securities, though presently treated separately for the purposes of disclosure in Chapter 6D of the *Corporations Act*, are a type of financial product: *Corporations Act 2001* (Cth) s 764A(1)(a). For further discussion of the disclosure regimes in Ch 6D and Pt 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.

6 See also [2.100] below, which explains the methodology for preparing Prototype Legislation B.

7 Australian Law Reform Commission, 'Reverse Concordance Table' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Reverse-concordance-table.xlsx>.

Figure 2.2: Integration of disclosure regimes



Improved navigability for users of the legislation

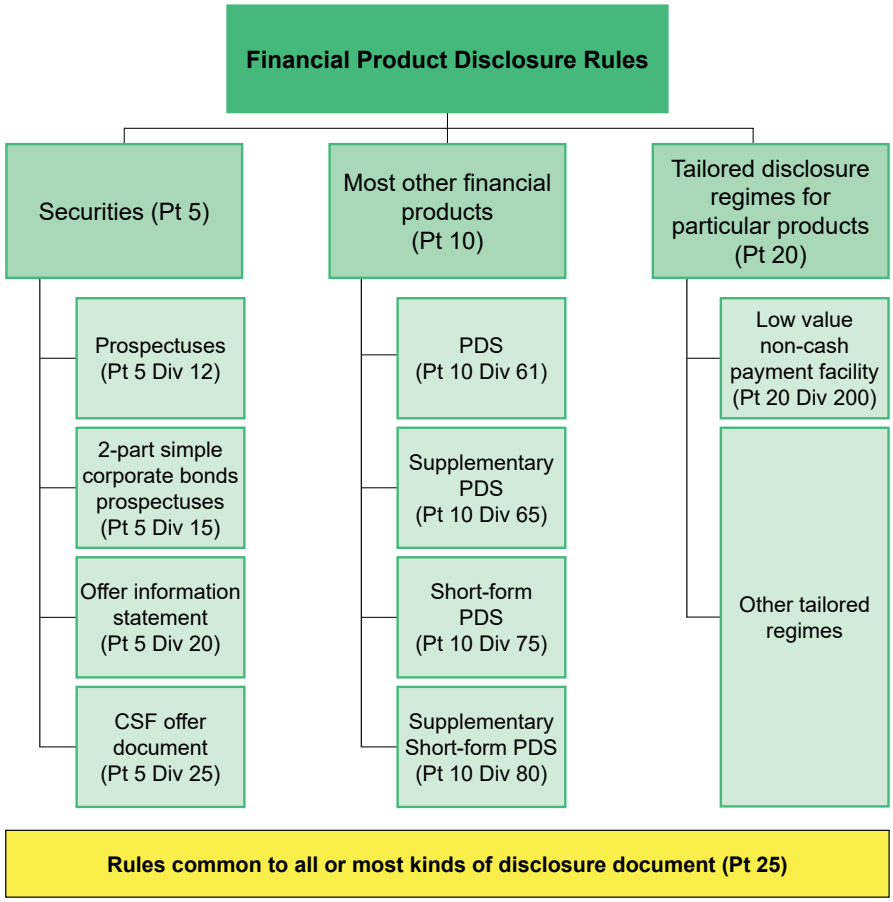
2.11 Prototype Legislation B demonstrates how the proposed legislative model can greatly improve navigability within — as well as between — 'layers' of the legislative hierarchy. As discussed further below, navigability between layers is facilitated by structuring the content of the Scoping Order and rulebooks according to function and theme. Navigability within a rulebook is facilitated by applying a logical structure that focuses on how a user of the legislation would be likely to engage with it. Not all laws will be of interest to all readers — in that respect, rulebooks are akin to a 'choose your own adventure' book.[8]

2.12 The 'choose your own adventure' structure of the Rules in Prototype Legislation B is illustrated by **Figure 2.3** below. The structure of the Rules makes it simple for a user:

- to identify the relevant Part applicable to their circumstances — be it disclosure in relation to shares and other similar financial products (Rules Part 5), most other financial products (Rules Part 10), or a particular kind of financial product (Rules Part 20);
- having located the relevant Part, to identify the disclosure document that applies in the particular case — for example, prospectus, offer information statement, PDS, or supplementary PDS; and
- in all cases, to locate the rules common to all or most kinds of disclosure document (Rules Part 25).

8 A 'choose your own adventure' book is usually written from a second-person perspective, which enables readers to assume the role of a character in the book. As the story progresses, readers are able to make choices that determine the character's actions and, ultimately, the story's outcome.

Figure 2.3: Structure of the Rules in Prototype Legislation B



2.13 The architecture that underpins the proposed legislative model would also enable the complexity of tailored regulatory regimes to be better managed over time. Such an architecture has been lacking in disclosure provisions of the *Corporations Act*. The 'siloing' of fundamentally similar disclosure regimes, and the use of notional amendments and conditional exemptions to tailor those regimes, has led to growing inconsistency and policy incoherence between them. These problems are particularly visible in relation to offences, which differ in their design and penalties as between disclosure for securities and other financial products.[9]

2.14 The architecture of Prototype Legislation B is based on a clear structure and set of tools — scoping orders and rules — that can facilitate adjustments to the regulatory regime. Prototype Legislation B shows that:

9 See [5.23]–[5.27].

- conditional exemptions and notional amendments, contained in hundreds of regulations and ASIC legislative instruments, are not necessary to ensure regulatory flexibility; and
- there are better law-making tools available to create a navigable and flexible regulatory framework for financial services.

Primary legislation

2.15 Applying the principles discussed in **Chapter 3**, 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);
- offence provisions, civil penalty provisions, and coercive powers — discussed in greater detail in **Chapter 5** of this Interim Report;
- other (non-coercive) regulatory powers — for example, ASIC's powers in relation to:
  - the AFSL regime (such as ss 913B, 914A, 915A, and 915B);
  - product intervention orders (s 1023D); and
  - granting individual (as opposed to class-based) relief;[10]
- 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; and
- key defined terms — for example, the definitions of 'financial product' and 'financial service'.

2.16 The above list is illustrative, and not necessarily exhaustive, of the types of matters currently contained in the *Corporations Act*, or delegated legislation made under it, that are more appropriate for primary legislation.

10 Noting that ASIC's powers and functions more generally are set out in the *ASIC Act*, as well as the *NCCP Act*. Interim Report C will consider, in more detail, how the various powers in these Acts and the *Corporations Act* may be rationalised or consolidated.

2.17 Prototype Legislation B contains several examples of appropriate primary legislation provisions in the context of financial product disclosure. These include:

- the obligation to give disclosure, and when it must be given;[11]
- core principles relating to the form and content of disclosure documents;[12] and
- penalties and remedies for defective disclosure documents.[13]

Scoping Order and individual relief

2.18 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. In Interim Report A, the ALRC showed how exclusions and exemptions spread across the legislative hierarchy are a source of complexity. Submissions in response to Interim Report A were generally supportive of the proposal to provide for a sole power to create exclusions and grant class exemptions from Chapter 7 of the *Corporations Act* in a consolidated legislative instrument.[14]

2.19 The Scoping Order would perform the role of adjusting the scope of Chapter 7 in a navigable and coherent way by consolidating the relevant detail in one instrument. In Interim Report A, the ALRC identified this instrument as an Implementation Order.[15] The ALRC suggests, however, that the label Scoping Order better reflects its role in adjusting the scope (or perimeters) of the regulatory regime.[16]

Exclusions and exemptions

2.20 In the proposed legislative model, primary legislation would more clearly focus on key obligations and norms, while flexibility and adaptability would be achieved through the use of rules. The ALRC expects that the model would reduce the number of exclusions and exemptions that would be required from Chapter 7 of the *Corporations Act*. However, the policy behind regulating functionally equivalent products and services in a like manner, and the need to adapt to new and emerging products, means that exclusions and exemptions will likely still be required. The ALRC does not expect that the boundaries of regulation could be managed by rules alone.

2.21 The proposed legislative model is not intended to encourage what the Financial Services Royal Commission viewed as ‘special rules for special interests’ which serve only to

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11 Prototype Legislation B, Act ss 1111–19.
12 Prototype Legislation B, Act s 1125.
13 Prototype Legislation B, Act ss 1135–40.
14 Australian Law Reform Commission, ‘Reflecting on Reforms — Submissions to Interim Report A’ (Background Paper FSL6, May 2022) [129].
15 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.38].
16 The nomenclature of Scoping Order is adopted in Prototype Legislation B.

> qualify the application of a more general principle to entities or transactions that are not different in any material way from those to which the general rule is applied.[17]

To avoid this, the power to exclude or exempt should not be unfettered and should be subject to safeguards, as discussed below.

2.22 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 2.1**, which contains examples of current exemptions from the *Corporations Act* that have been omitted from Prototype Legislation B because they are not required, and the underlying reasoning.

Table 2.1: Exemptions no longer required under the proposed legislative model

Example redundant exemptions	Reason for redundancy
Corporations Regulations regs 7.9.15D, 7.9.15F, 7.9.15A–7.9.15C	Prescriptive detail in the *Corporations Act* that necessitated these exemptions would be moved to tailored rules under the proposed legislative model.
• *Corporations Act* ss 703B, 1010A • *ASIC Class Order* 14/827 (Cth), s 5 (inserting notional s 1101AB into the Act)	These exemptions manage the boundaries between Chapter 6D and Part 7.9 of the *Corporations Act*, and that boundary would no longer exist under an integrated disclosure regime in the proposed legislative model.

2.23 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. This process need not involve re-opening questions of policy.
- 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. Section 911A(2) of the Act in Prototype Legislation B provides an example of this.
- Identifying the remaining exclusions and class exemptions, and locating them within a single legislative instrument (the Scoping Order).

17 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 16.

- 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). Individual relief is discussed further below.

2.24 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.

2.25 Exclusions and exemptions from the financial services regulatory regime demonstrate the inherent tension between the principle that matters of significant policy should be contained in primary legislation, and the principle that legislative frameworks should be durable, flexible, coherent, and navigable. Although fewer exclusions and exemptions from the financial services regulatory regime would be necessary under the proposed legislative model, including them all in primary legislation would still clutter the Act's core obligations. Further, it would not be feasible to rely only on parliamentary amendments to enact (and amend) each new exclusion and exemption. The proposed model therefore seeks to implement an appropriate balance between the principles discussed in **Chapter 3**.

2.26 **Proposal B4** would require the Minister or ASIC to explain how the creation of any exclusion or exemption is consistent with the objects of Chapter 7 of the *Corporations Act*, including those set out in s 760A.[18] 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.[19] This would enable the Delegated Legislation Scrutiny Committee, in accordance with its ordinary processes, to assess compliance with the requirement to provide an explanation and to assess the legislative instrument against the Committee's scrutiny principles more generally.

2.27 Further consideration would need to be given to the appropriate form for statements of consistency in relation to individual relief, as explanatory statements

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18 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].

19 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, or 'in order to provide scope for innovation, the development and investment in innovative technologies, processes, and practices'.

are not required for notifiable instruments under the *Legislation Act*. Options could include, for example, a supporting document published on the Federal Register of Legislation, or inclusion of the explanatory statement within the instrument granting relief.[20] Although greater transparency could be achieved by imposing a requirement for publication of a statement of reasons for granting individual relief, sensitive or confidential commercial considerations may militate against a general requirement to do so. 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, these would be offset by a reduced need for individual relief under the proposed legislative model, as discussed further below.

2.28 The ALRC does not propose that a failure to comply with the requirement to provide adequate explanation should affect the validity of a legislative or notifiable instrument.[21]

Sunsetting and review

2.29 In accordance with the principles and guidance discussed in **Chapter 4**, contents of the Scoping Order should be subject to a 10-year sunsetting period. Sunsetting aims to ensure that delegated legislation is 'kept up to date and continue[s] to be fit-for-purpose'.[22] It also ensures that parliamentary oversight, particularly in respect of exclusions and exemptions from primary legislation, is maintained.

2.30 Sunsetting would provide an opportunity for the proposed Rules Advisory Committee, whose consultative role is discussed further below in the context of **Proposal B9**, to be consulted on any parts of the Scoping Order that were proposed to be remade. Such consultation could consider whether the range of exclusions and exemptions in the Scoping Order remain necessary and whether any of those exclusions or exemptions should instead be enacted in primary legislation (for example, because they have increased in significance or scope of application over time). In this way, sunsetting helps to ensure that exemptions do not 'supplant a proper legislative amendment process'.[23] Sunsetting also helps to encourage better 'stewardship and oversight' to prevent 'legislative design from becoming unravelled by the use of exemptions from legislative requirements'.[24]

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20 Prototype Legislation B adopts the latter position by requiring that the explanation be contained in the instrument granting relief: see Prototype Legislation B, Act, s 1099(4).

21 See Prototype Legislation B, Act, ss 1098D, 1099(6).

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

23 Debra Angus, 'Things Fall Apart: How Legislative Design Becomes Unravelled' (2017) 15(2) *New Zealand Journal of Public and International Law* 149, 151. See also Tess Van Geelen, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, 309.

24 Angus (n 23) 159.

2.31 Sunsetting has resource implications, particularly when a legislative instrument is proposed to be remade.[25] As the contents of the Scoping Order should be thematically arranged — for example, by way of a chapter relating to financial product disclosure, and other chapters on different topics — the ALRC suggests that each chapter share a common sunsetting date.[26] While this would mean that some exclusions and exemptions made nearer to a sunsetting date would sunset sooner than 10 years, this method would facilitate a staged and thematic review.[27] Alternative approaches to managing sunsetting would also be available, each with their own practical and resource implications.[28]

Views of the Delegated Legislation Scrutiny Committee

2.32 The Delegated Legislation Scrutiny Committee has outlined its expectation that, as a general rule:

- exemptions from the operation of primary legislation should ordinarily be contained in primary legislation, rather than delegated legislation; and
- where exemptions are nevertheless included in delegated legislation, they should operate for no longer than is strictly necessary and, generally, for no longer than three years.[29]

2.33 The Delegated Legislation Scrutiny Committee's statements reflect the general principles that significant policy matters should be contained in primary legislation and that delegated legislation should be subject to appropriate parliamentary oversight. However, the Committee's general expectation also stands in tension with the fundamental policy of over-inclusiveness that underpins Chapter 7 of the *Corporations Act* and the important role that delegated legislation plays in adjusting the regulatory perimeter as a result of that policy.[30] Exclusions and class exemptions

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25 See, eg, Legislation Act Review Committee, Attorney-General's Department (Cth) (n 22) 45. See also Attorney-General's Department (Cth), *Guide to Managing the Sunsetting of Legislative Instruments* (2020). This guide emphasises the importance of appropriate planning and informed decision-making to managing the sunsetting process.

26 A tailored sunsetting regime such as this could form part of the enabling Act, so as to displace the general regime in Part 4 of the *Legislation Act*.

27 See, eg, Attorney-General's Department (Cth) (n 25) 16: 'A thematic review is a review of two or more instruments which share a common theme that makes it more efficient or effective to review them together, rather than separately. ... Thematic reviews allow agencies to review two or more instruments concurrently and to structure reviews around subject areas and policies, not instruments. This can facilitate investigation of the cumulative burden of regulation in a given area, and identify opportunities to streamline, simplify or reduce such burdens in line with the Government's deregulation agenda'.

28 Alternative approaches may include, for example, a single sunsetting date for the entire Scoping Order, or each provision of the Scoping Order sunsetting 10 years after the particular provision was made.

29 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (2nd ed, 2022) 36. In some cases, the Committee has suggested that a 5-year sunsetting period may be appropriate: see, eg, Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 3 of 2022, 10 March 2022) [1.25].

30 See [2.5], [2.20]–[2.22] above.

in delegated legislation also help to facilitate an adaptive and efficient legislative framework.

2.34 The proposed legislative model seeks to balance those considerations by applying appropriate safeguards to the creation of exclusions and class exemptions.[31] In particular, the safeguards of prescribed consultation and an explanation of consistency with the objects of Chapter 7 of the *Corporations Act* support the appropriateness of a sunsetting period longer than three years for the Scoping Order. As discussed above, the ALRC suggests that a 10-year sunsetting period for the Scoping Order would be appropriate.[32] In cases where the principles articulated in this and the following two chapters were not complied with, and non-compliance was not adequately justified, it would nonetheless be open to the Delegated Legislation Scrutiny Committee to insist (as it presently does) on a shorter period of operation for particular exclusions or class exemptions, which could be given effect by the wording of the exclusion or exemption itself.

Other scoping provisions

2.35 In addition to exclusions and exemptions, a number of other provisions that affect the scope and operation of Chapter 7 of the *Corporations Act* are presently contained in the *Corporations Regulations.* Several examples are discussed below. The ALRC proposes that all detail necessary for determining the scope of Chapter 7, and detail that would otherwise be inappropriate for rules, should be contained within the Scoping Order. This would enable the greatest simplification and limit the number of locations readers must look to understand their rights and obligations.[33]

2.36 Provisions of the *Corporations Regulations* that contain detail suitable for scoping orders include, for example:

- 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).

31 See also [2.25] above.
32 See [2.31] above.
33 As discussed below, the proposed legislative model does not envisage a role for regulations as a mode of law-making: see [2.80].

2.37 Inevitably, judgement would need to be exercised in cases where there is uncertainty as to whether particular prescriptive detail would be more appropriate for inclusion in the Scoping Order or rules. The following considerations should guide those judgements:

- Rules, as discussed further below, are intended to create self-contained provisions that should not need to be read alongside the primary legislation. Prescriptive detail that relates to only a specific section or sub-section of the Act, as opposed to an overarching obligation, would be better suited for the Scoping Order than rules. Regulations 5C.1.01 and 5C.1.02 of the *Corporations Regulations*, noted above, provide examples.
- Similarly, prescriptive detail that is inextricably linked to specific provisions in the Act, and which is difficult to understand in isolation from the Act's provisions, would be better suited to the Scoping Order than rules. This may include detail relating to definitions.
- Prescriptive detail that applies across multiple aspects of regulation — such as different parts of Chapter 7 of the *Corporations Act* — or that would transcend the thematic structure of rulebooks, may be better suited to inclusion in the Scoping Order. This may include monetary thresholds, for example. If, however, in a particular instance navigability and coherence would be better served by repeating the detail across rulebooks, then rules may be more appropriate. This may include, for example, a definition that applies to only some (but not all) rulebooks and which does not also appear in the Act.

2.38 Section 766A(4) of the Act in Prototype Legislation B exemplifies how a Scoping Order could accommodate detail presently allocated to regulations. That provision performs an equivalent role to 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

2.39 The ALRC envisages a reduced need for individual relief if the proposed model were implemented. This is because prescriptive detail currently in the *Corporations Act*, which necessitates individual exemptions in particular circumstances, would be removed from the Act and replaced by more readily adaptable rules.

2.40 The 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. Consistent with current policy, the power to grant individual relief would be conferred on ASIC under the proposed legislative model.

2.41 Section 1099 of the Act in Prototype Legislation B illustrates how an empowering provision directed solely at individual relief could be drafted.

Rules and rulebooks

2.42 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.

This complexity is partly attributable to 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.

2.43 The purpose of the rules contemplated in **Proposal B5** 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 than is presently the case.

2.44 Rules, unlike existing 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 could therefore facilitate a more adaptive, efficient, and navigable legislative framework. Submissions in response to Interim Report A strongly supported the introduction of a power to make rules in thematically consolidated legislative instruments (rulebooks).[34]

2.45 Chapter 7 of the *Corporations Act* presently contains several rule-making powers.[35] Section 1098 of the Act in Prototype Legislation B illustrates how **Proposal B5** could be implemented. 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.

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

35 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.93]–[10.96].

- The power may not be used to create serious criminal offences and significant civil penalties (discussed further in **Chapter 5**).
- 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 sunsetting.

2.46 **Proposal B6** is similar to **Proposal B4**, which as discussed above would require that the Minister or ASIC explain how creating an exclusion or exemption would be consistent with the objects of Chapter 7 of the *Corporations Act*. **Proposal B6** differs, however, by requiring that the Minister or ASIC explain how making a rule would further the objects of Chapter 7 of the *Corporations Act*. This difference recognises that while an exclusion or exemption typically lessens the regulatory burden, rules may create tailored regulatory regimes (in place of presently complex conditional exemptions or notional amendments). The explanation for rules should therefore meet a different standard.

2.47 Like **Proposal B4**, a failure to give an adequate explanation should not affect the validity of any rule, but act as a normative guide for rule-makers and promote transparency. Incorporating the explanation in an instrument's explanatory statement would enable the Delegated Legislation Scrutiny Committee, in accordance with its ordinary processes, to assess compliance with the requirement to provide an explanation and to assess the legislative instrument against the Committee's scrutiny principles more generally.

2.48 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 PDS;
- who must prepare a disclosure document; and
- information that must be given to ASIC.

2.49 The *Financial Services Rules (Financial Product Disclosure) 2022* in Prototype Legislation B illustrates the types and content of rules that could be made. Reading those rules alongside the Reverse Concordance Table enables a reader to identify the existing law that corresponds to particular rules.[36] Examples of current provisions in the *Corporations Act* and delegated legislation made under it that are reflected in the Rules in Prototype Legislation B are listed in **Table 2.2** below. Each example relates to specified content of a particular type of disclosure document.

36 Australian Law Reform Commission, 'Reverse Concordance Table' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Reverse-concordance-table.xlsx>.

Table 2.2: Examples of provisions converted to rules

Current provision	Equivalent provisions of the Rules in Prototype Legislation B
Corporations Act s 715	s 20-5 (Contents of offer information statement)
Corporations Regulations reg 6D.3A.03	s 25-10 (Contents of crowd-sourced funding offer document)
ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649 (Cth) s 7(a)	ss 61-15(1)–(2), 61-45(2), 65-3(1) (Provisions replacing current notional amendments to the *Corporations Act*)

2.50 Where possible, the expression of existing provisions has been simplified in the prototype rules. By their nature, the current exemption and notional amendment powers necessitate a drafting style similar to the Act. This need not be the case for rules. As the practice of rule-making develops, and new rules are implemented (as opposed to rules that attempt to reflect existing law as in Prototype Legislation B) it may be that simpler forms of expression can be used.

Sunsetting and review

2.51 Like the Scoping Order, rules should be subject to a 10-year sunsetting period under the proposed legislative model. The process of re-making any rules proposed to remain in force would provide an opportunity for consultation with the proposed Rules Advisory Committee, whose role is discussed further below.

2.52 Acknowledging the resource implications in managing sunsetting and remaking legislative instruments, the ALRC suggests that each rulebook should have a single (generally different) sunsetting date.[37] This would enable staged and thematic reviews of rules, as discussed in the context of exclusions and exemptions above. Alternative approaches to managing sunsetting, each with their own practical and resource implications, would also be available.[38]

Matters not to be contained in rules

2.53 Because of their impact on individual rights, the ALRC has consistently supported clear limits on the extent to which certain matters — including criminal

37 See, eg, Legislation Act Review Committee, Attorney-General's Department (Cth) (n 22) 45. See also Attorney-General's Department (Cth) (n 25).

38 These may include, for example, each provision sunsetting 10 years after the particular provision was made. As noted above in respect of the Scoping Order, a tailored sunsetting regime could be provided for in the enabling Act so as to displace the general regime in Part 4 of the *Legislation Act*.

offences, civil and administrative penalties, and coercive powers — should be created in delegated legislation.[39] 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 in **Chapter 5** discusses a number of principles for accommodating offences and civil penalties under the proposed legislative model.

2.54 A key issue for applying existing guidance is determining what amounts to a 'serious' criminal sanction and a 'significant' civil penalty. As discussed further in **Chapter 5**, the ALRC endorses existing guidance that considers any term of imprisonment to be a serious criminal sanction that should not be imposed by offences created in delegated legislation. In addition, criminal fines and civil penalties above 50 penalty units ($11,000) for an individual should only be imposed by primary legislation, and not by way of delegated legislation.

2.55 The appropriate maximum fine or civil penalty that should be imposed by rules for corporations in the financial services sphere may be higher than that generally recognised in guidance. A number of existing instruments impose maximum penalties for corporations of up to 500 penalty units ($110,000), and the *Corporations Act* includes a general provision that (unless otherwise specified) calculates corporate penalties by multiplying individual penalties by 10.[40] This may be justified by the nature of the regulated community and the nature of the civil penalty provisions, many of which have in-built materiality and seriousness thresholds.[41]

2.56 Given that administrative penalties are imposed automatically without court involvement, administrative penalties in the strict sense (such as an automatic monetary penalty or automatic disqualification from holding a directorship after conviction for certain crimes) should only be created in primary legislation. The key features of any schemes that empower regulators to take other, discretionary, administrative action against members of a regulated community as a consequence of breach or suspected breach of the law should also be included in primary legislation. Such features would include, for example, suspension or cancellation of licenses and banning orders, issuing of infringement notices, and the entering into of court enforceable undertakings.

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39 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**.

40 *Corporations Act 2001* (Cth) s 1311C.

41 See [5.76].

The law-making roles of the Minister and ASIC

2.57 As observed in **Chapter 6**, the *Corporations Act* includes an unusually high number of powers to make delegated legislation.[42] The proliferation of those powers and their exercise in myriad legislative instruments are a source of complexity.

2.58 **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 (each of which is discussed below):

- 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 concurrently allocated 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. Where powers are concurrently allocated, 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.
- 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 and poor navigability.

2.59 The majority of submissions in response to Interim Report A expressed general support in response to Question A11(b), which asked whether a rule-making power should be granted to ASIC.[43] Some submissions, however, expressly opposed granting a rule-making power to ASIC and suggested instead that it be granted to the Minister, with its exercise being subject to parliamentary oversight.[44]

Law-making capacity

2.60 As discussed in **Chapter 4**, Professor Black CBE has identified 'six key resources' that are 'critical to the performance' of regulatory functions.[45] Three are particularly relevant to delegated law-making:

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42 See [6.40]–[6.41].

43 Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [156].

44 Ibid [161].

45 Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' [2003] (Spring) *Public Law* 63, 73.

- **Information**: this includes '[s]pecialist and technical information' as well as 'information on how the potential targets of regulation act, interact and are likely to react', which are 'indispensable to the formation of standards and the development of techniques of behaviour modification'.[46]
- **Expertise**: there are different types of expertise, and according to Black expertise is particularly important 'in areas of activity that are characterised by a high degree of technical complexity such as financial services regulation'.[47]
- **Authority and legitimacy**: authority and legitimacy are interconnected.[48] Authority refers to 'whether or not what an actor says or requires makes a "practical difference"' and legitimacy refers to whether an organisation both has, and is perceived as having, 'a right to govern'.[49]

2.61 Submissions in response to Interim Report A emphasised similar factors. For example, consumer advocates suggested that 'regulatory decision-making by an independent and transparent regulator can aid effective administration of law, and remove opportunities for politicisation'.[50] By contrast, others suggested that 'there should be separation between the "rule makers" and "rule enforcers"'.[51]

2.62 In the context of financial services regulation, it may be argued that the Minister and ASIC each possess different, but overlapping and complementary, access to information and expertise. The Minister, for example, has access to a wide range of information from across government and is supported by Treasury's expertise in respect of economic policy, regulatory policy, and law-making. As the specialist financial services regulator, ASIC has access to a different range of information, including through contact with the regulated population and data collection, as well as different expertise in both law-making and enforcement. Each of the Minister and ASIC carry authority and legitimacy as law-makers. As present policy reflects, it is appropriate that the Minister and ASIC concurrently exercise law-making roles in the regulation of financial services.

The allocation of powers

2.63 As the ALRC demonstrated in Interim Report A, Chapter 7 of the *Corporations Act* presently confers wide powers on both the Minister (exercisable by way of regulations) and ASIC to create exemptions and to modify (notionally amend) the Act and regulations.[52] Conditional exemptions and notional amendments, in particular, enable the law to be changed in ways that can affect its underlying policy. Notional amendments differ from conditional exemptions in that compliance with a notional

46 Ibid 73.
47 Ibid 74.
48 Ibid 75.
49 Ibid 75–6.
50 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
51 Institute of Public Accountants, *Submission 31*.
52 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.12]–[10.16].

amendment is mandatory, whereas a regulated person may choose whether or not to comply with any conditions placed on an available exemption (and in the event that a choice is made not to comply with the conditions, the original obligation would apply).

2.64 Presently, Chapter 7 of the *Corporations Act* delegates law-making powers to the Minister and ASIC in many areas of regulation. A small number of examples of those powers are summarised in **Table 2.3** below with a larger set of examples provided at **Appendix C**. While not exhaustive, the examples focus on broad law-making powers that may affect multiple provisions of the Act or enable rules to be made, as opposed to more specific powers.[53]

Table 2.3: Examples of delegated law-making provisions

***Corporations Act* Part or Chapter**[54]	**Enabling provision**	
Part 7.5A (Regulation of derivative transactions and derivative trade repositories)	s 901A	ASIC may make rules (derivative transaction rules)
	s 903A	ASIC may make rules (derivative trade repository rules)
	s 906A	Regulations may impose obligations and confer powers
	s 907D	ASIC may exempt by legislative instrument[55]
	s 907E	Regulations may exempt or modify
Part 7.6 (Licensing of providers of financial services)	s 926A	ASIC may exempt or modify by legislative instrument (excluding Divs 4 and 8)
	s 926B	Regulations may exempt or modify
Part 7.7 (Financial services disclosure)	s 951B	ASIC may exempt or modify by legislative instrument
	s 951C	Regulations may exempt or modify

53 See, eg, *Corporations Act 2001* (Cth) s 911A(2)(k). Specific powers may nonetheless have significant implications. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) Appendix C.13.

54 Note that the powers set out in this table may also, for example, be exercised in relation to regulations or rules made for the purposes of the relevant part, and definitions (whether in the relevant part, elsewhere in the Act, or in regulations) which apply to the relevant part.

55 An exemption relating to a class is a legislative instrument: *Corporations Act 2001* (Cth) s 907D(4).

***Corporations Act* Part or Chapter**[54]	**Enabling provision**	
Part 7.9 (Financial product disclosure and other provisions)	s 1020F	ASIC may exempt or modify by legislative instrument
	s 1020G	Regulations may exempt or modify
Part 7.10 (Market misconduct and other prohibited conduct)	s 1045A	Regulations may exempt or modify
Chapter 6D (Fundraising) Chapter 7 (Financial services and markets)	s 1368	Regulations may exempt

2.65 **Appendix C** demonstrates that, in Chapter 7 of the *Corporations Act*, the existing law-making powers of the Minister (usually exercisable by regulations) and ASIC generally overlap and may be exercised concurrently. This is most evident in relation to exemption and modification (notional amendment) powers, which overlap in respect of significant areas of regulation.

2.66 Prototype Legislation B illustrates how the existing allocation of powers could be simplified by:

- enacting a single empowering provision relating to each of scoping orders and rules; and
- conferring those powers on the Minister and ASIC concurrently.[56]

As discussed above, each power would be exercisable when another provision of the Act 'turns on' the power.[57]

2.67 If Parliament were minded to grant exclusive law-making power to either the Minister or ASIC in a particular area, this could be achieved by inserting an additional enabling provision for the purposes of the relevant Part.[58] The reframing and restructuring of Chapter 7 of the *Corporations Act*, to be discussed in Interim Report C, may enable further simplification of delegated law-making powers than is possible within the current structure of Chapter 7.

2.68 As discussed in **Chapters 3** and **4**, the concepts of policy-making, law-making, and regulating exist on a continuum.[59] Just as it is difficult to clearly distinguish

56 Prototype Legislation B, Act, ss 1097, 1098.
57 See, eg, Prototype Legislation B, Act, s 1126.
58 This would re-introduce complexity which the proposed legislative model seeks to avoid.
59 See [3.58]–[3.62], [4.22]–[4.27].

between matters more appropriate for primary legislation or delegated legislation, so too is it difficult to clearly delineate between the appropriate law-making roles of the Executive Government and a regulator. As discussed above, the scope of delegated powers and the applicable safeguards under the proposed legislative model would be set by the primary legislation. This means that while there may be a 'grey area' in which matters could appropriately be dealt with by either the Minister or ASIC, the ultimate policy parameters (including matters of significant policy) would be determined (and overseen) by Parliament.

2.69 The ALRC proposes that the overlap in law-making powers delegated to the Minister and ASIC should, as is presently the case, be managed by administrative and political processes. This situation is not unique to the *Corporations Act*. For example, the *Navigation Act* effectively grants overlapping powers to the Minister (exercisable by way of regulations) and the regulator responsible for administering the Act, AMSA.[60] Administrative arrangements are one way of accommodating the nebulous boundaries between policy-making, law-making, and regulating. They also help to maintain flexibility and adaptability in the regulatory regime in a way that would not be possible if primary legislation drew rigid boundaries around concurrent powers.

2.70 A protocol or other administrative arrangement between the Minister and ASIC should be used to coordinate the law-making functions exercisable by ASIC or the Minister under the proposed legislative model.[61] In some respects, the Australian Government's 'Statement of Expectations' regarding ASIC, and ASIC's response ('Statement of Intent'), fulfil a similar role. For example, the 'Statement of Expectations' released in August 2021 provided that:

> In achieving its objectives, carrying out its functions and exercising its powers, the Government also expects ASIC to … consult with the Government and Treasury in exercising its policy-related functions, such as the use of its exemption and modification [notional amendment] powers, other rule-making powers, and guidance.[62]

2.71 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.

2.72 In the interests of transparency and accountability, the details of a protocol or other arrangement between the Minister and ASIC should be publicly available via (at least) ASIC's website.

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60 See [2.81] below for further discussion of the *Navigation Act*. See also [6.29].

61 Those functions are the subjects of **Proposals B2** and **B5**.

62 Australian Government, *Statement of Expectations: Australian Securities and Investments Commission* (2021) [3.3].

2.73 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. Adherence or non-adherence to any protocol would not affect the validity of any delegated legislation.

2.74 Presently, Chapter 7 of the *Corporations Act* does not clearly specify how potential inconsistencies between regulations and ASIC-made legislative instruments are to be resolved in most contexts. Section 761H of the Act provides, in summary, that a reference to particular provisions of Chapter 7 includes (unless the contrary intention appears) a reference to regulations or other instruments made under those provisions. As a result, for example, it is unclear how any inconsistencies between multiple notional amendments to a single provision of the Act are to be resolved. By contrast, some more specific provisions stipulate that to the extent of any inconsistency, regulations prevail over ASIC-made legislative instruments.[63]

2.75 Inconsistencies between regulations and ASIC-made legislative instruments are avoided by cooperation and sensible practice, and should rarely occur. The protocol suggested by the ALRC may help facilitate this. If it were thought necessary, the proposed legislative model could incorporate a legal 'fall-back' mechanism to provide for the rare event that differences between the Minister and ASIC could not be resolved through other means. This could, for example, take the form of a ministerial power to direct that ASIC amend or repeal a particular scoping order or rule.[64]

2.76 Other oversight mechanisms for law-making by ASIC could be provided for in the *Corporations Act*. For example, several existing rule-making powers granted to ASIC are subject to ministerial consent (except in emergencies).[65] Other alternatives may include a power enabling the Minister to prescribe certain matters to which ASIC must have regard when making scoping orders or rules.[66] With the exception of the generally applicable *Legislation Act* requirements, no other specific oversight mechanisms presently apply to ASIC's exemption and notional amendment powers. In light of the proposed framework surrounding the law-making powers to be delegated to ASIC, as well as the more general oversight mechanisms that apply to ASIC,[67] the ALRC does not propose that additional oversight mechanisms be applied. Applying further constraints may reduce responsiveness and flexibility, without clear benefits.

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63 See, eg, *Corporations Act 2001* (Cth) ss 765A(4), 908EB(6).

64 Noting that such a power may have implications for the perceived independence of ASIC. See International Monetary Fund, *Financial System Stability Assessment (Australia)* (IMF Country Report No 19/54, February 2019) 28. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.94].

65 See, eg, *Corporations Act 2001* (Cth) s 798G.

66 See, eg, Financial Services and Markets Bill 2022 (UK) cl 29.

67 These include monitoring and review by the Parliamentary Joint Committee on Corporations and Financial Services, participating in the Senate Estimates process, and review by the Financial Regulator Assessment Authority.

Simplification and improved navigability

2.77 Prototype Legislation B demonstrates the potential for simplification and improved navigability that **Proposals B2**, **B5**, and **B8** enable. At the level of the primary legislation, the number of empowering provisions can be greatly reduced, with other provisions clearly indicating when those powers can be exercised in relation to specific matters.[68]

2.78 Granting power to make scoping orders and rules to the Minister and ASIC concurrently means that the resultant legislation may be consolidated into a single instrument (as for the Scoping Order) or thematically consolidated instruments (as for rulebooks). This would greatly improve navigability between layers of the legislative hierarchy. Several current examples demonstrate that it is possible (and beneficial) for amendments by more than one author to be consolidated in the same principal instrument on the Federal Register of Legislation.[69]

2.79 Clearly, coordination and careful management would be needed to maintain coherence and consistency within legislative instruments amended by more than one law-maker. A protocol should facilitate this. Furthermore, OPC could be engaged to assist and provide advice for this purpose.[70]

2.80 The proposed legislative model does not envisage a role for regulations as a mode of law-making. Instead, it proposes a division of content between two types of legislative instrument — the Scoping Order and rulebooks — based on differences in content and function. This design feature enables simplification and improved navigability in three important respects:

- first, it enables a significant reduction in the number of legislative instruments that together form the law, reducing the number of places a person needs to look to find the law;
- secondly, by focusing on function and theme, a person can more easily navigate to the correct instrument to find what they need; and
- thirdly, by removing prescriptive detail from the Act and enabling the Minister and ASIC concurrently to make amendments to the same consolidated instruments, notional amendments can be eliminated.[71]

2.81 The *Navigation Act* illustrates a different design for accommodating concurrent powers between the Executive Government and a regulator. As noted

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68 See, eg, Prototype Legislation B, Act, ss 765A(1), 766J(1). The ability to add statutory notes to identify when scoping orders have been made is another feature that can be used to improve the visibility and navigability of delegated legislation: see, eg, Prototype Legislation B, Act s 1097(6).

69 For example, the *National Health (Listing of Pharmaceutical Benefits) Instrument 2012* (Cth) was originally made by the Minister, and subsequently amended by both the Minister (*National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2018 (No. 2)* (Cth)) and a departmental delegate of the Minister (*National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2022 (No. 4)* (Cth)).

70 See, eg, Office of Parliamentary Counsel (Cth), *OPC's Drafting Services: A Guide for Clients* (7th ed, 2022) [248]–[249].

71 See the discussion of **Proposals B10** and **B11** below.

above, concurrent powers may be exercised under the *Navigation Act* by way of regulations or legislative instruments, known as Marine Orders, made by AMSA. The Act achieves this by including Marine Orders within the definition of 'regulations', and providing that AMSA may make marine orders 'with respect to any matter for which provision must or may be made by the regulations'.[72] Unlike the *Corporations Act*, the *Navigation Act* does not include notional amendment powers.

2.82 Relative to the *Corporations Act*, regulations make up a much smaller proportion of delegated legislation under the *Navigation Act*. Regulations made under the *Navigation Act* account for approximately 2% (23 pages) of delegated legislation made under that Act, compared to 14% (1,324 pages) under the *Corporations Act*. Marine Orders made by AMSA under the *Navigation Act* account for the remaining 98% of delegated legislation under that Act. In comparison, ASIC-made legislative instruments make up approximately 26% of all delegated legislation under the *Corporations Act*.

2.83 This data suggests that while delegated legislation made under the *Navigation Act* may be easier to navigate than under the *Corporations Act*, that outcome is a result of how law-making powers are exercised, rather than their design. The fact that 98% of delegated legislation under the *Navigation Act* is made by one law-maker creates a more navigable body of law. If applied to the *Corporations Act*, a law-making model similar to the *Navigation Act* would not overcome the problems created by substantial bodies of delegated legislation made by different law-makers in different types of legislative instrument.

2.84 Particular features of regulations could be incorporated into the proposed legislative model if they were thought beneficial.[73] For example, while there may be resource implications, amendments to the Scoping Order or particular rules could (as a matter of policy) be treated as though they were 'tied work' under the *Legal Services Directions 2017* (Cth), with the consequence that they would be drafted by OPC on the instructions of either the Minister or ASIC (as the case may be). This would also result in the Scoping Order and rules falling within OPC's practice of referring certain drafts to AGD for review in accordance with OPC Drafting Direction 4.2.[74] In any event, drafts could be referred to AGD as a matter of practice, regardless of OPC's involvement in drafting.

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72 *Navigation Act 2012* (Cth) ss 14, 342. See also [6.29].

73 Presently, the Commonwealth is required to consult with a forum comprising state and territory representatives when making regulations under the *Corporations Act*: see The Corporations Agreement 2002 (compilation as at July 2017 prepared by the Department of the Treasury (Cth)) div 2; Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021). More generally, the current constitutional framework has implications for reform of the *Corporations Act*, and this Inquiry 'presents an opportunity for the Commonwealth and states to revisit that constitutional framework without the urgency to address constitutional uncertainty that existed in 2000, and with the benefit of 20 years' experience of the referrals in practice': Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.86]–[7.88].

74 Office of Parliamentary Counsel (Cth), Drafting Direction 4.2, 'Referral of drafts to agencies' (Document release 8.12, February 2020) [8].

2.85 As discussed above, the Scoping Order and rules should be subject to sunsetting. In contrast, the *Corporations Regulations* are exempt from sunsetting. The Delegated Legislation Scrutiny Committee has identified that exemption from sunsetting is a feature that heightens its scrutiny concerns regarding amendments to the *Corporations Regulations*.[75] Any relocation of material from regulations to other instruments under the proposed legislative model would have resource implications related to an increase in material subject to sunsetting. Importantly, however, periodic review via sunsetting helps to maintain the law's currency and relevance.[76]

Prescribed consultation

2.86 Recognising the potential significance of the proposed scoping and rule-making powers, **Proposal B9** builds in an enhanced consultation mechanism compared to the generally applicable *Legislation Act* requirements. As discussed in **Chapter 4**, consultation is an important safeguard. In particular, the Bills Scrutiny Committee has expressed a view that where important elements of a regulatory regime are to appear in delegated legislation, enhanced consultation requirements should apply.[77] **Proposal B9** also responds to concerns expressed by several consultees to date that present consultation processes, though often conducted as a matter of course and with the public at large, do not always result in meaningful consultation with affected stakeholders. Several submissions in response to Interim Report A also emphasised the importance of consultation.[78]

2.87 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) before scoping orders or rules are made.[79] 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 their delegated law-making functions. The committee's composition and appointment processes should facilitate sufficient independence from the Government.

2.88 The advisory committee model is consistent with the broader role the Corporations and Markets Advisory Committee previously held in relation to financial

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75 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 29) [1.7], [1.23]. Note also that the Legislation Act Review Committee has recommended that 'agencies and rule-makers should review exemptions [from sunsetting and disallowance] of the particular instruments they administer to determine whether they are appropriate for repeal': Legislation Act Review Committee, Attorney-General's Department (Cth) (n 22) rec 3.2.

76 Legislation Act Review Committee, Attorney-General's Department (Cth) (n 22) 35.

77 See [4.65].

78 Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [140], [159].

79 See Prototype Legislation B, Act, ss 1098B, 1098E. If it were thought beneficial, this requirement could be applied to pre-existing law-making powers in Chapter 7 of the *Corporations Act*.

services laws, which was highly regarded by practitioners. The advisory role would be restricted to new delegated law-making powers and not existing powers.[80]

2.89 Section 1098B of the Act in Prototype Legislation B is modelled on other, recently enacted provisions of the *Corporations Act* which oblige ASIC to consult the public before making rules.[81] A requirement to consult the public is appropriate given the potential significance of scoping orders and rules. It also formalises the current practice adopted in many cases by Treasury and ASIC to conduct public consultation before making delegated legislation. The ALRC does not anticipate that the proposed requirement would impose a significant burden. Section 1098B(2) of the Act in Prototype Legislation B provides guidance on how the consultation requirement may be satisfied.

2.90 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 generally applicable *Legislation Act* regime and other existing requirements in the *Corporations Act*.[82] Rather, consultation with the Committee and the public should act as a normative constraint on delegated law-making power, as well as providing transparency and enhancing scrutiny of the law-making process.[83] For the avoidance of doubt, s 1098C of the Act in Prototype Legislation B provides that consultation may be dispensed with in the case of emergencies.

2.91 Combined with sunsetting, 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 sunsetting. Such expert consultation could address matters of policy as well as whether the substance of any scoping orders or rules should be moved to primary legislation.

Regulatory guidance

2.92 The ALRC observed in Interim Report A that a

> significant volume of guidance in all its forms is arguably both a source and a symptom of complexity in the law. … It is a symptom of complexity in that the demand for guidance in part stems from difficulties in understanding and navigating the legislative scheme.[84]

2.93 The ALRC anticipates that, by creating a more coherent and navigable legislative hierarchy, the proposed legislative model would not necessitate the

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80 For example, the existing power to create market integrity rules in s 798G of the *Corporations Act*.

81 See, eg, *Corporations Act 2001* (Cth) ss 903G, 908CL, 981L.

82 See, eg, ibid ss 903G(3), 908CL(3), 981L(3). These provisions were enacted in, respectively, 2012, 2018, and 2017.

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

84 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 144.

same volume of regulatory guidance as presently exists. For example, simpler and more navigable legislation relating to financial product disclosure would reduce the need for guidance (or parts of guidance) primarily aimed at explaining disclosure obligations.[85] Guidance explaining the presence and effect of notional amendments would also be unnecessary under the proposed legislative model.[86] There may be scope for reduction not only in the volume of materials identified as 'Regulatory Guides' by ASIC, but also in other types of guidance, such as 'Information Sheets'.

2.94 Rules, however, are not intended to completely displace regulatory guidance. The crucial distinctions between law and guidance — namely, legislative status and enforceability — are to remain. Under the proposed legislative model there would still be a role for regulatory guidance focused on, for example:

- explaining ASIC's approach to exercising its powers and performing its functions;[87] and
- providing guidance that assists members of the regulated population to comply with their obligations,[88] particularly where complexity in the underlying law cannot be avoided or in areas that relate to highly technical matters.[89]

Steps to implementation

2.95 **Proposals B10** and **B11** are consequent on **Proposals B1**–**B9**. In other words, implementing **Proposals B10** and **B11** would follow implementation of **Proposals B1**–**B9**. This means that the subject matter of pre-existing exclusions, exemptions, and notional amendments made in reliance on the current exemption

85 See, eg, Australian Securities and Investments Commission, *Disclosure: Product Disclosure Statements (and Other Disclosure Obligations)* (Regulatory Guide 168, July 2022); Australian Securities and Investments Commission, *Disclosure for On-Sale of Securities and Other Financial Products* (Regulatory Guide 173, March 2016); Australian Securities and Investments Commission, *Hedge Funds: Improving Disclosure* (Regulatory Guide 240, October 2013); Australian Securities and Investments Commission, *Offering Securities under a Disclosure Document* (Regulatory Guide 254, August 2020).

86 See, for example, Australian Securities and Investments Commission, *Time-Sharing Schemes* (Regulatory Guide 160, December 2020), which is 79 pages long and explains the regulation of time-sharing schemes, mostly based on notional amendments made by the 68-page *ASIC Corporations (Time-Sharing Schemes) Instrument 2017/272* (Cth); and Australian Securities and Investments Commission, *Short Selling* (Regulatory Guide 196, October 2018), which contains a consolidated version of Part 7.9 Div 15 of the *Corporations Act* showing notional amendments and definitions inserted by *ASIC Corporations (Short Selling) Instrument 2018/745* (Cth).

87 See, eg, Australian Securities and Investments Commission, *Applications for Relief* (Regulatory Guide 51, July 2020); Australian Securities and Investments Commission, *Confidentiality and Release of Information* (Regulatory Guide 103, July 2007); Australian Securities and Investments Commission, *AFS Licensing: Discretionary Powers* (Regulatory Guide 167, July 2022); Australian Securities and Investments Commission, *Over-the-Counter Contracts for Difference: Improving Disclosure for Retail Investors* (Regulatory Guide 227, August 2011).

88 Australian Securities and Investments Commission, *Advertising Financial Products and Services (Including Credit): Good Practice Guidance* (Regulatory Guide 234, November 2012).

89 Australian Securities and Investments Commission, *Guidance on ASIC Market Integrity Rules for Participants of Futures Markets* (Regulatory Guide 266, August 2022).

and notional amendment powers would be considered for inclusion in the proposed legislative model before the powers were repealed.

2.96 The majority of submissions that addressed Proposal A9 in Interim Report A, which proposed that notional amendment powers in Chapter 7 of the *Corporations Act* be repealed, were supportive.[90] Submissions agreed with the ALRC that existing exemption and notional amendment powers have been a driver of complexity, make the law difficult to navigate, and raise principled rule of law concerns.[91] Other submissions noted the important role that the existing powers perform in respect of Chapter 7 and disagreed that they are a source of complexity.[92]

2.97 In the ALRC's view, the proposed legislative model would provide 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.[93]

Staged transition

2.98 As discussed in Interim Report A, the proposed legislative model could be implemented in stages by focusing on particular themes of regulation in Chapter 7 of the *Corporations Act*.[94] The ALRC suggests that financial product disclosure, or discrete aspects of financial product disclosure regulation, would be a suitable first candidate for reform. Prototype Legislation B and the accompanying explanatory notes demonstrate how that process could be commenced.

2.99 Other suitable themes for reform and thematic rulebooks would include the AFSL regime,[95] financial advice, and conduct requirements relating to client property and financial records.[96] **Figure 2.4** below illustrates how the proposed legislative model could be applied to the AFSL regime. The reframing and restructuring of provisions relating to financial advice could coincide with any substantive reforms arising out of the Quality of Advice Review currently being undertaken by Treasury with the support of an independent reviewer.

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90 Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [129].

91 Ibid [130], [133].

92 Ibid [136]–[137].

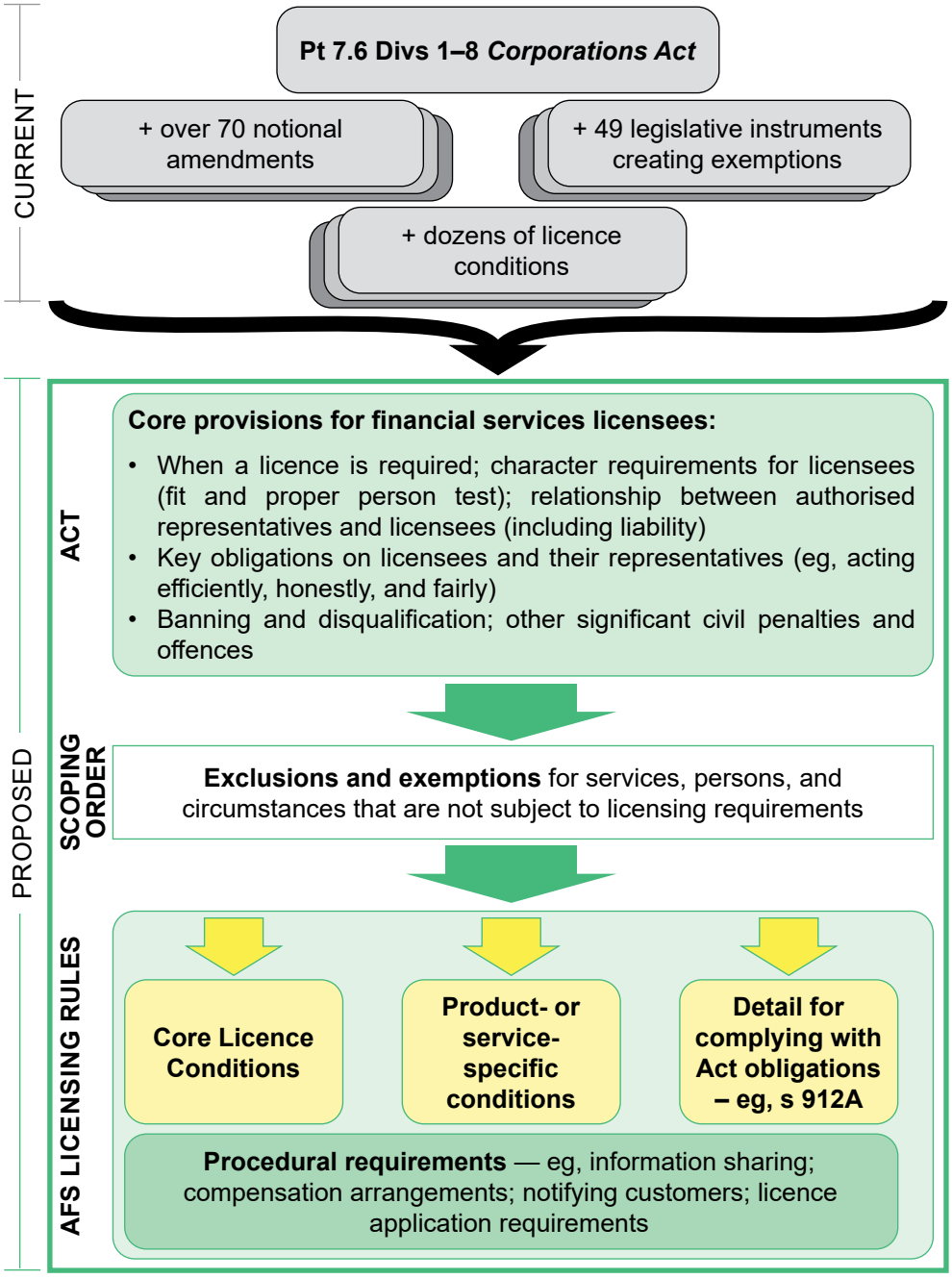
93 The ALRC recognises, however, that there may be a limited role for notional amendment powers in the case of emergencies. See, for example, s 1362A of the *Corporations Act* introduced in response to the COVID-19 pandemic.

94 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.8]–[10.9].

95 *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 wide range of exemptions from that obligation, can be simplified under the ALRC's proposed model: see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.115]–[10.122].

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

Figure 2.4: Applying the proposed legislative model to the AFSL regime



A methodology for implementation

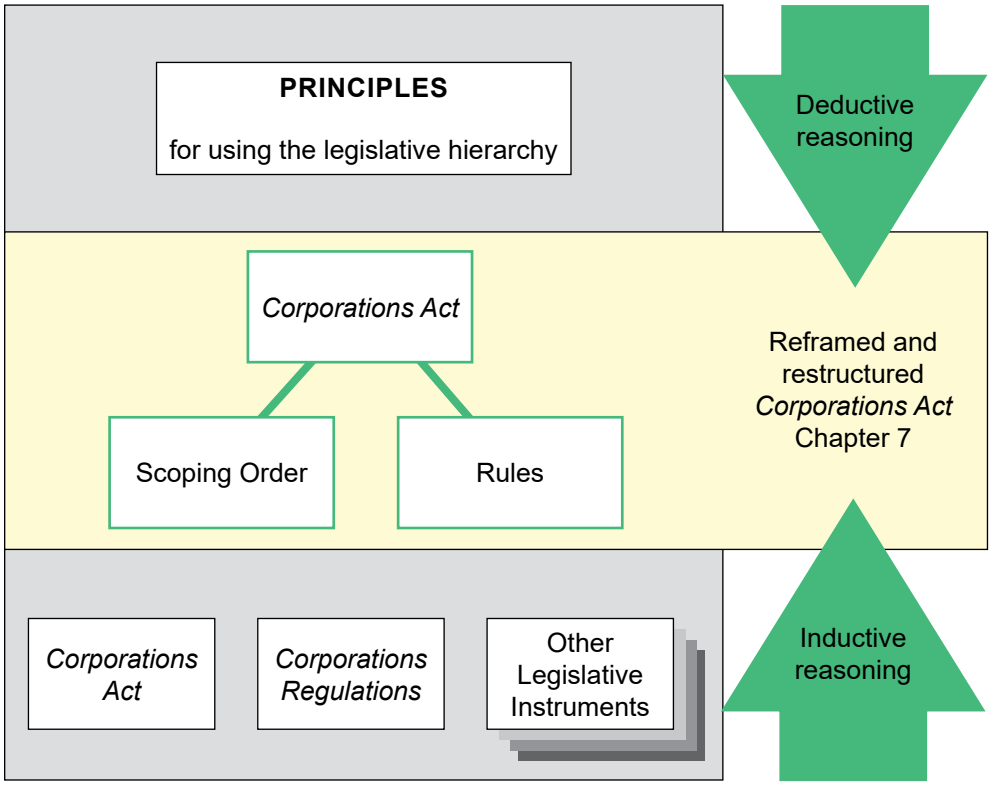
2.100 Through applying the proposed legislative model to financial product disclosure and preparing Prototype Legislation B, the ALRC has developed a methodology for restructuring and reframing Chapter 7 of the *Corporations Act*. **Figure 2.5** below illustrates that methodology, showing how deductive (or 'top-down') and inductive (or 'bottom-up') analyses 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 the principles for using the legislative hierarchy discussed in this Interim Report.[97]

2.101 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.[98] 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.

97 The ALRC foreshadowed this approach in Interim Report A: see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.9].

98 See, eg, ibid [4.16], [6.107].

Figure 2.5: A methodology for applying the proposed legislative model



Implementation risks

2.102 Implementing **Proposals B1**–**B9** with the goal of simplifying the law would involve a significant program of work. This was also recognised by the Financial Services Royal Commission, which observed that 'the very size of the task shows why it must be tackled'.[99]

2.103 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 more complex state, than before. A similar observation has been made to the ALRC in respect of the unfinished Taxation Laws Improvement Project.[100]

99 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 17) 495.

100 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.

2.104 The proposed reforms carry implementation risks. However, the potential staged nature of implementation minimises the risk that the law may be left in a worse state than at present if the reforms were not fully carried through. Although it would be sub-optimal if the model proposed by the ALRC were applied to only some areas of regulation — such as financial product disclosure — but not others, the reformed and 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.

The value of a model

2.105 Australia is not alone in grappling with difficult questions about the architecture of financial services regulation. The UK, for example, has recently completed its Financial Services Future Regulatory Framework Review ('FRF Review'), triggered by the UK's exit from the European Union ('EU'). In summary, the FRF Review was concerned with how to accommodate the 'onshoring' of a significant body of EU law that formerly regulated financial services within the UK's domestic regulatory and legislative framework. The UK Government proposes to extend and further develop the 'FSMA model', which takes its name from the *FSM Act* (UK), being the main law regulating financial services.[101] The experience of the FRF Review illustrates how a clear model can help to manage legislative complexity and change.

2.106 A notable feature of the *FSM Act* (UK) is its distinct legislative architecture and hierarchy, in which it is generally clear what type of law should go where and who should make it. The FSMA model has the following key features:

> Parliament, through primary legislation, sets the overall approach and institutional architecture for financial services regulation, including the regulators' objectives.
>
> Parliament establishes the parameters within which [Her Majesty's] Treasury sets the 'regulatory perimeter' through secondary legislation, specifying which financial activities should be regulated and the circumstances in which regulation should apply.
>
> An expert, operationally independent regulator … [has] statutory responsibility for setting the detailed requirements that apply to regulated firms and markets. … [The regulator is] also responsible for enforcing requirements applied to firms operating within the perimeter and for taking action against regulatory breaches.[102]

101 Explanatory Notes, Financial Services and Markets Bill 2022 (UK).

102 HM Treasury, *Financial Services Future Regulatory Framework Review — Phase II Consultation* (Consultation Paper No 305, October 2020) [2.5]. See also Explanatory Notes, Financial Services and Markets Bill 2022 (UK) [115].

2.107 EU law (including financial services regulation) was preserved in the UK through the *European Union (Withdrawal) Act 2018* (UK),[103] which created a vast body of domestic legislation under the label of 'retained EU law'. The present state of UK financial services law therefore reflects a fragmented legislative architecture and hierarchy in terms of who makes law and the legal instruments through which it is made.[104] This is primarily because large parts of the law now appear in primary legislation, by virtue of the *European Union (Withdrawal) Act 2018* (UK). Her Majesty's Treasury (UK) observed that keeping regulation in primary legislation would mean 'that it is not possible in many areas to regulate in an agile and flexible way that reflects changing markets'.[105] The House of Commons Treasury Committee also concluded that it 'would be resource-intensive and impractical' for rules to remain in primary legislation.[106]

2.108 The present fragmentation in the UK somewhat mirrors the state of Chapter 7 of the *Corporations Act*. However, unlike the UK, Australia lacks a clear 'model' of regulation in Chapter 7, or a clear allocation of responsibilities between Parliament, the Treasury, and ASIC. The Financial Services and Markets Bill 2022 (UK) follows from the FRF Review and introduces measures for 'applying the FSMA model to areas currently covered by retained EU law' and creating a 'comprehensive FSMA model for financial services regulation'.[107] In other words, the Bill contains measures designed to bring coherence to the legislative hierarchy. The legislative model proposed by the ALRC could facilitate a similar process for Chapter 7.

2.109 The value of a coherent legislative model is also illustrated by Treasury's observations that 'both the underlying policy positions and the legislative framework' for regulating financial services have been developed in an 'incremental and at times piecemeal' way. According to Treasury:

> Decisions taken on legislative design — what material is included in primary legislation, regulations, class orders and what should be left to firms and industry to grapple with — has varied over time resulting in inconsistencies in design and a lack of a clearly discernible legislative design philosophy across the law.[108]

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103 *European Union (Withdrawal) Act 2018* (UK) ss 2–3, as amended by the *European Union (Withdrawal Agreement) Act 2020* (UK). Section 2(1) preserved EU-derived domestic legislation as it was at 11.00 pm on 31 December 2020: see s 39 of the *European Union (Withdrawal Agreement) Act 2020* (UK) for the definition of 'IP completion day'.

104 Explanatory Notes, Financial Services and Markets Bill 2022 (UK) [11]: The present UK legislation is 'a complicated patchwork of regulatory requirements across primary and secondary legislation, retained EU law, and regulator rulebooks'.

105 HM Treasury, *Financial Services Future Regulatory Framework Review — Proposals for Reform* (Consultation Paper No 548, November 2021) [1.39].

106 House of Commons Treasury Committee, *The Future Framework for Regulation of Financial Services* (Fifth Report of Session 2021–22, July 2021) [27].

107 Explanatory Notes, Financial Services and Markets Bill 2022 (UK) [15], [24].

108 Department of the Treasury (Cth), Submission to the Financial Services Royal Commission (Interim Report)*, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Undated) [22], [28].

3. What Goes Where

Contents

Introduction

3.1 This chapter seeks to answer the question of 'what goes where' in the legislative hierarchy. In other words, the chapter focuses on the appropriate allocation of matters between primary legislation and delegated legislation. This allocation of matters is critical to coherence in regulatory design and the hierarchy of laws, as well as to ensuring an appropriate delegation of legislative authority. The question of 'what goes where' is both a technical and normative one — technical because it involves techniques of legislative design, and normative because it invokes fundamental constitutional principles of democracy and the rule of law.

3.2 To address 'what goes where', this chapter discusses existing guidance and legislative practice regarding the use of the legislative hierarchy. Existing guidance largely focuses on examples, and as a result does not accommodate the wide variety of current legislative practice. The chapter 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 helping those who design legislation to develop their skills in applying those principles.

3.3 Although the focus of this Inquiry is on corporations and financial services legislation, the same general principles ought to inform decisions about 'what goes where' in all legislative contexts. This chapter discusses those common principles and how they could be embodied in consolidated guidance. The role of non-legislative materials — sometimes referred to as 'soft law' or regulatory guidance — is also discussed.

3.4 The proposed legislative model, which was discussed in **Chapter 2**, illustrates how the guidance and principles discussed in this chapter can be applied.

3.5 While this chapter focuses on principles that guide decisions about 'what goes where', **Chapter 4** illustrates that those decisions should not be made in isolation from decisions about the range of safeguards that can be applied to the delegation of legislative power. **Chapter 5** discusses particular issues relating to offences, penalties, and coercive powers. **Chapter 6** uses data and specific examples to explore the different approaches to legislative hierarchies across the Commonwealth statute book.

Context: Good regulatory and legislative design

3.6 As discussed in **Chapter 4**, practical necessity is often considered the overarching justification for delegated legislation. However, delegated legislative power is now seen not merely as necessary, but as an important aspect of regulatory and legislative design.[1]

3.7 In some respects, delegated legislation is necessary because Parliament simply does not have time to enact every law. Delegated legislation can be made much more expeditiously than primary legislation. This characteristic, together with the potential for delegating power to a technical expert in relevant circumstances, makes delegated legislation important for regulatory systems.

3.8 The expediency of delegated legislation is also a cause for concern. Justice Stephen has observed that the history of delegated legislation

> reflects the tension between the needs of those who govern and the just expectations of those who are governed. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realization by the imposition and enforcement of appropriate controls upon the power of subordinate legislators, whose power, as Fifoot observed 'requires an adequate measure of control if it is not to degenerate into arbitrary government'.[2]

3.9 Justice Stephen's observations encapsulate two widely held concerns: that unfettered delegated power presents a threat to the rule of law; and that delegated legislation lacks the same level of democratic legitimacy as primary legislation. The principles and safeguards discussed here and in the following two chapters are underpinned by the need to balance the expediency of delegated legislation with the risks that it presents for fundamental principles of democracy and the rule of law.

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1 See [4.8]–[4.11]. For further discussion of regulatory design and legislative design, see **Chapter 1**.
2 *Watson v Lee* (1979) 144 CLR 374 [21] (citations omitted).

Current guidance

3.10 Existing guidance for parliamentarians, policy-makers, drafting instructors, and legislative drafters on the allocation of matters between primary legislation and delegated legislation at the Commonwealth level in Australia is spread across several sources. The most important and directly relevant sources are summarised in **Appendix D**. Several others also touch upon delegating legislative power, some of which are discussed in **Chapter 4**.[3]

3.11 Current guidance generally refers to examples, as opposed to more generally applicable principles. The *Legislation Handbook*, maintained by PM&C, lists 12 examples of 'matters generally implemented only through Acts of Parliament'.[4] These include appropriations of money, provisions imposing taxes or levies, offences subject to imprisonment or fines above certain thresholds, and civil penalties. Less prescriptive examples include 'significant questions of policy including significant new policy or fundamental changes to existing policy', 'rules which have a significant impact on human rights and personal liberties', and 'procedural matters that go to the essence of a legislative scheme'.[5] The *Legislation Handbook* notes that matters 'of detail and matters which may change frequently' — and for which a high degree of flexibility is required — are 'best dealt with by subordinate legislation', such as 'fees to be paid for various services' and 'addresses where applications are lodged'.[6]

3.12 The present examples in the *Legislation Handbook* have evolved from an earlier list of eight matters which, in 1992, the Administrative Review Council ('ARC') recommended be incorporated into the *Legislation Handbook*.[7] Those eight matters were intended to operate as 'criteria for the division of content between primary and other forms of legislation'.[8] The ARC observed that a 'theme common to most of them [was] the presence or absence of significant policy' (which was itself a separate criterion).[9] The ARC's recommendation was informed by its observation that, although existing guidelines reflected 'the traditional distinction between primary and other forms of legislation', they were 'too vague in their present form to provide a reliable guide'.[10]

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3 See, eg, Office of Parliamentary Counsel (Cth), *OPC's Drafting Services: A Guide for Clients* (7th ed, 2022).

4 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [1.10]. The 12 examples are listed in **Appendix D**.

5 Department of the Prime Minister and Cabinet (Cth) (n 4) [1.10].

6 Ibid [5.65].

7 Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, 1992) rec 2. The eight examples are listed in **Appendix D**. For further discussion, see Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) [6.47]–[6.63]. For discussion of the ARC and its functions prior to being disbanded in around 2016, see Narelle Bedford, 'The Kerr Report's Vision for the Administrative Review Council and the (Sad) Modern Reality', *AUSPUBLAW* (21 May 2021) <www.auspublaw.org/blog/2021/05/the-kerr-reports-vision-for-the-administrative-review-council>.

8 Administrative Review Council (n 7) rec 2.

9 Ibid [2.15].

10 Ibid [2.9].

3.13 The *Legislation Handbook* is predominantly about 'the procedures involved in making a law, especially those coordinated by the Department of the Prime Minister and Cabinet'.[11] Although many public servants may be familiar with the Handbook, some readers may not expect to find guidance about 'what goes where' in the legislative hierarchy in a resource otherwise focused on procedure. This incongruity is somewhat illustrated by the location of the 12 examples in the Handbook's 'Introduction'.[12] Some further commentary about legislative and non-legislative instruments is contained at the conclusion of Chapter 5 of the Handbook, which relates to preparing drafting instructions.[13]

3.14 Like the *Legislation Handbook*, the scrutiny principles of the Senate Scrutiny Committees refer to examples of matters that are more appropriately included in primary legislation.[14] Though not as extensive, the examples generally replicate those contained in the *Legislation Handbook*. Less prescriptive examples include provisions that set out 'significant elements of a regulatory scheme' and provisions that have 'a significant impact on personal rights and liberties'.[15]

3.15 The scrutiny principles of the Senate Scrutiny Committees differ from other guidance in respect of their focus. They focus on technical aspects of legislation and the proper role of Parliament. They are not explicitly focused on good law design or how the legislative hierarchy may best be used in a particular case.

3.16 Existing guidance contemplates that OPC should play an advisory role to drafting instructors (principally departmental officers) in relation to delegated legislation.[16] Pursuant to OPC Drafting Direction 4.2, AGD also performs an advisory role regarding several categories of legislation.[17] Those categories include legislation that 'creates a framework, skeleton or coat-hanger scheme' and legislation that confers a notional amendment power.[18]

3.17 A key theme in existing guidance is that 'significant matters', particularly matters of 'significant policy', are more appropriately enacted in primary legislation.[19] This is because primary legislation 'is subject to a greater level of parliamentary

11 Department of the Prime Minister and Cabinet (Cth) (n 4) [1.1].
12 Ibid [1.10].
13 Ibid [5.65]–[5.76].
14 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (2nd ed, 2022) 31–2; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Guidelines* (2nd ed, 2022) 17–19.These examples are listed in **Appendix D**.
15 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (n 14) 31. See also Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia (n 14) 18–19.
16 Department of the Prime Minister and Cabinet (Cth) (n 4) [5.66]; Office of Parliamentary Counsel (Cth) (n 3) [161].
17 Office of Parliamentary Counsel (Cth), Drafting Direction 4.2, 'Referral of drafts to agencies' (Document release 8.12, February 2020) [8]. See also Attorney-General's Department (Cth), *Australian Administrative Law Policy Guide* (2011) [3.2].
18 Office of Parliamentary Counsel (Cth), Drafting Direction 4.2, 'Referral of drafts to agencies' (Document release 8.12, February 2020) Attachment A.
19 See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.158]–[2.161].

oversight than delegated legislation'.[20] Existing guidance does not contain detailed analysis of what makes a matter 'significant'. The Delegated Legislation Scrutiny Committee's scrutiny principles note that significant policy matters may include 'matters significantly affecting the public interest' or 'issues of national significance'.[21]

3.18 Further guidance can be gleaned from the work of the Senate Scrutiny Committees. The Committees publish regular reports and correspondence in which they apply their scrutiny principles on a case-by-case basis.[22] OPC Drafting Direction 4.1 advises drafters to consult the *Delegated Legislation Monitor* to note any comments made by the Delegated Legislation Scrutiny Committee on instruments a drafter has prepared.[23]

3.19 While the work of the Senate Scrutiny Committees provides a significant volume of guidance, it is not an easily accessible source for two main reasons. First, Parliament's website does not provide a mechanism to search across the Committees' publications, which are published periodically as individual documents.[24] The annual reports of the Committees nonetheless provide an accessible summary of their work and a small number of examples to illustrate the application of scrutiny principles. Secondly, because the Committees analyse legislative instruments on a case-by-case basis, it is difficult to deduce generally applicable principles that inform the specific scrutiny principles outlined above.[25]

Current practice

3.20 Current legislative practice suggests that three important trends are increasingly prominent. These are:

- an ever-increasing volume of delegated legislation;
- an increased use of delegated legislation in relation to matters of 'policy' as opposed to only administrative or technical detail; and
- an inconsistent use of the legislative hierarchy over time, reflected in sometimes inconsistent division of content between primary legislation and delegated legislation.

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20 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (n 14) 31.

21 Ibid 44.

22 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor — Committee Correspondence* (Monitor 1 of 2022, 25 January 2022) 22.

23 Office of Parliamentary Counsel (Cth), Drafting Direction 4.1, 'Dealing with instructors' (Document release 4.1, July 2020) [16].

24 For example, the Delegated Legislation Scrutiny Committee publishes each Delegated Legislation Monitor, committee correspondence, and ministerial responses (respectively) as a separate Portable Document Format (PDF) document.

25 Furthermore, as the composition of the Senate changes over time, so too does membership of the Senate Scrutiny Committees. Because much of the Committees' work involves an exercise of judgement, it is unavoidable that different Committee members may take different views over time.

3.21 The first of these trends is discussed in **Chapter 6**. The second and third are discussed below.

From administrative detail to policy

3.22 According to the ARC, the 'view that the general role of delegated legislation is to fill in details in a legislative scheme' was well established at the time of its report in 1992.[26] For some time prior, however, the practical reality of that view was questioned. In 1979, the Senate Standing Committee on Regulations and Ordinances (now the Delegated Legislation Scrutiny Committee) observed that its scrutiny principle (d) — that delegated legislation should be 'concerned with administrative detail' and 'not amount to substantive legislation which should be a matter for Parliamentary enactment' — had 'for some years been a source of some difficulty'.[27] The committee noted:

> It is very doubtful whether delegated legislation can now be restricted to 'administrative detail', if indeed it could even in 1932. Some delegated legislation, such as ordinances of the territories, by its very nature contains substantive legislation. The Parliament has also seen fit in recent years to pass an increasing number of statutes leaving substantive matters to delegated legislation.[28]

3.23 More recent observations of the Delegated Legislation Scrutiny Committee also suggest that 'delegated legislation is increasingly being used to make laws on significant policy matters'.[29] In a joint submission to the 2021–2022 Review of the *Legislation Act 2003*, the Senate Scrutiny Committees and Parliamentary Joint Committee on Human Rights observed that

> delegated legislation does not always deal with purely technical or administrative matters, but now regularly deals with matters of policy significance and matters that affect individual rights and liberties.[30]

3.24 The data discussed in **Chapter 6** regarding scrutiny concerns of the Senate Scrutiny Committees provides further evidence that matters of 'policy' are prevalent in delegated legislation.[31] As discussed below, the difficulty in drawing a line between matters of 'policy' and technical detail suggests that this practice may be inevitable, and that guidance should recognise that reality.

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26 Administrative Review Council (n 7) [2.3].

27 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Principles of the Committee, 64th Report* (1979) [5].

28 Ibid.

29 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (2021) [3.8].

30 Parliamentary Joint Committee on Human Rights, Senate Standing Committee for the Scrutiny of Bills and Senate Standing Committee for the Scrutiny of Delegated Legislation, Submission to Legislation Act Review Committee, Attorney-General's Department, *2021–2022 Review of the Legislation Act 2003* (December 2021) 2.

31 See [6.69]–[6.76].

Differing and inconsistent practices

3.25 Legislative practice in relation to allocating matters between primary and delegated legislation varies across the statute book in two main respects. First, different practices are adopted among different statutory regimes: some regimes allocate large amounts of material to delegated legislation, while others do not.[32] Secondly, some legislation demonstrates inconsistent (or incoherent) approaches over time to allocating matters between primary and delegated legislation.

3.26 In 1992, the ARC observed that 'the practices actually followed' in the application of then existing guidelines demonstrated 'considerable discrepancies in the nature of the rules implemented through primary and delegated legislation'.[33] The inference drawn from examples considered by the ARC was that

> the division of content between primary and secondary legislation [did not] follow standard criteria but [was] often haphazard, depending on such factors as the legislative history of the scheme in question.[34]

3.27 OPC's submission to the ARC supported that conclusion, and

> drew attention to evidence that agencies stray[ed] in both directions from the basic distinction between primary and delegated legislation in giving drafting instructions for new legislation.[35]

3.28 The ARC observed that, as a result, excessive detail was included in primary legislation and substantial matters of principle were contained in delegated legislation.[36]

3.29 The data discussed in **Chapter 6** indicates a range of different approaches to the use of delegated legislation across different statutory regimes, departments, and subject matters. These different approaches represent legislative design choices which, to a greater or lesser degree, reflect an allocation of matters between primary and delegated legislation to suit the regime in question.

3.30 While some subject matters may lend themselves to a greater use of delegated legislation than others, subject matter appears to be just one contributing factor to legislative design. The civil aviation regulatory regime, for example, comprises a large amount of delegated legislation which contains technical and detailed specifications for aircraft and passenger safety.[37] Health is another area of regulation with a large volume of delegated legislation, often dealing with technical matters such as medical benefit payments and pharmaceuticals.[38] By contrast, much of the detail regarding

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32 See **Chapter 6**.
33 Administrative Review Council (n 7) [2.10].
34 Ibid [2.11].
35 Ibid [2.12].
36 Ibid.
37 See **Figure 6.2** at [6.12]. See also Dennis Pearce AO and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5th ed, 2017) 7.
38 See **Figure 6.3** at [6.15].

social security is contained in the *Social Security Act 1991* (Cth), with relatively little delegated legislation.[39]

3.31 The differences between these regimes may partly be explained by the need for more technical or specialist input in the areas of civil aviation and health, compared to broader social policy input that is required in relation to social security. Political interest may also explain the differences, with social security regulation ordinarily being more politically sensitive than civil aviation and health.[40] However, Emeritus Professor Pearce AO and Stephen Argument note that, given the complexity and frequently changing nature of social security regulation, it could be suited to administration through delegated legislation.[41] According to Pearce and Argument, the approach to social security legislation may partly be explained by historical factors, including design choices made in earlier versions of the legislation.[42]

3.32 As observed in **Chapter 6**, the *Corporations Act* lacks a coherent and consistent legislative hierarchy. It represents 'the worst of both worlds' as a lengthy Act underpinned by a substantial body of delegated legislation.[43] No single factor can explain this development. However, the following factors may have contributed:

- The statutory regulation of corporations has a long and complex history. The present *Corporations Act*, for example, arose out of earlier state-based legislation which, in turn, drew on UK legislation.[44] The uniform regulation of corporations and financial services in Australia has also been beset by Constitutional difficulties.[45]
- Political factors may partly explain why considerable detail appears in primary legislation. For example, it may be argued that governments have chosen to enact detailed legislation so as to be seen to respond appropriately to the scandals or crises of the day. Furthermore, government responses to inquiries and Royal Commissions have led to numerous legislative amendments.[46]

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39 Ibid.

40 However, health-related legislative instruments created in response to the COVID-19 pandemic, particularly under the *Biosecurity Act 2015* (Cth), have been the subject of comment by the Delegated Legislation Scrutiny Committee: see, eg, Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (n 29) xv–xvi; Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 16 of 2021, 25 November 2021) 3–10. See also Matthew McLeod, 'Distancing from Accountability? Governments' Use of Soft Law in the COVID-19 Pandemic' (2022) 50(1) *Federal Law Review* 3, 6.

41 Pearce and Argument (n 37) 8.

42 Ibid.

43 See [6.12].

44 See Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021).

45 Ibid [71].

46 See, eg, ibid [88].

- The *Corporations Act* recognises that flexibility and specialist technical knowledge, so as to address atypical circumstances, are important.[47] This is reflected in the considerable delegated legislation authorised by the Act.

3.33 An incoherent and inconsistent approach to using the legislative hierarchy *within* a single statutory regime is more problematic than different approaches across different regimes. Interim Report A highlighted, for example, how inconsistent use of the legislative hierarchy over time in the *Corporations Act* has produced significant complexity by reducing navigability and coherence of the overall legislative regime.

3.34 Professor Page's observation that there is 'no perfect match between the instrument of government and the importance of the issue at stake' supports the view that decisions about using the legislative hierarchy are largely matters of choice.[48] Through an empirical study of delegated legislation in the UK, Page sought to examine 'the obscure world of everyday policy-making'.[49] Page concluded that the question of whether there are some issues that should be handled through primary legislation as against delegated legislation 'is primarily a normative question' and one that 'probably cannot be answered other than on a case-by-case basis'.[50] In reaching this view, Page used the concepts of 'high politics' and 'everyday politics' to distinguish between matters that might be more or less suited to primary or delegated legislation. Page concluded that there is 'no *a priori* characteristic of an issue that makes it a matter of high politics'.[51] Rather, issues could 'move between the two' and 'elevating everyday political issues to high politics or keeping them in the arena of low politics is an important strategy in managing political conflicts'.[52]

3.35 The wide range of legislative practice suggests that it would be impossible to prescribe a 'one size fits all' approach to using the legislative hierarchy. Ideally, however, design choices across the statute book should be guided by a common set of principles.

Re-thinking principles and practice

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.

47 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [1.60]–[1.65], [10.12]–[10.21].
48 Edward C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Hart Publishing, 2001) 177.
49 Ibid.
50 Ibid 186.
51 Ibid.
52 Ibid 179.

Question B13 Does the Draft Guidance included in this Interim Report:

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; and

c. 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.

3.36 Guidance regarding the delegation of legislative power is one aspect of the institutional framework supporting key stakeholders involved in the legislative process — including Parliament, its Members and Senators, government departments, policy-makers, legislative drafters, and drafting instructors.

3.37 Presently, guidance is spread across multiple sources published by different authors. 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, AGD is most appropriately placed to publish and maintain consolidated guidance.[53] This function should be performed in consultation with OPC and PM&C, as both play important coordinating roles in the preparation of Commonwealth laws.

3.38 **Appendix E** contains draft guidance which could be adopted by AGD. For convenience, **Appendix E** is referred to as 'Draft Guidance' throughout this Interim Report. The Draft Guidance has been developed primarily by reference to existing Australian guidance, discussed above. It also draws upon comparable guidance contained in Chapters 14–16 of the New Zealand *Legislation Guidelines*, which

53 This is also consistent with two recommendations of the 2021–2022 Review of the *Legislation Act 2003*. The Review Committee recommended that AGD revise policy guidance for agencies in relation to sunsetting periods and alternative approaches to disallowance: see Legislation Act Review Committee, Attorney-General's Department (Cth), *2021–2022 Review of the Legislation Act 2003* (2022) recs 4.1, 7.11. The Draft Guidance discusses sunsetting and disallowance, but does not expressly take the Review's findings into account. The Review's recommendations and the ALRC's **Proposal B12** could be implemented as part of the same process.

exemplify how guidance may be expressed in the form of principles and guiding questions.[54]

3.39 The Draft Guidance illustrates how existing guidance should be reframed in terms of guiding principles. As discussed above, current guidance largely consists of examples. Expressing guidance in the form of examples does not adequately capture the range of fundamental and sometimes competing principles that underpin decisions about allocating matters between primary and delegated legislation.

3.40 Principally, the Draft Guidance reframes existing guidance so as to draw out the key principles that underpin it. The Draft Guidance revises or expands existing guidance in some respects to recognise that the key principles are capable of being applied differently in a range of circumstances. Existing guidance has also been revised to better reflect Parliament's current legislative practice. For example, the Draft Guidance revises aspects of existing guidance by incorporating:

- express recognition that some matters of 'policy' may, and in some cases inevitably will, be dealt with by delegated legislation;
- recognition that exclusions and exemptions in delegated legislation may endure for longer than three years, with appropriate safeguards;[55] and
- guidance regarding offence and civil penalty provisions, which is discussed in detail in **Chapter 5**.

3.41 **Question B13** invites feedback from stakeholders on the content and expression of the Draft Guidance. The range of principles and guidance contained in the Draft Guidance are discussed in this and the following two chapters.

3.42 Although the focal point of this Inquiry is corporations and financial services legislation, **Proposal B12** suggests that guidance should apply more generally. The reasons for this are:

- The issues of coherence in regulatory design and legislative complexity are not isolated to corporations and financial services legislation. The ALRC's data analysis suggests, for example, that several of the problems evident in the use of the legislative hierarchy in the context of the *Corporations Act* may be more widespread.
- There would be little utility in developing guidance relevant to one area of law without having regard to more generally applicable principles. Coherence in regulatory design and legislative design is more likely to be achieved by

54 Legislation Design and Advisory Committee (NZ), *Legislation Guidelines* (2021).These are discussed in more detail on the ALRC website: Australian Law Reform Commission, 'Comparative frameworks for promoting good legislative design' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Comparative-frameworks-for-legislative-design.pdf>.

55 Cf Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (n 29) [7.115].

employing a common set of principles capable of being applied across the statute book.[56]

- Consultations to date have indicated that policy-makers and legislative designers — including those who work outside of corporations and financial services regulation — believe there would be benefit in consolidated guidance relating to delegated legislation.
- Experiences in comparable parliamentary jurisdictions, such as the UK and New Zealand, suggest that principled guidance is important. The UK House of Lords Delegated Powers and Regulatory Reform Committee, for example, observed in 2021 that the absence of 'any explicit statement of the underlying principles' in legislative guidance was a 'fundamental flaw'.[57] The Committee recommended the inclusion of a 'statement of principles of parliamentary democracy' in guidance to counter what the Committee saw as the prevailing view of delegated powers 'as merely a political or practical matter'.[58]

3.43 While the Draft Guidance may have its greatest utility for policy-makers and legislative drafters responsible for developing legislative proposals, it is intended for a broader audience, including Parliamentarians and civil society. The value of guidance which may be drawn on by policy-makers and Parliamentarians alike is illustrated by the Delegated Legislation Scrutiny Committee's observations that:

- 'despite the Scrutiny of Bills committee's best efforts, warnings regarding the inappropriate delegation of legislative powers are routinely ignored';[59] and
- issues may better be addressed 'at the policy development and drafting stages, rather than raising these issues when the relevant bill is before the Parliament'.[60]

3.44 Implementing **Proposal B12** may necessitate some amendments to the *Instruments Handbook* maintained by OPC.[61] That process could form part of a more ambitious project, discussed in **Chapter 4**, to rationalise guidance relating to legislative design and improve the institutional framework that supports the legislative process more generally.[62]

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56 For further discussion of regulatory design and legislative design, see **Chapter 1**.

57 Delegated Powers and Regulatory Reform Committee, House of Lords, *Democracy Denied? The Urgent Need to Rebalance Power between Parliament and the Executive* (House of Lords Paper No 106, 12th Report of Session 2021–22, 2021) [126].

58 Ibid.

59 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (2019) [5.34].

60 Ibid [5.36]. See also Jacinta Dharmananda, Submission No 11 to Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (2019) 3: 'To some extent to talk about the parliamentary scrutiny of delegated legislation is to discuss the topic in the context of the horse having already bolted.'

61 Office of Parliamentary Counsel (Cth), *Instruments Handbook* (Document release 3.7, September 2022).

62 See [4.70]–[4.79].

Community of Practice

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

3.46 **Proposal B14** arose out of a consultation conducted by the ALRC regarding legislative design, complexity, and delegation of legislative power with 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.

3.47 Given the obligation placed on First Parliamentary Counsel to encourage high standards in the drafting of legislative instruments and notifiable instruments,[63] OPC is the agency best placed to support a Community of Practice for legislative designers. Such a Community of Practice would complement training courses already offered by OPC and the OPC's Drafters' Forum, which aims to support 'in-house' drafters of legislative instruments.[64] The ALRC anticipates that any resource implications for OPC would not be substantial and the work of the Community of Practice would have broader benefits for OPC's day-to-day work. For example, several consultees observed that the skills and knowledge of those instructing OPC in the development of legislation and involved in preparing delegated legislation was critical for good legislative design outcomes.

Overarching principles

3.48 The four overarching principles set out in this section (and in the Draft Guidance) should guide decisions about 'what goes where' in the legislative hierarchy and how delegated powers should be designed. To some extent, the principles compete with each other and reflect the unavoidable tension between the benefits and risks of delegating legislative power.

3.49 Although expressed at a high level of abstraction, guiding principles are important because it is not possible to create 'bright line' rules about what is and is not appropriate for Parliament to delegate.[65] The question of 'how much law-making the parliament can leave to the decision of other organs or branches of government' is

63 *Legislation Act 2003* (Cth) s 16.

64 See, eg, Office of Parliamentary Counsel (Cth), *Annual Report 2019–2020* (2020), 5; Legislation Act Review Committee, Attorney-General's Department (Cth) (n 53) rec 5.1. See also Office of Parliamentary Counsel (Cth) (n 3) [248]–[249].

65 See, eg, *McWilliam v Civil Aviation Safety Authority* (2004) 142 FCR 74 [41]; Department of the Prime Minister and Cabinet (Cth) (n 4) [1.10].

a normative one which involves other fundamental principles and presuppositions.[66] Associate Professor Iancu has observed that 'across constitutional systems' judicial decisions that have attempted to place legal restrictions on legislative delegation 'are notoriously hard to reconcile, inconsistent, and erratic'.[67] According to Iancu:

> More nebulous yet are the relevant theoretical debates. Beginning at the semantic level, one encounters, often with respect to the pertinent literature within the same constitutional jurisdiction, a bewildering terminological diversity. … Since the words we use and the ways in which we use them structure and reveal our thought, this lexical laxity may reflect, already at first sight, a degree of analytical imprecision and epistemological uncertainty. And things appear yet more intractable in strictly substantive terms.[68]

Principle One: Democratic accountability and legitimacy

3.50 Legitimacy is about 'whether or not an institution is perceived as having a "right to govern" both by those it seeks to govern and those on whose behalf it purports to govern'.[69] The democratic process is crucial to the Parliament's legitimacy and people's acceptance of the laws it makes (or authorises) as legitimate.[70] Delegated law-making may lack the same level of democratic legitimacy as laws made by the Parliament for several reasons. First, while Parliament's proceedings are conducted in public and recorded in Hansard, delegated legislation may be made behind closed doors and take effect as soon as it is published.[71] Secondly, those who make delegated legislation are not directly accountable to electors in the same way as members of Parliament (who represent 'competing voices' and 'diverse community views').[72] Delegation therefore 'reduces accountability of the exercise of legislative power'.[73] According to Professor Appleby and Associate Professor Howe, democracy may also

66 Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* (Springer, 2012) 2.

67 Ibid.

68 Ibid 2–3.

69 Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' [2003] (Spring) *Public Law* 63, 76.

70 See, eg, Simon Longstaff AO, 'Democracy, Trust and Legitimacy' in *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and Other Papers* (Department of the Senate, Parliament of Australia, Papers on Parliament No 63, July 2015) 77.

71 See, eg, Joo-Cheong Tham, 'Law-Making and Temporary Migrant Labour Schemes: Accountability and the 457 Visa Scheme' (2009) 17 *Australian Journal of Administrative Law* 18; Ernst Willheim, 'Government by Regulation: Deficiencies in Parliamentary Scrutiny?' (2004) 15 *Public Law Review* 9.

72 Cheryl Saunders, 'Australian Democracy and Executive Law-Making: Practice and Principle (Part II)' in *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and Other Papers* (Department of the Senate, Parliament of Australia, Papers on Parliament No 66, October 2016) 71, 72.

73 Judith Bannister et al, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2014) 112.

> be offended by delegations when the legislature abdicates its responsibility in favour of the executive, eluding and deflecting responsibility and electoral accountability.[74]

3.51 Maintaining the legitimacy of delegated legislation requires, at a minimum, that the democratically accountable Parliament exercise some form of control over delegated legislation and hold delegated law-makers to account. Safeguards and processes for achieving this are discussed in **Chapter 4**.

3.52 The scope of delegated legislation is also a potential threat to legitimacy. According to Professor Meyerson, the unlimited transfer of legislative power to the Executive risks 'subverting the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it'.[75] The rule of law may also 'be offended by delegating provisions that are so vague they fail to provide guidance to the individual and thus vest arbitrary legislative power'.[76]

Principle Two: Durability and flexibility

3.53 Durability refers to the ability of legislation to maintain its currency and relevance over a period of time. It is an important quality of legislation because it helps to provide certainty. Durable legislation saves parliamentary time because Parliament does not need to re-visit the same questions on a regular basis. Flexibility is also important, however, so that the law can adapt to changing or unforeseen circumstances as and when necessary.[77] Delegated legislation is an important means of providing flexibility. Delegated legislation should not, however, completely replace law reform or periodic review of primary legislation.[78]

Principle Three: Clarity and predictability

3.54 In the same way that clarity about the policy being implemented helps to produce clearer legislation,[79] clarity is important to delegated legislation. Primary

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74 Gabrielle Appleby and Joanna Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power' (2015) 15(1) *Oxford University Commonwealth Law Journal* 3, 4. See also Iancu (n 66) 4–5.

75 Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 52.

76 Appleby and Howe (n 74) 4.

77 See also the fifth guiding principle discussed in Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 38: 'The legislative framework should be sufficiently flexible to address atypical or unforeseen circumstances, and unintended consequences of regulatory arrangements.'

78 See, eg, Tess Van Geelen, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, 309. See also Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, forthcoming).

79 Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (2014) 1. See also the first guiding principle discussed in Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 38: 'It is essential to the rule of law that the law should be clear, coherent, effective, and readily accessible'.

legislation should make the subject of delegation and its parameters clear. It should also clearly allocate responsibility to (or between) law-makers.

3.55 Wide or open-ended delegations, particularly in respect of policy matters, risk undermining the law's predictability. This is because the delegation itself gives little guidance as to its limits or how Parliament intends it to be exercised. Unconstrained delegations also increase the risk that power may be exercised arbitrarily.

Principle Four: Coherence and navigability

3.56 The law, and particularly related pieces of legislation, should be coherent. Coherence is important at several levels: within an Act, between Acts, between different pieces of delegated legislation, and between different layers of the legislative hierarchy. Multiple layers or sources of law spread across the legislative hierarchy can lead to complexity, fragmentation, and overlap.

3.57 Navigability refers to the ease with which readers can find the law and find their way around it.[80] Coherence and navigability are mutually reinforcing. Like coherence, navigability is important both within and between layers of the legislative hierarchy.[81] As illustrated in Interim Report A, the scattering of law throughout myriad legislative instruments makes it difficult for individuals to navigate the law, undermining the rule of law ideal that the law should be accessible and knowable.

Primary legislation

3.58 Parliament is the Commonwealth's democratically accountable law-maker. As a general rule, therefore, matters of significant policy and principle should be contained in primary legislation. The corollary of this is that delegated legislation should generally deal with minor or technical matters that relate to implementing the policy of an Act and the Act's operation. However, there is no clear line that divides matters of policy, or 'significant' policy, from minor or technical matters. Rather, when considering the allocation of matters between primary legislation and delegated legislation, there are difficult choices to make on the continuum between significant policy and technical or administrative detail.

Policy and its significance

3.59 Policy is an elusive term capable of different meanings in different contexts. For example, regulators may have practical 'policies' in terms of how the law should be interpreted, applied, and enforced. In the context of legislation, policy refers to decisions about what matters should be subject to legislation and how those matters are to be dealt with. In other words, policy identifies the problem and its legislative solution. Policy may also refer to the underlying goal of legislation, or its purpose and object. In this sense, policy may be expressed at varying levels of generality

80 See Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021).

81 See also [2.74], [2.78].

or specificity. Policy may also be conceived at the level of an Act (or several Acts forming a legislative scheme), or at a lower level (such as a chapter or section). Likewise, 'significance' is difficult to define objectively and is a matter of degree.

3.60 Although the 'significant policy' criterion lends itself to different interpretations and application, it remains a useful guide. This is because it gives effect to the principle of democratic legitimacy by ensuring that the more significant a matter is from the perspective of democratic accountability and the rule of law, the more likely it will be appropriate for parliamentary enactment. The 'significant policy' criterion also has value in that it recognises — albeit only implicitly — that at least some 'policy' may be addressed in delegated legislation. This is reinforced by the distinction between legislative and administrative power, which identifies considerations of policy as a key characteristic of legislative activity.[82]

3.61 On its own, however, the 'significant policy' criterion does not provide sufficient guidance to make principled decisions, particularly in marginal cases,[83] about the allocation of matters between primary legislation and delegated legislation. Guidance could be improved by expressly recognising the wide spectrum of matters that may be considered 'policy' and exploring what makes some policy 'significant'. Acknowledging this reality also helps to align the principles with legislative practice, which as discussed above, indicates that matters of policy are often dealt with in delegated legislation.

3.62 The Draft Guidance suggests that there are three main aspects to 'significance' in practice — democratic or public interest significance, substantive significance, and significance to legislative design.[84] These categories provide an analytical tool to help form a principled view about the significance of a particular policy decision. Recognising that decisions about 'significance' have implications for the coherence of a legislative scheme helps to promote coherence and consistency in using the legislative hierarchy (which is lacking in the case of the *Corporations Act*).

3.63 In some cases, there are likely to be incentives for a government to pass legislation that does not accord with the principles discussed here. For example, a government may choose to include prescriptive detail that is better suited to delegated legislation in a Bill:

- because of a belief that the detail 'is more likely to be accepted as part of a Bill than as [delegated legislation] promulgated later';[85]
- so as to make it more difficult for a later government to amend that detail than if it were contained in delegated legislation;[86] or

82 Greg Craven, 'Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing' (1988) 16(3) *Melbourne University Law Review* 569, 571–2.
83 Saunders (n 72) 73.
84 See **Appendix E** [E.15].
85 Administrative Review Council (n 7) [2.12].
86 Rodney Fehr, 'Legislative Building Blocks — Basic Design: Fundamental Choices for Statutes and Regulations' (Paper, Canadian Institute for the Administration of Justice, 2012) 8.

- to make the matter a subject of parliamentary debate, to illustrate that the government is acting on a matter of perceived importance or to highlight a difference of views between opposing parties.[87]

3.64 Conversely, there may be incentives to leave matters more suitable for an Act to delegated legislation, in order to pass an Act more quickly or to avoid debate on contentious matters.[88]

3.65 Commonwealth departments and agencies, supported by guidance such as that proposed by the ALRC, play an important role in advising the Government about the consequences of poor legislative design. Guidance also helps to emphasise the importance of a coherent legislative hierarchy as part of a legislative scheme to minimise incoherence that may be produced by the political process at a later time.

Matters more appropriate for primary legislation

3.66 The Draft Guidance lists nine categories of matters as examples of the principle that significant policy should be contained in primary legislation.[89] These examples largely replicate existing guidance. The ALRC agrees with existing guidance that 'it is not possible or desirable to provide a prescriptive list of matters suitable for inclusion in primary legislation'.[90] To avoid the examples being interpreted as a prescriptive list and to reiterate the importance of the general principle that significant policy should be contained in an Act, the Draft Guidance characterises the examples as applications of that principle.[91]

Delegated legislation

3.67 The principle that matters of significant policy should be contained in primary legislation operates as a limitation on what may be contained in delegated legislation, but provides little assistance otherwise. Consistent with the idea that 'significant policy' and 'technical and administrative detail' form a continuum, there will likely be a range of matters appropriate for both primary and delegated legislation. As a result there is no clear dividing line. The decision to use primary or delegated legislation is therefore a matter of judgement that should take into account the principles and guidance discussed in this chapter.

3.68 The lack of a clear dividing line reflects the fact that Parliament is free to legislate as it sees fit, subject only to the *Australian Constitution*, and to deny it the ability to delegate power would itself be 'a restriction of the supremacy of the [P]arliament'.[92] As discussed in **Chapter 4**, Parliament has put in place arrangements that do not restrict its ability to delegate legislative power, but which place safeguards on the delegation and exercise of that power.

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87 Ibid.
88 See, eg, ibid 9.
89 See **Appendix E** [E.19].
90 Department of the Prime Minister and Cabinet (Cth) (n 4) [1.10].
91 See **Appendix E** [E.19].
92 Pearce and Argument (n 37) 11.

3.69 The Draft Guidance outlines six categories of matters that are generally appropriate for delegated legislation.[93] The six categories represent applications of the general principles outlined above, as follows:

- Principle One: Democratic accountability and legitimacy — the categories generally do not include matters of 'significant policy'. To the extent they do traverse matters that fall into the realm of policy, other mechanisms (such as parliamentary oversight) help to safeguard their democratic legitimacy.
- Principle Two: Durability and flexibility — several of the categories cover matters that may change over time, and therefore provide the law with greater durability and flexibility than if changes could only be made by Parliament.
- Principle Three: Clarity and predictability — an Act is more likely to convey its core principles if it is not cluttered by unnecessary prescriptive detail.
- Principle Four: Coherence and navigability — coherently organising matters as between primary and delegated legislation, including by grouping material of similar relative importance at one layer of the legislative hierarchy, helps to make the law more navigable. An Act that is not cluttered by unnecessary prescriptive detail is easier to navigate than a lengthy and detailed Act.

3.70 These principles also draw attention to other important considerations — namely, the underlying purposes for which legislative power may be delegated, how those purposes may be achieved, and who should be delegated legislative power so as to achieve those purposes — which are discussed further in **Chapter 4**.

Problematic use of delegated legislation

3.71 Policy and legislation often need to be developed under significant time and resource constraints.[94] The development of legislation and its passage through Parliament is also a political matter. These practical and political considerations have an effect on legislative design. As discussed above, political considerations may, for example, lead to the inclusion of detail in primary legislation that is more suitable for delegated legislation.

3.72 Practical and political considerations may also incentivise the inclusion of significant policy matters in delegated legislation when it may not otherwise be appropriate.[95] For example, political negotiations to secure passage of a Bill might result in certain matters being left for delegated legislation. In this way, delegated legislation becomes a tool for managing political conflict.[96] This may be legitimate; however, it should be weighed against the fundamental principles discussed earlier in this chapter.

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93 See **Appendix E** [E.21].
94 The legislation development process is discussed further in **Chapter 4**.
95 Fehr (n 86) 9.
96 See, eg, Page (n 48) 179.

3.73 The Draft Guidance identifies four reasons, related to procedural and political concerns, that do not justify including significant policy matters in delegated legislation.[97]

'Soft law' and regulatory guidance

3.74 The focus of this chapter has been what goes where in the *legislative* hierarchy, without considering the role of non-legislative materials such as 'soft law' and regulatory guidance. Although it does not have the force of law, soft law or regulatory guidance is sometimes regarded as a fourth 'layer' in the legislative hierarchy. This is particularly the case for statutory regimes that seek to regulate conduct. A detailed examination of soft law as a regulatory tool is beyond the scope of this Interim Report.[98] However, given the significant volume of regulatory guidance that forms part of the corporations and financial services regulatory ecosystem, this section briefly discusses the role of regulatory guidance alongside a principled legislative hierarchy.[99]

3.75 Professor Weeks has noted that soft law 'means different things to different people', and that it is generally best defined negatively, or 'by what it *isn't*'.[100] Soft law is not primary legislation or delegated legislation, which are both made 'subject to the express authority of Parliament'.[101] Beyond this negative description or a list of examples, however, it is difficult to define.[102] Soft law may also be referred to as 'quasi-legislation' or 'quasi-regulation'. The *Australian Government Guide to Regulatory Impact Analysis*, for example, describes 'quasi-regulation' as:

> Any rule or requirement that is not established by a parliamentary process, but which can influence the behaviour of businesses, community organisations or individuals. Examples include industry codes of practice, guidance notes, industry-government agreements (co-regulation) and accreditation schemes.[103]

3.76 In some areas, including the regulation of corporations and financial services, non-legislative guidance is perceived by some as though it were 'the law' on a

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97 See **Appendix E** [E.20]. See also Legislation Design and Advisory Committee (NZ) (n 54) 69–70.

98 For more comprehensive analysis in the regulatory context, see, for example, Julia Black, 'Constitutionalising Self-Regulation' (1996) 59(1) *Modern Law Review* 24; Julia Black, *Rules and Regulators* (Clarendon Press, 1997); Donald Feaver and Benedict Sheehy, 'Designing Effective Regulation: A Positive Theory' (2015) 38(3) *UNSW Law Journal* 961.

99 See also [2.92]–[2.94].

100 Greg Weeks, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42(1) *Federal Law Review* 1, 2–3 (emphasis in original).

101 Ibid 3–4.

102 Ibid 3.

103 Department of the Prime Minister and Cabinet (Cth), *Australian Government Guide to Regulatory Impact Analysis* (2nd ed, 2020) 60.

particular topic.[104] This can be problematic because soft law is not subject to the same accountability mechanisms as legislation. It therefore presents a challenge to fundamental principles such as the separation of powers.[105]

3.77 As well as influencing behaviour, soft law can perform an important explanatory or 'communicative' function.[106] Guidance can be used to 'translate [the law's] content, and … provide guidance as to how it might be implemented in a particular case'.[107] This function is particularly important in complex or technical areas of regulation, and where individual rights are affected. The various forms of guidance used to communicate and explain the public health measures implemented in response to the COVID-19 pandemic provide examples.[108]

3.78 Just as it is impossible to be prescriptive about the subject matter appropriate for delegated legislation, it is difficult to be prescriptive about the role of soft law. In many contexts, such as corporations and financial services, the decision whether to publish non-legislative guidance, and the content of any such guidance, is a matter of discretion.[109] For example, ASIC may publish guidance in response to feedback from industry participants or it may do so of its own accord. The content of guidance may also be influenced by industry consultation.[110] However, the following general observations can be made about the use of regulatory guidance:

- The more effectively a statutory scheme uses the legislative hierarchy, the more likely it is that the law itself should be comprehensible without further elaboration in non-legislative guidance.
- Given the risk of regulatory guidance being perceived as authoritative, its non-legislative (and therefore non-binding) status should be clear. Regulatory Guides issued by ASIC, for example, often contain a 'disclaimer' which specifies that guides do not constitute legal advice and that examples are

104 See, eg, Greg Weeks, 'Soft Law and Public Liability: Beyond the Separation of Powers?' (2018) 39 *Adelaide Law Review* 303; The Hon Chief Justice Robert French AC, 'Law — Complexity and Moral Clarity' (Speech, Perth, 17 May 2013) 7. In Interim Report A, the ALRC noted that '[s]takeholders, including lawyers, have told the ALRC that they rely heavily on ASIC guidance, and can even treat guidance as law': Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 144.

105 See, eg, Weeks (n 104) 305.

106 Lisa Burton Crawford, 'Between a Rock and a Hard Place: Executive Guidance in the Administrative State' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 7, 9.

107 Ibid.

108 See McLeod (n 40).

109 For example, the *ASIC Act* does not expressly confer a power or function upon ASIC to issue regulatory guidance. The Act does, however, confer upon ASIC powers 'to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions': see, eg, *Australian Securities and Investments Commission Act 2001* (Cth) ss 11(4) and 12A(6).

110 See, eg, Australian Securities and Investments Commission, 'ASIC publishes guidance on breach reporting' (Media Release 21-235MR, 7 September 2021): 'ASIC's guidance was greatly enhanced by the constructive submissions and valuable insights received from industry through the consultation.'

purely illustrative.[111] Consideration may be given to ways in which disclaimers and other materials relating to regulatory guides could more clearly convey that they are non-binding.

111 See, eg, Australian Securities and Investments Commission, *Superannuation Forecasts: Calculators and Retirement Estimates* (Regulatory Guide 276, July 2022) 276.

4. Delegating Legislative Power

Contents

Introduction

4.1 In **Chapter 2**, the ALRC proposes a legislative model for financial services regulation. That model relies on moving much of the existing prescriptive detail in the *Corporations Act* to coherently structured delegated legislation. This chapter explains a number of the considerations underpinning the proposed legislative model. It also explains the rationale for a number of safeguards built into the model to ensure that legislative power is delegated appropriately.

4.2 The appropriate delegation of Parliament's legislative power often requires a balance between the competing interests of expediency and principle. This chapter examines the legal and institutional safeguards that help to maintain the rule of law, and ensure appropriate accountability, when legislative power is delegated. The chapter focuses on how Parliament delegates law-making power to the Executive Government — which includes departments, agencies and other statutory bodies for which the government is responsible. The chapter also examines the appropriate design of empowering (or enabling) provisions in an Act.

4.3 The analysis in **Chapter 3** regarding the allocation of law between primary legislation and delegated legislation is complemented by this chapter, which 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?

4.4 As discussed in **Chapter 6**, corporations and financial services is just one area in which delegated legislation plays an important role. Together with **Chapters 3** and **5**, the analysis in this chapter underpins many of the principles that are outlined in the Draft Guidance (**Appendix E**). Those principles seek to ensure that delegated powers are expressed in a way that is consistent with maintaining an appropriate delegation of legislative authority.

Appropriateness

4.5 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'. This section explains how 'appropriateness' should be assessed.

4.6 As discussed in **Chapter 3**, Parliament is able to delegate its legislative power as it sees fit, subject only to the *Australian Constitution*. The constitutionally enforceable limits, discussed further below, are very few.[1] The fundamental principles embodied in the *Australian Constitution* — such as the separation of powers, rule of law, and representative democracy — nonetheless provide important touchstones. The ALRC has observed previously that 'the principle that legislative power should not be inappropriately delegated to the executive' can be derived from the separation of powers doctrine in the *Australian Constitution* and Parliament's role to make laws on important matters of policy.[2]

4.7 The appropriateness of a delegation of legislative authority should be assessed having regard to:

- the subject matter of the delegated power and where those matters might fall on the spectrum between 'technical or administrative detail' and 'significant policy';[3]
- the applicable safeguards, including the scope or breadth of power, procedural constraints on exercising the power, and the extent of parliamentary oversight and control over exercise of the power; and
- whether the delegation of legislative authority is consistent with the overarching principles discussed in **Chapter 3** and maintaining the rule of law (in light of the subject matter and safeguards).

1 See [4.37] below.
2 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2016) [17.2].
3 See **Chapter 3**.

Rationales for delegation

4.8 Practical necessity has long been recognised as the overarching justification for delegating legislative power.[4] In 1931, Evatt J expressed the view that unless Parliament's legislative power could be delegated, 'effective government would be impossible'.[5] The data discussed in **Chapter 6** reinforces that view.[6] Delegated legislative power is now seen not merely as necessary, but as an important aspect of regulatory and legislative design.

4.9 In summary, delegation is necessary and desirable for three main reasons:

- Parliament simply does not have time to create all the legislation needed for society to function. Parliament's time is better spent debating 'matters of principle and importance'.[7]
- Technical or detailed aspects of legislation may be more appropriately made by subject-matter experts, rather than Parliament.[8]
- Delegated legislation 'provides flexibility in areas of regular change or in the face of unexpected contingencies, particularly in response to crises'.[9] This is because delegated legislation is not subject to the same 'laborious and slow' process as applies to amending primary legislation.[10]

4.10 *Odgers' Australian Senate Practice* summarises 'the essential theory of delegated legislation':

> while the Parliament deals directly with general principles, the executive, or other body empowered to make subordinate legislation, attends to matters of administration and detail. As the theory was expressed in 1930 by Professor KH Bailey: 'It is for the executive in making regulations to declare what Parliament itself would have laid down had its mind been directed to the precise circumstances'.[11]

4.11 Professor Black CBE has observed that regulatory systems often involve a wide range of actors and functions.[12] As discussed below, Parliament's ability to

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4 See, eg, Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (n 2) [17.15]; Louis Jaffe, 'An Essay on Delegation of Legislative Power: I' (1947) 47 *Columbia Law Review* 359, 361; *The Queen v Burah* (1878) 3 App Cas 889, 898.

5 *The Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73, 117.

6 See also Tess Van Geelen, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, 298–99.

7 See, eg, Gabrielle Appleby and Joanna Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power' (2015) 15(1) *Oxford University Commonwealth Law Journal* 3, 4.

8 See, eg, ibid.

9 See, eg, ibid.

10 See, eg, ibid. See also Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 14th ed, 2016) 441.

11 Laing (n 10) 430 (citation omitted).

12 Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' [2003] (Spring) *Public Law* 63, 67–70.

delegate its legislative power enables greater flexibility to design a more responsive regulatory system. This includes how the various functions of a regulatory system, including delegated law-making, are allocated and operationalised within the system's institutional frameworks.[13] From the related perspective of legislative design, delegating legislative power can help to avoid '[t]orturous and cumbersome legislation, bulging with minutiae' which 'disfigures the statute book and tends to detract from the prestige of Parliament'.[14]

Delegates of legislative power

4.12 The justifications for delegating legislative power raise the question, who (in each case) should exercise the delegated power? In most cases, the answer will involve a choice between:

- the Governor-General in Council, as the formal maker of regulations;[15] or
- an executive or administrative authority, including 'ministers, heads of departments and agencies and their delegates'.[16]

Guidance

4.13 Presently, there is very little Australian guidance on choosing the most appropriate delegate of legislative power. Existing guidance is limited to:

- whether certain matters, if they are to be dealt with in delegated legislation, should be contained only in regulations;[17] and
- the circumstances in which it may or may not be appropriate to allow delegated powers to be further delegated (sub-delegated) to another person.[18]

4.14 There would be value in guidance which recognises expressly (rather than implicitly) that legislative power should be delegated to the most appropriate person in each case. It should also set out guiding considerations for choosing that delegate. Drawing on equivalent guidance from New Zealand, the following factors should guide decisions about the most appropriate delegate:

- the extent of policy or value judgements that are required;
- the degree of democratic accountability required, or alternatively, the extent to which the decision-maker should be insulated from political influence; and

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13 See [4.29]–[4.30] below.
14 Stanley de Smith, *Constitutional and Administrative Law* (Penguin Books, 3rd ed, 1977) 325.
15 That is, the Governor-General acting on the advice of the Federal Executive Council.
16 Laing (n 10) 430.
17 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.5, June 2020) [4]; Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (2019) [5.13].
18 See, eg, Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.5, June 2020) [26]–[27]; Office of Parliamentary Counsel (Cth), *Instruments Handbook* (Document release 3.7, September 2022) [99]–[103].

- the technical expertise required of the person making the delegated legislation.[19]

4.15 These three factors are inter-related and to some extent reflect the observation in **Chapter 3** that legislation may deal with a wide spectrum of matters, from technical detail through to significant policy. Importantly, the suggestion that a decision-maker might be insulated appropriately from political influence is not to suggest that the delegate (or legislation made by the delegate) should necessarily be exempt from oversight by Parliament.[20] If the exercise of a delegated power would involve matters of policy or political (and democratic) accountability, a minister may be the appropriate delegate. On the other hand, in the case of matters that require technical expertise (and do not involve significant policy) or some degree of political independence, a statutorily independent regulator may be an appropriate delegate.

Regulations

4.16 Historically, regulations have been the dominant form of executive law-making.[21] **Chapter 6** demonstrates, however, that regulations now make up a smaller proportion of delegated legislation.[22] This is reflected in OPC guidance which suggests that for new Acts 'instruments should not be regulations unless there is a good reason for regulations to be used'.[23] Notwithstanding this, the guidance advises that certain matters, if they are to be dealt with in delegated legislation, should be contained in regulations.[24] Those matters include, for example, offence provisions, coercive powers, and provisions imposing taxes.[25]

4.17 Three factors underpin this guidance:

- regulations are made by the Governor-General on the advice of the Federal Executive Council, which 'engages the collective responsibility of ministers who are accountable to the legislature';[26]

19 Legislation Design and Advisory Committee (NZ), *Legislation Guidelines* (2021) 74.

20 For example, the Delegated Legislation Committee has noted (citing evidence given to the Committee) that the '"political process" is what provides democratic accountability in our system of government': Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (2021) 43.

21 See, eg, Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, 1992) [1.16].

22 See [6.20].

23 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.5, June 2020) [3].

24 Ibid [4].

25 Ibid.

26 Cheryl Saunders AO, 'Australian Democracy and Executive Law-Making: Practice and Principle (Part II)' in *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and Other Papers* (Department of the Senate, Parliament of Australia, Papers on Parliament No 66, October 2016) 71, 72.

- the involvement of the Federal Executive Council means regulations are subject to greater scrutiny than other legislative instruments;[27] and
- regulations are 'tied work',[28] which means they must be drafted by OPC and, as a result of being drafted by specialist drafters, may tend to be of higher drafting quality than instruments drafted by non-specialists.[29]

4.18 Former First Parliamentary Counsel, Peter Quiggin PSM KC, has observed that regulations are drafted by OPC because they are made or approved by the Governor-General, and not because of their content.[30] Quiggin also explained that the OPC guidance outlined above is underpinned by an additional factor, namely, ensuring OPC's limited resources are directed towards delegated legislation 'that will have the most significant impacts on the community'.[31]

4.19 Drafting quality is important because it affects comprehensibility and legal effectiveness. As a general rule, a specialist drafter is likely to be more proficient than a non-specialist. However, perceptions about drafting quality should not be the primary driver of decisions about whether parts of the law should be placed in regulations or another type of legislative instrument. In addition, the extent to which involvement by the Federal Executive Council improves the quality or accountability of regulations as compared to other legislative instruments is unclear.[32]

4.20 The Draft Guidance attempts to balance these considerations, by explaining that:

- some matters may be more appropriately enacted through regulations because of the involvement of the Federal Executive Council and OPC;
- the primary consideration should be identifying the most appropriate delegate, regardless of who might draft the delegated legislation; and
- to the extent drafting quality is a concern, it may be addressed in other ways.

4.21 In relation to drafting quality, s 16 of the *Legislation Act* places an obligation on First Parliamentary Counsel (as head of OPC) to 'encourage high standards in the drafting of legislative instruments and notifiable instruments' by causing

> steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments and notifiable instruments.

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27 See, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest 3 of 2018, 21 March 2018) [2.386]; Senate Standing Committee on Regulations and Ordinances, Parliament of Australia (n 17) [5.39].

28 *Legal Services Directions 2017* (Cth) s 2, app A, item 3.

29 Stephen Argument, 'Australian Democracy and Executive Law-Making: Practice and Principle (Part I)' in *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and Other Papers* (Department of the Senate, Parliament of Australia, Papers on Parliament No 66, October 2016) 21, 37.

30 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2015* (Report, 11 February 2015) 27.

31 Ibid 29.

32 See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.78].

Stephen Argument has observed that this obligation is important because, notwithstanding their best efforts, non-specialist drafters outside of OPC do not receive the same level of formal training and support as those within OPC.[33]

Particular considerations for regulatory systems

4.22 Regulators are often called upon to make delegated legislation. Law-making is usually, however, just one function of a regulator. Furthermore, regulators are just one (albeit important) actor in often complex regulatory systems.[34] This section discusses some particular considerations that may help to guide decisions about delegating legislative power within a regulatory system. **Chapter 2** illustrates how those considerations may be applied in the context of the proposed legislative model.

4.23 Ashley Brown has noted that delineating

> between the roles of government policy-makers and independent regulators is the subject of controversy and confusion wherever independent regulatory agencies have been established.[35]

4.24 Echoing the observation in **Chapter 3** that matters dealt with by legislation can be placed on a spectrum between technical detail and significant policy, Brown notes that part of the controversy 'is simply that the boundaries between "policy-making" and "regulating" are inherently fluid'.[36] According to Brown,

> the very notion of distinguishing between 'policy making' and 'regulating' may well pose a false dichotomy. Both policy makers and regulators make policy. … It is more useful to think, not in terms of policy making versus regulation, but, rather, as macro policy versus micro policy.[37]

4.25 To help explain the distinction between 'macro policy' and 'micro policy', Brown says

> it is useful to think in terms of the following key concepts:
>
> 1. Basic and macro policy must be set by the Government.
> 2. Government policy must be set and altered only on a prospective basis.
> 3. Regulators must follow and enforce policies articulated by the Government.
> 4. Regulators are creatures of the state and not necessarily of the Government.
> 5. Policy vacuums are inherent and to be expected.
> 6. Some policy issues require technical expertise to be resolved.

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33 Argument, 'Australian Democracy and Executive Law-Making: Practice and Principle (Part I)' (n 29) 37.

34 Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' (n 12) 67–70.

35 Ashley Brown, 'Regulators, Policy Makers, and the Making of Policy: Who Does What and When Do They Do It?' (2003) 3(1) *International Journal of Regulation and Governance* 1, 2.

36 Ibid.

37 Ibid.

7. Regulatory decision making, policy or otherwise must be subject to appellate review.[38]

4.26 Black has observed a similar controversy, noting that

> in democratic states, at least, there is a continual debate as to how much power should be delegated to regulators, who should be involved in their decision making, how they should be called to account, by whom and with what consequences.[39]

4.27 This controversy arises from the 'tension between independence, political control and political accountability'.[40] According to Black, the problem

> is one of regulators having sufficient independence to act as the technocratic experts they need to be to perform the functions they have been assigned with some consistency over time. …
>
> But whether or not regulatory actors are seen as agents of government principals or participants in the performance of the collective enterprise of the state, those delegating powers to them will want to minimise 'drift' away from the task they were created to perform, and ensure they stay within their legal remits. So the political, legal and constitutional problem from these different perspectives is how to manage the tension between delegated independence on the one hand and legal and political accountability on the other…[41]

4.28 Of particular relevance to a model for corporations and financial services regulation, Black has also noted that

> from an economic perspective, for those regulating industries or markets which are characterised by high levels of private investment, there is a need for political systems to demonstrate clear and credible commitment to a particular mode of regulation …[42]

4.29 According to Black, 'six key resources can be identified as being critical to the performance of at least one or more regulatory functions'.[43] These are: information, expertise, financial and economic resources, authority and legitimacy, strategic position, and organisational capacity. Using this analysis, it is possible

> to consider which actors are best placed to perform which function given the resources they possess now and, so far as can be anticipated, in the future, and how those resources will be used.[44]

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38 Ibid.

39 Julia Black, *Constitutionalising Regulatory Governance Systems* (LSE Law, Society and Economy Working Papers No 02/2021, London School of Economics and Political Science, 2021) 2.

40 Julia Black, *Calling Regulators to Account: Challenges, Capacities and Prospects* (LSE Law, Society and Economy Working Papers No 15/2012, London School of Economics and Political Science, 2012) 3.

41 Black, 'Constitutionalising Regulatory Governance Systems' (n 39) 16.

42 Ibid.

43 Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' (n 12) 73. These functions include 'policy and rulemaking' and 'enforcement and compliance'.

44 Ibid 82.

4.30 This framework can be used to understand and guide decisions about allocating law-making power within such systems. Three of the six key resources identified by Black are particularly relevant in this regard:

- **Information**: Information 'is a key resource for all regulatory functions'.[45] In particular:

  > Specialist and technical information on which to base policy decisions, as well as information on how the potential targets of regulation act, interact and are likely to react, is indispensable to the formation of standards and the development of techniques of behaviour modification.[46]

- **Expertise**: Expertise is another 'key resource for performing any regulatory function'.[47] This is particularly so, according to Black, 'in areas of activity that are characterised by a high degree of technical complexity such as financial services regulation'.[48]
- **Authority and legitimacy**: Authority and legitimacy are 'separate but interconnected' concepts.[49] Authority may take the form of legal authority, but in a fuller sense means 'whether or not what an actor says or requires makes a "practical difference" to the way that others act or behave'.[50] Similarly, legitimacy does not mean merely 'whether or not an actor has the legal power to act' — although that may be an important indicator of legitimacy — but whether 'an institution or organisation is perceived as having a "right to govern" both by those it seeks to govern and those on whose behalf it purports to govern'.[51]

4.31 Information and expertise are related, and may together underpin a regulatory actor's 'knowledge and understandings'.[52] According to Black, the

> importance of analysing knowledge and understandings is particularly, though not uniquely, evident when the focus of a regulatory regime is on managing risks, as there is often significant contestation as to whether a risk exists and, if so, of what nature and scale. The highly differential national and regional responses to the continually emerging risks of Covid-19 provide a good example.[53]

4.32 Black describes those varied responses as 'a classic example of the "duck/rabbit" illusion — a drawing which to some looks like a rabbit, to others like a duck'.[54] Although there may be many reasons for differing responses to COVID-19, 'the differential understanding of the risks arising from differential interpretations of the

45 Ibid 73.
46 Ibid.
47 Ibid 74.
48 Ibid.
49 Ibid 75.
50 Ibid.
51 Ibid 76.
52 Black, 'Constitutionalising Regulatory Governance Systems' (n 39) 7.
53 Ibid.
54 Ibid 8. An example of the illusion may be found at www.illusionsindex.org/i/duck-rabbit.

same data is fundamental to explaining them'.[55] Financial services regulation is a prime example of a regulatory regime with a focus on managing risks.[56]

Safeguards

4.33 Safeguards on the exercise of delegated legislative power are necessary for two main reasons. First, the Executive lacks the same 'democratic credentials' as Parliament.[57] While the Executive is accountable to Parliament, members of the Executive are not directly accountable to electors in the same way as are members of Parliament. Secondly, the procedures for making delegated legislation lack the same level of transparency and publicity as the parliamentary process.[58] This means that unless limits are placed on delegated legislative power, there is a risk of

> subverting the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it.[59]

Safeguards aim to address concerns about democratic legitimacy and to ensure adherence to the rule of law.

4.34 This section examines the range of safeguards that can apply to the exercise of delegated legislative power, with particular focus on safeguards that are most readily influenced by Parliament (as the delegator of power) and the Executive (as the delegate of power).[60] As discussed in **Chapter 1**, Professor Stack has identified five principles 'which provide a framework for an account of the rule of law's demands of administrative governance'.[61] These principles provide a useful guide for understanding the safeguards placed on delegated legislative power.

4.35 As the Draft Guidance explains, the *Legislation Act* applies a minimum level of safeguards for the making of delegated legislation. Safeguards below the minimum must be justified. **Figure 2** contained in the Draft Guidance illustrates the general rule that safeguards should reflect the seriousness of the delegated power — the wider the scope and the more a power may involve policy considerations, the stronger should be the safeguards. However, a balance should be struck to ensure that unduly burdensome safeguards do not undermine the benefits of delegation.

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55 Black, 'Constitutionalising Regulatory Governance Systems' (n 39) 8.

56 See Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022).

57 Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 53.

58 Judith Bannister et al, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2014) 112.

59 Meyerson (n 57) 52. See also Dan Meagher and Matthew Groves, 'The Common Law Principle of Legality and Secondary Legislation' (2016) 39(2) *UNSW Law Journal* 450, 453.

60 The focus in this section is on those safeguards that have their source in legislation, guidance, or parliamentary practice. Other sources of safeguards, including the *Constitution* and the common law, are discussed briefly.

61 Kevin Stack, 'An Administrative Jurisprudence: The Rule of Law in the Administrative State' (2015) 115(7) *Columbia Law Review* 1985, 1985. See [1.34].

Judicial review

4.36 Judicial review is the ultimate safeguard placed on the exercise of delegated legislative power. Judicial review may declare an enabling provision in primary legislation unconstitutional, or it may invalidate a particular exercise of delegated legislative power. In practice, a power is unlikely to be challenged until it is exercised.[62] As Laureate Professor Emeritus Saunders AO has observed:

> Executive law-making is just another form of executive action. It falls to the judicial power, in the last resort, to ensure that it is exercised within lawful bounds.[63]

4.37 The High Court has recognised very few limitations on Parliament's ability to delegate legislative power and the extent of any delegated power. According to Saunders, it is

> received wisdom that there are effectively no enforceable constitutional limits on the extent of the law-making authority that can be delegated to the executive government by the Commonwealth Parliament.[64]

4.38 A delegation may be invalid if there is

> such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power.[65]

4.39 The High Court has also suggested that the 'distribution of powers' between the arms of government may provide 'considerations of weight affecting the validity of an Act creating a legislative authority'.[66] Professor Appleby and Associate Professor Howe have observed that the second suggested limit 'remains Delphic in its formulation and has never been further developed'.[67]

4.40 The absence of substantive limitations based on the separation of powers reflects the

> logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation.[68]

It also reflects the 'asymmetrical' separation of powers in the *Australian Constitution*.

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62 See, eg, Saunders (n 26) 74; Robin Creyke et al, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 6th ed, 2022) [6.4.1].

63 Saunders (n 26) 74.

64 Ibid 73.

65 *The Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73, 101.

66 Ibid.

67 Appleby and Howe (n 7) 8. See also Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* (Springer, 2012) 2.

68 *The Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73, 91.

While the judicial power of the Commonwealth is 'protected and quarantined', there are few constraints on the delegation of legislative power.[69]

4.41 Appleby and Howe point out that several Australian scholars 'have called for greater constitutional limits' on delegation by Parliament.[70] They argue that the 'interplay of constitutional principle' — particularly the separation of powers and responsible government — supports the enforcement of limits on delegations in two respects. First, a substantive limitation could be set by a

> constitutional, judicially enforceable requirement for Parliament to set foreseeable standards by which delegated legislative power must be exercised…[71]

4.42 Secondly, Appleby and Howe argue that courts could impose procedural limits on delegations of legislative power by assessing 'the various processes in place to determine whether the necessary level of scrutiny has been achieved'.[72] As discussed below, to date procedures for the exercise of delegated power have been prescribed by statute, rather than by courts.

4.43 While a court may declare a particular piece of delegated legislation invalid, there is no jurisdiction for a court 'to make any determination with respect to the merits or otherwise of the exercise of delegated legislative power'.[73] Courts may apply some of the criteria for the validity of administrative action when considering the validity of delegated legislation.[74] Generally, questions of validity are limited to:

- whether the legislative instrument in question is within the scope of the delegated power;[75]
- whether any conditions on the exercise of the power, such as satisfaction as to a state of affairs, have been fulfilled;[76] and
- consistency with the enabling Act and other legislation.[77]

4.44 Judicial review (or the threat of it) provides an important form of accountability by ensuring that power is properly delegated and lawfully exercised. However, it is a relatively blunt safeguard. For example, judicial review is unable to prevent defective law from continuing 'unchallenged, if technicalities or the poverty of the person

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69 Mark Aronson, 'The Great Depression, This Depression, and Administrative Law' (2009) 37 *Federal Law Review* 165, 177.
70 Appleby and Howe (n 7) 26.
71 Ibid 30.
72 Ibid 36.
73 The Hon Chief Justice Wayne Martin AC, *'Too Many Cooks?': Parliament, the Courts and the Scrutiny of Delegated Legislation* (Speech, Australian-New Zealand Scrutiny of Legislation Conference, 2016) 16, citing *Yougarla v Western Australia* (2001) 207 CLR 344 [130].
74 Creyke et al (n 62) [6.4.3].
75 See, eg, *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 259 CLR 431; *Public Service and Professional Officers' Association Amalgamated Union (NSW) v New South Wales* (2014) 242 IR 338.
76 See, eg, *Cigno Pty Ltd v Australian Securities and Investments Commission* (2021) 287 FCR 650.
77 See, eg, *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1.

aggrieved prevents the issue from being raised before a court'.[78] As Saunders has observed:

> Whether in the absence of judicial constraints or as a complement to them, it falls to the legislature itself to scrutinise the practice of executive law-making and to keep it in appropriate bounds.[79]

Parliamentary scrutiny and oversight

4.45 As the delegator of legislative power, Parliament retains ultimate control. Parliament determines the scope of delegated power in enabling legislation, it may pass an Act that has the effect of overriding delegated legislation, and it may amend or repeal enabling legislation. Parliament is also responsible for overseeing the exercise of delegated powers. However, parliamentary time and that of its members is necessarily limited. Parliament has therefore established two committees — the Bills Scrutiny Committee and the Delegated Legislation Scrutiny Committee — to undertake scrutiny activities and report to Parliament.[80]

4.46 This section briefly discusses how the scrutiny procedures put in place by Parliament operate as safeguards on delegated legislative power. Parliamentary scrutiny operates as a safeguard at two points in time: before an enabling provision is enacted, and after delegated legislation is made. Through the *Legislation Act*, Parliament has also enacted process-oriented safeguards that affect how delegated legislation is made.

Scrutiny of enabling provisions

4.47 Enabling provisions in an Act, also known as empowering or authorising provisions, are the method by which Parliament delegates legislative power. Associate Professor Neudorf has described enabling provisions as the 'gatekeepers' of legislative power.[81] This is because the terms of the enabling provision determine the nature and scope of the delegated power, and therefore the potential delegated legislation made under it. Furthermore, according to Professor Pünder, parliaments provide a level of 'democratic legitimation' to delegated legislation by 'predetermining' the executive's law-making role.[82]

4.48 As noted in **Chapter 3**, the Delegated Legislation Scrutiny Committee has observed that 'despite the Scrutiny of Bills committee's best efforts, warnings

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78 Creyke et al (n 62) [6.4.1], quoting John Willis, *The Parliamentary Powers of English Government Departments* (Harvard University Press, 1933) 172.

79 Saunders (n 26) 75.

80 See Van Geelen (n 6) 301. See also Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, forthcoming).

81 Lorne Neudorf, 'Enabling Provisions: The Gatekeeper of Legislative Power' (Presentation, Canadian Institute for the Administration of Justice, Making Laws in a Post-Modern World: Are You Ready?, 2020).

82 Hermann Pünder, 'Democratic Legitimation of Delegated Legislation — A Comparative View on the American, British and German Law' (2009) 58 *International and Comparative Law Quarterly* 353, 353.

regarding the inappropriate delegation of legislative powers are routinely ignored'.[83] This observation draws attention to how the scrutiny of enabling provisions may be improved.

4.49 The Draft Guidance may enable better scrutiny of enabling provisions in two key ways. First, the Draft Guidance would provide a resource to aid in the drafting of explanatory memoranda and therefore aid the Scrutiny of Bills Committee's task. Secondly, the Draft Guidance contains several guiding statements of principle that relate to the drafting of enabling provisions. For example, the Draft Guidance specifically directs attention to the clarity and scope of an enabling provision.[84]

Example 4.1: Defining the scope of a delegated power

Section 1270T(1) of the *Corporations Act* confers an open-ended power on the Minister to make rules 'required or permitted' or 'necessary or convenient' for the purposes of Part 9.1 Div 1 of the Act.[85] Section 1270T(2) places a limit on that power by providing that, 'to avoid doubt', rules may not (for example) create an offence or civil penalty, impose a tax, or directly amend the text of the Act.[86]

Example 4.2: Defining the scope of a delegated power

By contrast to **Example 4.1**, ss 908CA–908CC of the *Corporations Act* illustrate how an enabling provision may define the scope of power in a prescriptive, but non-exhaustive way. Section 908CA provides that ASIC may make 'financial benchmark rules' dealing with one or more of the matters permitted by ss 908CB and 908CC. Section 908CB sets out a list of 'main permitted matters' that may be dealt with by rules. Section 908CC sets out a non-exhaustive list of 'other permitted matters' that are 'incidental or related to the matters permitted under s 908CB'.

83 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia (n 17) [5.34].

84 See **Appendix E** [E.23]–[E.27].

85 The *Treasury Laws Amendment (2022 Measures No. 1) Act 2022* (Cth) delays commencement of a number of provisions of the *Corporations Act* relating to the Modernising Business Registers Program, including s 1270T, until a date fixed by Proclamation or 1 July 2026: see Explanatory Memorandum, Treasury Laws Amendment (2022 Measures No. 1) Bill 2022 (Cth) [4.43].

86 See also Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.5, June 2020) [28]–[34].

4.50 The Draft Guidance suggests that an alternative way to approach the scope of enabling provisions is to consider whether, from the perspective of a citizen who may be subjected to the power, the empowering provision would enable that person to predict how the delegated power may be exercised, and to understand the factors that will guide the exercise of the power. These two statements of principle are drawn from a similar standard contained in the German Basic Law[87] and discussion of that standard by Appleby and Howe.[88] According to Appleby and Howe, German law on this standard emphasises the importance of 'foreseeability'.[89] In their view, a

> requirement that in delegating legislative power, Parliament must set the policy framework with sufficient foreseeability, particularly where there is potential intrusion on rights, or in sensitive or contested policy areas, serves the principles of representative democracy and the rule of law. … It also provides the necessary criteria against which Parliament can engage in its scrutiny function meaningfully and thus promotes the separation of powers and responsible government.[90]

4.51 Enabling provisions that contain guiding considerations, or require satisfaction as to a state of affairs, are one way of providing 'foreseeability' to citizens as well as placing appropriate constraints on the scope of delegated powers.[91]

87 *Grundgesetz — Basic Law for the Federal Republic of Germany* (Germany) Art 80(1): 'The federal government, a federal minister or the governments of the Lander may be authorized by statute to issue regulations. The content, purpose and scope of such authorization must be determined by the statute. …'.

88 Appleby and Howe (n 7) 31–3.

89 Ibid 31–2.

90 Ibid 36.

91 See also Van Geelen (n 6) 309.

Example 4.3: Guiding considerations

Section 901H of the *Corporations Act*, copied below, illustrates that primary legislation may set out both mandatory and non-mandatory guiding considerations for the exercise of delegated legislative power.

901H Matters to which ASIC must have regard when making rules

In considering whether to make a derivative transaction rule, ASIC:

(a) must have regard to:

(i) the likely effect of the proposed rule on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system; and

(ii) the likely regulatory impact of the proposed rule; and

(iii) if the transactions to which the proposed rule would relate would be or include transactions relating to commodity derivatives — the likely impact of the proposed rule on any Australian market or markets on which the commodities concerned may be traded; and

(b) may have regard to any other matters that ASIC considers relevant.

Note: Matters that ASIC may have regard to under paragraph (b) may, for example, include:

(a) any relevant international standards and international commitments; and

(b) matters raised in consultations (if any) under section 901J.

Example 4.4: Satisfaction as to a state of affairs

Section 1023D(3) of the *Corporations Act* confers on ASIC a power to make a legislative instrument, known as a 'product intervention order', which prohibits a person from engaging in specified conduct in relation to a class of financial products. Section 1023D(3)(b) provides that, before exercising the power, ASIC must be satisfied that the class of financial products 'has resulted in, or will or is likely to result in, significant detriment to retail clients'. Section 1023D(3) was applied by the Court in *Cigno Pty Ltd v Australian Securities and Investments Commission*, in which it was held that ASIC reached the necessary state of satisfaction when it issued a product intervention order.[92]

92 *Cigno Pty Ltd v Australian Securities and Investments Commission* (2021) 287 FCR 650.

Scrutiny of exercise

4.52 Disallowance and sunsetting are the principal measures by which Parliament is able to scrutinise and control the exercise of delegated legislative power.[93] Taken together, these measures further the principles of legitimacy, transparency, and accountability. This section discusses alternatives to, and exemptions from, the default disallowance and sunsetting regimes provided by the *Legislation Act*.

4.53 As with many other practices related to delegated legislation, these procedures aim to balance expediency and principle. Expediency is retained by allowing delegated legislation to commence immediately upon registration and without the need for approval by Parliament. Parliamentary oversight is retained by permitting a period for disallowance. Certainty is promoted by placing an expiry on the period of time for disallowance. However, as Appleby and Howe have noted, these arrangements mean that, where a legislative instrument achieves its objective before Parliament has an opportunity to consider disallowance, then a government 'may be able to achieve permanent policy objectives through regulations [or other legislative instrument], even where they are opposed by Parliament'.[94]

Disallowance

4.54 Unless exempt, all delegated legislation must be tabled in Parliament and subject to disallowance by either House of Parliament.[95] The Draft Guidance recognises the generally applicable *Legislation Act* requirements and discusses potential alternatives to the standard disallowance procedure. For example, an enabling Act could provide:

- that an instrument does not commence until a time after the opportunity for parliamentary disallowance has elapsed;
- for a period of disallowance longer or shorter than 15 sitting days; or
- that an instrument does not commence until approved by a resolution of both Houses of Parliament, often referred to as an 'affirmative resolution procedure'.

4.55 Each of these alternatives presents a different balance between expediency and principle to the standard currently set by the *Legislation Act*. This point is illustrated by Recommendation 18 of the Delegated Legislation Scrutiny Committee's 2019 report and the Government's response to that recommendation. The Committee suggested that the *Legislation Act* be amended to provide that, subject to limited exceptions, legislative instruments commence 28 days after registration.[96] In response, the Government noted that such a change would reduce its 'capacity to implement its

93 For further discussion, see Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, forthcoming).

94 Appleby and Howe (n 7) 23. See also Ernst Willheim, 'Government by Regulation: Deficiencies in Parliamentary Scrutiny?' (2004) 15 *Public Law Review* 9; Van Geelen (n 6) 300, 311.

95 *Legislation Act 2003* (Cth) ss 38, 42.

96 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia (n 17) rec 18.

policy agenda in an effective and agile manner' and that 'delayed commencement should continue to be treated as an option rather than the default position'.[97]

4.56 The Draft Guidance discusses the potential benefits and risks of alternatives to the standard disallowance regime, consistent with the ALRC's recognition in **Chapters 3** and **6** that there is no 'one size fits all' approach to using delegated legislation.

Sunsetting

4.57 Sunsetting refers to the automatic repeal of delegated legislation, which under the *Legislation Act* typically occurs after 10 years.[98] Sunsetting ensures that legislative instruments 'are kept up to date and only remain in force for so long as they are needed'.[99] According to the Delegated Legislation Scrutiny Committee, sunsetting also

> provides an important opportunity for the Parliament to maintain effective and regular oversight of its delegated legislative powers and ensures that the content of legislative instruments remains current and appropriate. In this way, the regime promotes parliamentary supremacy.[100]

4.58 The Draft Guidance recognises both aspects of sunsetting. It also acknowledges that, in some cases, a sunsetting period of less than 10 years may be appropriate. This would provide Parliament with a more frequent opportunity to reconsider particular types of delegated legislation.[101]

Exemptions from disallowance and sunsetting

4.59 The Delegated Legislation Scrutiny Committee has commented that:

- exemptions from disallowance should be 'very few' because they reduce accountability and undermine Parliament's law-making role;[102]

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97 Australian Government, *Australian Government Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation* (2019) 7.

98 *Legislation Act 2003* (Cth) s 50.

99 Legislation Act Review Committee, Attorney-General's Department (Cth), *2021–2022 Review of the Legislation Act 2003* (2022) 25.

100 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (2nd ed, 2022) 34.

101 Parliamentary Joint Committee on Human Rights, Senate Standing Committee for the Scrutiny of Bills and Senate Standing Committee for the Scrutiny of Delegated Legislation, Submission to Legislation Act Review Committee, Attorney-General's Department, *2021–2022 Review of the Legislation Act 2003* (December 2021) 9–10. See also Legislation Act Review Committee, Attorney-General's Department (Cth) (n 99) 49. The Draft Guidance does not expressly take account of the findings of the 2021–2022 Review of the *Legislation Act* and Recommendation 4.1 of the Review, which recommends that the 'Attorney-General's Department should revise policy guidance for agencies to consider applying shorter sunsetting periods for certain instruments'. That recommendation, however, could be implemented by AGD concurrently with **Proposal B12**.

102 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 20) [5.6].

- exemptions from sunsetting 'are a significant impediment to Parliament's scrutiny work';[103]
- 'current drafting guidance material on exemptions from disallowance is deficient';[104] and
- there is 'a clear need for guidance material to actually provide substantive guidance on the appropriateness of exemptions from disallowance'.[105]

4.60 The Draft Guidance seeks to address these concerns by setting out principles and guidance for exemptions from disallowance and sunsetting. In this respect, the Draft Guidance adopts the key principles that the Delegated Legislation Scrutiny Committee proposed should guide Parliament's decisions about exemptions from disallowance.[106] It also notes the Committee's views about particular categories of delegated legislation.[107] The Draft Guidance (directed at those involved in the design and drafting of legislation) is therefore broadly aligned with the Committee's guidance (which is directed at parliamentarians and those involved in the design and drafting of legislation).

4.61 The Draft Guidance also discusses potential alternatives to the standard disallowance regime in the *Legislation Act*. In this respect, it provides a starting point for implementing Recommendation 7.1 of the 2021–2022 Review of the *Legislation Act 2003*, which recommended that AGD and PM&C should update guidance relating to alternative approaches to disallowance.[108]

Process-oriented safeguards

4.62 In addition to the tabling of legislative instruments in Parliament, the *Legislation Act* imposes two key process-oriented safeguards on the exercise of delegated legislative power: consultation and publication.

Consultation

4.63 Section 17 of the *Legislation Act* requires a delegated law-maker to be satisfied, before making a legislative instrument, that any consultation the law-maker considers 'appropriate' and 'reasonably practicable' has been undertaken in relation to the proposed legislative instrument. Consultation before making delegated legislation provides a level of transparency (particularly if conducted with the public

103 Ibid [7.74]. See also Stephen Argument, 'Is "sunsetting" Limping off into the Sunset?: Recent Developments in the Regime for Sunsetting of Commonwealth Delegated Legislation' (2019) 95 *AIAL Forum* 37.
104 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 20) [7.34].
105 Ibid [7.36].
106 Ibid [7.90]–[7.95].
107 Ibid.
108 Legislation Act Review Committee, Attorney-General's Department (Cth) (n 99) rec 7.11.

at large) to the delegated law-making process and a form of procedural fairness for potentially affected individuals and groups.[109]

4.64 The *Legislation Act* does not impose a mandatory obligation to consult before making delegated legislation, and a failure to consult does not affect the validity or enforceability of a legislative instrument.[110] Associate Professor Edgar has noted that, although the reform process leading to the *Legislation Act*

> started with a recommendation for enforceable public consultation provisions, ambivalence crept in soon after and resulted in the inclusion of unenforceable legal requirements.[111]

4.65 According to Edgar, the unenforceability of consultation requirements may be explained partly by a desire on the part of politicians to ensure the delegated law-making process is efficient and to avoid the risk of litigation alleging insufficient consultation processes.[112] Notwithstanding Edgar's observation, the Bills Scrutiny Committee has suggested that, in some cases, enforceable specific consultation requirements beyond those in the *Legislation Act* should be imposed by enabling legislation.[113] Those cases include, for example, when Parliament 'delegates its legislative power in relation to significant regulatory schemes'.[114] Edgar has observed that specific consultation requirements, including enforceable requirements, are commonly used in regulatory regimes.[115] Corporations and financial services legislation contains several examples of specific, but typically unenforceable, consultation requirements that go beyond s 17 of the *Legislation Act*.[116]

4.66 The Draft Guidance recognises the potential role of enhanced consultation requirements, and outlines the circumstances in which they may be appropriate.[117]

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109 Administrative Review Council (n 21) [5.2]. See also Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) [6.178]; Andrew Edgar, 'Deliberative Processes for Administrative Regulations: Unenforceable Public Consultation Provisions and the Courts' (2016) No. 16/20 *Sydney Law School Legal Studies Research Paper*.

110 *Legislation Act 2003* (Cth) s 19.

111 Andrew Edgar, 'The Westminster Model in Comparative Administrative Law: Incentives for Controls on Regulation-Making' (2019) 38(1) *University of Tasmania Law Review* 47, 65. See also Edgar (n 109); Administrative Review Council (n 21) 28–39.

112 Edgar (n 111) 64.

113 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia (n 27) 72.

114 Ibid.

115 Edgar (n 111) 68. See, for example: *Broadcasting Services Act 1992* (Cth) s 126; *Food Standards Australia New Zealand Act 1991* (Cth) ss 58–63.

116 See, eg, *Banking Act 1959* (Cth) ss 38F(4), (5); *Corporations Act 2001* (Cth) ss 901J, 903G, 908CL; *Superannuation Industry (Supervision) Act 1993* (Cth) ss 34K(9), (10).

117 See **Appendix E** [E.53]–[E.56]. See also Legislation Act Review Committee, Attorney-General's Department (Cth) (n 99) rec 5.3, which recommends that s 17 of the *Legislation Act* 'should be amended to make the standard for what constitutes appropriate consultation an objective rather than subjective standard, and this should be supported by additional guidance material in the Instruments Handbook'. If that recommendation were implemented, then relevant guidance could be implemented as part of **Proposal B12**.

Publication and drafting quality

4.67 Section 15K of the *Legislation Act* provides that a legislative instrument is not enforceable against any person until it is registered — and therefore made publicly available — on the Federal Register of Legislation. This is a fundamental safeguard which ensures that the law is available to those who are potentially affected by it. The *Legislation Act* also requires that an explanatory statement for each legislative instrument be registered.[118] Improved guidance on the delegation of legislative power may provide a useful resource for improving the quality of explanatory statements.

4.68 As briefly discussed above, the *Legislation Act* places an obligation on First Parliamentary Counsel to encourage high standards in the drafting of legislative instruments.[119] **Proposals B12** and **B14**, as well as the content of the Draft Guidance, complement that obligation.

4.69 Provisions that allow delegated legislation to amend, or to notionally amend, primary legislation have been heavily criticised on the basis that they 'subvert the appropriate relationship between Parliament and the executive'.[120] Notional amendments also make the law difficult to access and navigate.[121] The Draft Guidance acknowledges both sets of concerns and suggests that in the limited circumstances where notional amendments may be appropriate, measures should be considered to improve their navigability.[122]

Emphasising the importance of legislative design

4.70 This Inquiry raises broader questions about the value placed upon good legislative design in Commonwealth legislation. An overarching principle identified by the ALRC is that legislative design should promote meaningful compliance with the substance and intent of the law.[123] The focus topics of this Inquiry, such as the use of legislative definitions and legislative hierarchy, are aspects of legislative design.[124]

4.71 The ALRC's analysis and stakeholder feedback suggests that corporations and financial services legislation is not well designed, that it is incoherent, and that inconsistent use of the legislative hierarchy is a particular source of complexity. Although the ALRC has not been tasked with reviewing the entire Commonwealth

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118 *Legislation Act 2003* (Cth) s 15G(4).

119 Ibid s 16.

120 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 100) 36. See also Delegated Powers and Regulatory Reform Committee, House of Lords, *Democracy Denied? The Urgent Need to Rebalance Power between Parliament and the Executive* (House of Lords Paper No 106, 12th Report of Session 2021–22, 2021) [16]; Richard Gordon, 'Why Henry VIII Clauses Should Be Consigned to the Dustbin of History', *Public Law Project* (6 November 2015) <www.publiclawproject.org.uk>.

121 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.60].

122 See **Appendix E** [E.32]

123 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 38.

124 For further discussion of legislative design, see **Chapter 1**.

statute book, data analysis demonstrates that complexity is a feature of many Commonwealth Acts and the statute book more generally. The interaction of over 1,200 Acts with over 24,000 legislative instruments, comprising hundreds of thousands of pages, invariably leads to systemic legislative complexity. Good legislative design is a recognised strategy for managing complexity over time.[125]

4.72 As **Chapter 3** demonstrated, the current Inquiry presents an opportunity to examine the current institutional frameworks supporting key stakeholders involved in the legislative process — including Parliament and its members, government departments, policy-makers, legislative drafters in OPC and those who instruct them, and drafters of delegated legislation outside of OPC. In the ALRC's view, those stakeholders (and ultimately the general public) could benefit from a stronger emphasis on the importance of good legislative design.

4.73 The ALRC website contains a note outlining frameworks that support good legislative design in other jurisdictions.[126] The note contains a more detailed comparison between Australia and New Zealand than other jurisdictions. Among comparable parliamentary jurisdictions, such as the UK, Canada, and Singapore, New Zealand legislation and guidance material most clearly emphasises the importance of good legislative design.

4.74 In summary, a comparison of the position in Australia and New Zealand shows that:

- key legislation related to legislative drafting and other supporting frameworks in New Zealand demonstrates an aspiration for good legislative design that is not currently reflected in equivalent Commonwealth legislation; and
- in New Zealand, an expert advisory body known as the Legislation Design and Advisory Committee ('LDAC') is responsible for maintaining centralised and consolidated guidance regarding legislative design. The LDAC also performs other functions, including an advisory role in relation to the appropriate allocation of matters between primary and delegated legislation. A direct equivalent does not exist in Australia.

4.75 In 2019, the Delegated Legislation Scrutiny Committee commented on the LDAC and its role in relation to delegated legislation. In the Committee's view, establishing such a body in Australia

> may assist in resolving issues associated with inappropriate delegations of legislative power at the policy development and drafting stages, rather than raising these issues when the relevant bill is before the Parliament.[127]

4.76 Those observations led the Committee to recommend

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125 See, eg, Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (2014).

126 Australian Law Reform Commission, 'Comparative Frameworks for Promoting Good Legislative Design' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Comparative-frameworks-for-legislative-design.pdf>.

127 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia (n 17) 91.

> that the government give consideration to developing an expert advisory body to assist departments in appropriately developing proposals for bills that seek to delegate legislative power.[128]

4.77 In its response, the Government indicated that it did not support the Committee's recommendation, largely based upon the potential for delay in the legislative process and a view that existing support for legislative designers was sufficient.[129]

4.78 Reasons in support of the Committee's recommendation are discussed further below. However, feedback from consultees to date has indicated that such a body would be ineffective without a more comprehensive review of the legislative development process. In particular, consultees emphasised that the short timeframes in which legislative proposals are developed means that there would be little scope for an expert advisory body to assist. Consultees' observations in this regard are consistent with existing guidance and commentary which recognise that lack of time and urgency are barriers to good legislative design.[130] Therefore, the ALRC has not made any formal proposal or recommendation in respect of a legislative design advisory body.

4.79 A comprehensive review of the legislative development process is beyond the scope of this Inquiry. The findings of the Inquiry so far suggest that such a review could be beneficial. A review of that nature would require all stakeholders in the legislative development process — including parliamentarians and their advisers, policy-makers, legislative designers and instructors, and legislative drafters — to examine how processes could be improved to facilitate better quality and less complex legislation.

The potential for an expert advisory body in Australia

4.80 Consideration of an expert advisory body on legislative design in Australia should form part of any review of the legislative development process for the following reasons:

- Ultimately, the appropriate balance between primary and delegated legislation, and scrutiny of that balance, is a matter for Parliament. Both Parliament and departments responsible for preparing legislative proposals would be assisted by clearer guidelines and an advisory body to assist with the issues surrounding delegated legislative power.
- The range and number of existing sources containing guidance is itself a problem. The need to navigate multiple sources is potentially a source of

128 Ibid rec 8.

129 Australian Government (n 97) 3.

130 See, eg, Attorney-General's Department (Cth) (n 125) 2; Legislation Design and Advisory Committee (NZ), *Annual Report 1 January 2020 to 31 December 2020* (2021) 6–7; Hon Hilary Penfold, 'The Genesis of Laws' (Paper presented at 'Courts in a Representative Democracy', National Conference presented by the AIJA, the LCA and the CCF, Canberra, 1994); Sir George Engle, '"Bills Are Made to Pass as Razors Are Made to Sell": Practical Constraints in the Preparation of Legislation' (1983) 4(2) *Statute Law Review* 7, 11.

delay in preparing legislation. Furthermore, although existing guidance is broadly consistent, it is published by several different entities. A body similar to the LDAC, if established in Australia, could be tasked with rationalising and consolidating such guidance so far as possible. It could thereafter be responsible for maintaining that guidance, in the same manner as the LDAC is responsible for maintaining the New Zealand *Legislation Guidelines*.[131]

- Undoubtedly, there are legislative drafters and departmental officers throughout OPC and the Australian Government who strive to produce high quality legislation, and who possess a high level of knowledge, experience, and expertise in legislative design. OPC, for example, provides a range of advice and education services to government agencies.[132] By way of further example, during the Inquiry the ALRC has been greatly assisted by Treasury's Law Division, which is a centralised legislation team that performs a 'specialist law design and review function' within Treasury.[133] Developing centralised and regularly reviewed guidance, maintained by a dedicated committee, could be one further way of better capturing specialist knowledge and experience so as to make it widely available.[134]
- The existence of an expert advisory body may complement, and not necessarily duplicate, the existing scrutiny of Commonwealth legislation.[135] For example, engagement between departmental officers and an advisory body early in the development of legislation may provide a form of 'scrutiny' that does not currently exist. Furthermore, an advisory body could make submissions to parliamentary committees in relation to draft bills and delegated legislation, aiding those Committees in performing their scrutiny roles.[136]

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131 Legislation Design and Advisory Committee (NZ), *Legislation Guidelines* (n 19). These are discussed in more detail on the ALRC website: Australian Law Reform Commission, 'Comparative Frameworks for Promoting Good Legislative Design' (n 126).

132 See, eg, Office of Parliamentary Counsel (Cth), 'Training' <www.opc.gov.au/opc-services/training>.

133 Legislation Act Review Committee, Attorney-General's Department (Cth) (n 99) 54.

134 See, eg, Stephen Argument, 'The Importance of Legislative Drafters — Challenges Presented by Recent Developments in the Commonwealth Jurisdiction' (2015) 81 *AIAL Forum* 40, 56: '[D]rafting offices can be great repositories of experience and "corporate knowledge"'.

135 Cf Australian Government (n 97) 3.

136 The LDAC is able to perform a similar function: see Legislation Design and Advisory Committee (NZ), 'The Role of the LDAC' <www.ldac.org.nz/about/role/>.

5. Offences and Penalties

Contents

Introduction

5.1 This chapter takes the proposed legislative model outlined in **Chapter 2** and considers potential issues it might raise concerning offences and penalties in corporations and financial services legislation. The chapter concludes that the application of the model to offences and penalties is not only practicable, but that the proposed structured approach to legislative design and hierarchy for such provisions could bring significant benefits to regulated communities, regulators, and the public at large.

5.2 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 create criminal offences resulting in potential imprisonment or a fine. Others allow for the imposition of civil or administrative penalties. Other provisions give ASIC or APRA the power to prohibit a person or company from operating in the regulated area, or to impose conditions on a licence.

5.3 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 offences and penalties have on individual rights and liberties. Clear principles guide the delegation of legislative power and legislative drafting in this area, and offence and penalty 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.

5.4 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. This chapter shows how the high level of prescription in the existing legislation, discussed in Interim Report A, is matched by a large number of individual offence and penalty provisions attached to individual obligations and prohibitions. If detail in the legislation 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.

5.5 On the other hand, academic commentary, stakeholder consultations, and analysis of data relating to legislation and enforcement indicate that:

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

5.6 This analysis suggests that, rather than posing a dilemma, the proposed legislative model provides an opportunity to streamline offence and penalty provisions within existing policy settings. Building on existing guidance, the chapter develops proposed principles for the design and location of such provisions in the legislative hierarchy. A structured approach to legislative design and hierarchy would not only enhance democratic accountability, but would improve navigability of the law for regulated communities, promote meaningful compliance with it, and facilitate enforcement where it is breached.

Offences and penalties in context

5.7 This section sets out a short summary of offences and penalties within regulatory schemes in Australia, how they are enforced, and how they interact with other consequences for breach of the law. It highlights key theory and policy settings informing the design and use of these mechanisms in the context of corporations and financial services regulation. It then briefly considers the specific rules that have been developed about where such mechanisms should be located in the legislative hierarchy, and how power should be delegated to create them.

Offences, penalties, and other administrative action

5.8 Regulatory regimes, including financial services regulation, rely on a range of mechanisms to encourage compliance with the law. These may include collaborative approaches like education and persuasion. However, the ultimate mechanism is the imposition of consequences set out in the law for those who contravene it.[1]

Potential consequences for breach of the law in regulatory regimes

5.9 The types of consequences that may flow from a breach of the law in a given area of regulation fall into three broad categories. The first category comprises 'penalties' in a strict sense. Under the constitutional separation of powers, these punitive, discretionary consequences can be imposed by a court only.[2] These include:

- **Criminal offences**, by which contravening behaviour attracts the stigma of criminalisation, and upon conviction may lead to imprisonment (for individuals) and/or the payment of a fine.[3]
- **Civil penalties**, which are imposed by the courts applying civil rather than criminal court processes, including a lower standard of proof.[4] When a court finds a contravention of a civil penalty provision it will usually impose a monetary penalty, but it may also make orders including injunctions, banning orders, licence revocations, adverse publicity orders, relinquishment (disgorgement) orders, and orders for reparation and compensation.[5]
- **Administrative penalties**, which (in the strict sense) are non-discretionary penalties that are 'imposed automatically by force of law instead of being imposed by a court'.[6] They are notably found in taxation law and social security law, but examples are also found in corporations law, such as automatic disqualification from managing a corporation if a person is convicted on indictment of certain offences.[7]

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1 See [1.65]–[1.67]. See also Australian Law Reform Commission, *Corporate Criminal Responsibility* (ALRC Report No 136, 2020) 170–2, discussing strategic regulation theory and 'responsive regulation'.

2 This is because the imposition of a penalty with an element of discretion has been held to be a form of judicial power, which can only be exercised by courts established under Chapter III of the *Australian Constitution*: Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) [2.68], [2.146] ('*Principled Regulation*'). See also *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560.

3 Community service orders may in some cases be imposed in place of imprisonment. Forfeiture of property is another criminal penalty, and criminal conviction may also result in 'follow-on' penalties such as cancellation of licences: see generally Australian Law Reform Commission, *Principled Regulation* (n 2) [2.40]–[2.44].

4 Ibid [2.51]. The standard of proof applied in civil proceedings is the balance of probabilities. For further explanation of the differences and similarities in procedure and standard of proof, see Australian Law Reform Commission, *Corporate Criminal Responsibility* (n 1) [4.130]–[4.137].

5 Australian Law Reform Commission, *Principled Regulation* (n 2) [2.45]. As to the purposes of civil penalties, see *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599.

6 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) 2. See also Australian Law Reform Commission, *Principled Regulation* (n 2) [2.124]–[2.128].

7 *Corporations Act 2001* (Cth) s 206B.

5.10 The second category includes a range of protective administrative actions that a regulator may take as a consequence of a breach or alleged breach of the law in order to fulfil its regulatory role.[8] These include:

- The giving of an **infringement notice**, which sets out particulars of an alleged offence or contravention, and gives the option of either paying a fixed monetary amount or electing to have the matter dealt with by a court.[9] The amount to be paid under an infringement notice is ordinarily much lower than the penalty that a court could impose, on the basis that payment does not reflect a court sanction, nor constitute an admission of guilt.[10]
- Agreeing to accept **court enforceable undertakings**. An individual or corporation who is reasonably believed to have contravened the law may agree to take certain actions as an alternative to the regulator pursuing civil proceedings or using other powers (such as disqualification or revocation of a licence).[11]
- Other forms of administrative action, such as imposing restrictions on a person's activities or withholding benefits to which they would otherwise be entitled. Where the regulator has an element of discretion going beyond the mechanistic application of the legislation (such as in relation to **banning orders**, **stop orders**, **revocation of a licence**, **imposition of licensing restrictions**, or **referral to disciplinary action**), the action is not considered a penalty for the breach (which would need to be imposed by a court), but rather administrative action aimed at protecting the public.[12]

5.11 The third category includes a range of civil remedies that may be pursued by a regulator or an affected person through civil proceedings, such as orders that a company be wound up, compensation for loss or damage, or injunctions.[13] Civil proceedings and remedies are not a focus of this chapter.[14]

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8 See, eg, *Australian Securities Commission v Kippe* (1996) 67 FCR 499 (banning order primarily for protective, rather than punitive, purposes). See generally *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 [65]–[82] (Kiefel CJ, Keane and Gleeson JJ), [106]–[112] (Gageler J), [138]–[174] (Gordon J), [238]–[240] (Edelman J).

9 Although these are sometimes referred to as a form of administrative penalty, it is more correct to consider them a form of administrative action: Australian Law Reform Commission, *Principled Regulation* (n 2) [2.129].

10 Attorney-General's Department (Cth), 'Infringement Notices' <www.ag.gov.au/legal-system/administrative-law/regulatory-powers/infringement-notices>.

11 See generally Australian Law Reform Commission, *Principled Regulation* (n 2) [2.159]–[2.164].

12 See, eg, Australian Securities and Investments Commission, *ASIC's Approach to Enforcement* (Information Sheet 151, 2021). See also Australian Prudential Regulation Authority, *Enforcement Strategy Review: Final Report* (2019) 13.

13 See, eg, *Corporations Act 2001* (Cth) ss 461(1)(k), 464, 1041I, 1324.

14 For further discussion in the context of corporations and financial services regulation, see Australian Securities and Investments Commission (n 12).

5.12 Given the distinctions outlined above, the remainder of this chapter will adopt the following terminology:

- **'offences'** to mean criminal offences and associated punishments;
- **'penalties'** to refer to civil penalties and administrative penalties in the strict sense; and
- **'other administrative action'** to refer to the range of other administrative actions that regulators may take in consequence of breaches or alleged breaches of the law.

The importance of the constitutional context

Although the distinction between penalties in the strict sense and other administrative action may seem a technical and sometimes artificial one, it has consequences for the ways in which regulatory schemes are established in Australia in comparison to other countries. For example, in some countries with a similar legal tradition to Australia, such as the UK and Canada, financial regulators have broad discretionary powers to impose substantial fines (subject to judicial review) for breaches of the law.[15] In Australia, the imposition of penalties involving an element of discretion is considered an exercise of judicial power, so any attempt to give a regulator such powers would be unconstitutional.[16]

5.13 This chapter focuses on offences and penalties — the most severe level of response to a breach of the law. However, it is important to recognise that, in regulation, rules need not necessarily have an offence or penalty attached to be 'enforceable' through other administrative or civil action.

5.14 In Australia, ASIC is the main conduct regulator for consumer credit and financial products and services, and APRA's role is predominantly reserved for prudential (and preventive) regulation. Notwithstanding this distinction, APRA also has formal enforcement powers, and has recently indicated a greater appetite to exercise those powers.[17]

15 See, eg, *Financial Services and Markets Act 2000* (UK) s 66; *Securities Act*, RSBC, 1996, c 418, s 162; *Securities Act*, RSO, 1990, c S-5, s 127.

16 See above, [5.9], n 2.

17 For example, APRA has enforcement powers under *Banking Act 1959* (Cth) s 37J; *Financial Sector (Collection of Data) Act 2001* (Cth) s 19; *Superannuation Industry (Supervision) Act 1993* (Cth) s 34R, pt 22. In relation to APRA's enforcement approach see: Australian Prudential Regulation Authority (n 12).

Offences and penalties: theory and policy

5.15 The design of offences, penalties, and other administrative action in corporations and financial services legislation, and the way they are enforced and applied, is informed by regulatory theories discussed in Interim Report A and **Chapter 1** of this Interim Report. 'Responsive regulation', drawn from strategic regulation theory, and, increasingly, risk-based regulation, have been particularly influential in this regard.[18]

5.16 The 'enforcement pyramid' at the heart of responsive regulation, discussed further in **Chapter 1**, is reflected in the range of penalties and other potential regulatory responses available in corporations and financial services legislation.[19] The enforcement pyramid concept was particularly influential in the introduction of civil penalty provisions into corporations law, providing regulators with an intermediate step between persuasive measures and criminal sanctions.[20] The theory of responsive regulation is also said to justify the choice that legislation often gives to regulators to pursue either criminal or civil penalty proceedings for substantially the same conduct — referred to as 'dual-track' regulation.[21] Sometimes, the same conduct may also be dealt with by issuing an infringement notice.[22]

5.17 However, reports of significant misconduct in the financial services sector have given rise in the past five years to renewed consideration of offences and penalties, and the way they are enforced. This has taken place as part of the ASIC Enforcement Taskforce Review ('ASIC Enforcement Review'),[23] the Financial Services Royal Commission, and reviews of the enforcement approaches adopted by each of ASIC and APRA.[24] A document setting out further detail of relevant findings of these reviews and subsequent developments is available on the ALRC website.[25]

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18 See [1.65]–[1.68]; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.129]–[2.132]. See also Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022).

19 See [1.66]. See generally Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 38; Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) [4.4].

20 Australian Law Reform Commission, *Principled Regulation* (n 2) [2.60].

21 See generally Australian Law Reform Commission, *Corporate Criminal Responsibility* (n 1) [5.24]–[5.26]. The ALRC has made relevant comments regarding civil penalties and dual-track regulation in previous reports: see Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2016) [8.171]; Australian Law Reform Commission, *Corporate Criminal Responsibility* (n 1) [5.52]–[5.55].

22 Australian Law Reform Commission, *Corporate Criminal Responsibility* (n 1) [5.26] (referring to 'tri track' provisions).

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

24 Sean Hughes, 'ASIC's Approach to Enforcement after the Royal Commission' (Speech, 36th Annual Conference of the Banking and Financial Services Law Association, Gold Coast, 30 August 2019) <www.asic.gov.au/about-asic/news-centre/speeches>; Australian Prudential Regulation Authority (n 12).

25 Australian Law Reform Commission, 'Recent developments — Penalties and enforcement', <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Penalties-and-enforcement-developments.pdf>.

5.18 The reports resulting from these reviews have not questioned the underlying approach of responsive regulation or (in general terms) the legislative architecture that facilitates it. However, they have placed more emphasis on the importance of public enforcement of the law attended by strong penalties,[26] and the role of a risk-based approach in prioritising enforcement action.[27] The report of the ASIC Enforcement Review called for simplification and standardisation of penalties, and penalties that properly price potential misconduct.[28] This led to recent increases in penalty amounts for a number of serious offences and significantly increased maximum civil penalties available under the *Corporations Act*, along with the imposition of civil penalty liability for breach of additional provisions.[29] Requirements for AFS Licensees to report their own breaches of the law have also recently been significantly reformed.[30] These policy considerations and recent legislative changes are relevant to framing offences and penalties within the proposed legislative model.

Existing guidance on the delegation of offences and penalties

5.19 Broad constitutional, legal, and policy considerations apply when deciding where to locate particular provisions within the legislative hierarchy, as discussed in detail in **Chapter 3**. Because of their impact on fundamental rights and liberties, penalties and offences are given particular attention when legislative power is delegated. This section briefly outlines key principles of the law and guidance on delegation discussed in **Chapter 3** specific to offences and penalties, and points to several areas where further clarity is required.

Established limits to delegation

5.20 The guidance documents and the Senate Scrutiny Committees' practice outlined in **Chapter 3** establish the following principles for delegation in this area:

- Criminal offences that are subject to serious criminal sanctions, significant civil penalties, and administrative penalties, should be contained in primary legislation.[31] Serious criminal sanctions are generally considered to include imprisonment and fines of more than 50 penalty units for an individual, and more than 250 penalty units for a corporation. Significant civil penalties are similarly generally considered to include monetary penalties of more

26 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (Volume 1, 2018) 277; Australian Government (n 23) 58–69.

27 Australian Prudential Regulation Authority (n 12) 12–13; Australian Securities and Investments Commission (n 12).

28 Australian Government (n 23) ch 7.

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

30 *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) sch 11.

31 Department of the Prime Minister and Cabinet (Cth) (n 6) [1.10]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Guidelines* (2nd ed, 2022) Principle (iv); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (2nd ed, 2022) Principle (j).

than 50 penalty units for an individual, and more than 250 penalty units for a corporation. However, as discussed further in **Chapter 6**, practice shows that — particularly in the case of civil penalties — a number of provisions in delegated legislation in the corporations and financial services sphere provide for higher maximum penalties.[32]

- Any power to create criminal offences or civil penalty provisions in delegated legislation should be circumscribed, including by specifying the maximum penalty that can be imposed, and by making the power subject to appropriate safeguards.[33]
- When power is delegated to create offences and impose penalties, that power should generally be exercised through regulations.[34]
- Provisions establishing schemes for administrative action that can be taken in response to breaches or alleged breaches of the law should be contained in primary legislation, although implementing detail may be included in delegated legislation.[35]

5.21 ALRC analysis of the Commonwealth statute book, described in more detail in **Chapter 6**, shows that one area where existing guidance is almost universally followed is in relation to the level of penalty imposed through delegated legislation. The only significant exception to this is in the regulation of corporations and financial services.[36]

5.22 Because of their impact on individual rights, the ALRC has consistently supported clear limits on the extent to which criminal offences, and civil and administrative penalties, should be created in delegated legislation.[37] Existing parliamentary guidance on this issue reflects an appropriate balancing of important considerations, including democratic accountability, personal rights and liberties, navigability, and flexibility and adaptability.

5.23 The AGD Guide to Framing Offences also addresses the extent to which the *content* of an offence created in primary legislation can be set out in delegated legislation. The general principle is that the content of an offence created in an Act should be clear from the offence provision itself.[38] The Guide gives the following as an example of drafting that would 'normally be considered undesirable':

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32 See [6.62]–[6.64].

33 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 14.

34 Ibid 26, 28.

35 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 31) Principle (j). In relation to infringement notices, see Australian Law Reform Commission, *Principled Regulation* (n 2) [6.100].

36 See [6.62]–[6.64].

37 Australian Law Reform Commission, *Principled Regulation* (n 2) [6.45]–[6.50], [6.70]; Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (n 21) [17.44]–[17.54].

38 Attorney-General's Department (Cth) (n 33) 26. See also Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [8].

> A person commits an offence if the person fails to comply with obligations set out in the Regulations …[39]

5.24 Clarity of content on the face of the provision is considered important:

- so that 'the scope and effect of the provision is clear to the Parliament and those subject to the offence';
- to enable Parliament to scrutinise 'the entirety of the content of an offence'; and
- to avoid imposing a general offence that applies a single maximum penalty to 'a wide range of potential conduct of undifferentiated seriousness'.[40]

5.25 However, the AGD Guide to Framing Offences recognises that there may be circumstances in which delegation of content is acceptable, including where:

- 'the relevant content involves a level of detail that is not appropriate for an Act';[41]
- 'prescription by legislative instrument is necessary because of the changing nature of the subject matter';[42]
- 'the relevant content involves material of such a technical nature that it is not appropriate to deal with it in the Act';[43] or
- 'elements of the offence are to be determined by reference to treaties or conventions, in order to comply with Australia's obligations under international law or for consistency with international practice'.[44]

5.26 The AGD Guide to Framing Offences also notes that it is appropriate for general offences to attach to contravention of conditions on a licence, authorisation, or permit 'because the holder applies for a licence or permit and agrees to its terms'.[45] However, if conditions are changed the holder 'should be notified of that change and given the opportunity to comply'.[46]

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39 Attorney-General's Department (Cth) (n 33) 27.
40 Ibid [2.3.4].
41 Ibid, giving the example of s 20AB of the *Civil Aviation Act 1988* (Cth), which allows regulations to specify the process for determining the types of people who are authorised to carry out a variety of duties in relation to different categories of aircraft.
42 Attorney-General's Department (Cth) (n 33) 27, giving the example of s 18HE of the *National Measurement Act 1960* (Cth), which creates an offence in relation to selling an article or utility by reference to a measurement contrary to prescription in regulations of scales of measurement appropriate for particular classes of goods for sale.
43 Attorney-General's Department (Cth) (n 33) 27, giving the example of Div 4 of Part VI of the *National Measurement Act 1960* (Cth), which allows for the prescription of the procedures by which the average quantity of a statistically significant sample of goods is calculated.
44 Attorney-General's Department (Cth) (n 33) 27, giving the example of the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth).
45 Attorney-General's Department (Cth) (n 33) 29.
46 Ibid.

5.27 There is no specific guidance on the extent to which it is acceptable to delegate the content of a civil penalty provision. This issue is considered further from [5.41].

Existing offence and penalty architecture

5.28 The ALRC has summarised key features of the offence and penalty architecture under the *Corporations Act* and associated legislative instruments in a paper available on its website.[47] In brief, these key features include:

- a broad range of potential consequences for breach of the law, including criminal offences, civil and administrative penalties, and other administrative or civil action;[48]
- a very large and steadily increasing number of offence and civil penalty provisions, with a much larger proportion being criminal offences;[49]
- a wide range of available maximum penalties for offences, ranging from a fine of 10 penalty units to 15 years imprisonment, with half of the offences having a maximum penalty for an individual of 60 penalty units or less;[50]
- recently increased and standardised maximum pecuniary penalties for contravention of civil penalty provisions;[51]
- dual-track, and sometimes tri-track regulation, by which the same conduct may be subject to a fault-based criminal offence, civil penalty liability, and/or a strict liability criminal offence;[52]
- wide availability of infringement notices for both civil penalty provisions and criminal offences, including for all strict liability offences;[53]
- delegation of the content of offence and civil penalty provisions to other legislative instruments in a number of circumstances, some involving very broad delegation;[54]
- notional amendment of offence and civil penalty provisions in the *Corporations Act* by legislative instrument;[55]
- the creation of offences in delegated legislation, including in ASIC instruments;[56] and
- important interactions between offence and penalty provisions, licensing, and breach-reporting.[57]

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47 Australian Law Reform Commission, 'Corporations Act Offence and Penalty Architecture' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Corps-Act-offence-and-penalty-architecture.pdf>.
48 Ibid [2].
49 Ibid [15]–[16]. See also below [5.31].
50 Ibid [8]. As at 1 January 2022, 491 offences had a maximum penalty for an individual of 60 penalty units or less, making up 50% of the total offences in the *Corporations Act*.
51 Ibid [9]–[14].
52 Ibid [19].
53 Ibid [20]–[21].
54 Ibid [17]–[18]. See also below [5.43].
55 Ibid [22]–[23]. See also below [5.76]–[5.78].
56 Ibid [24]–[25]. See also below [5.79]–[5.81].
57 Ibid [26]–[29].

5.29 Some of these features are also found in other corporations and financial services legislation. For example, dual-track regulation, and the interactions of offence and penalty provisions with licensing and breach reporting are key features of the *ASIC Act*.[58]

A blueprint for offences and penalties

5.30 Taking into account the law, policy, and practice outlined above, this section sets out preliminary conclusions in relation to applying the proposed legislative model to offence and penalty provisions in the *Corporations Act*. The remainder of the chapter provides further background and the analysis behind these conclusions, and outlines wider benefits that implementation of the model would have in relation to offence and penalty provisions more broadly.

Addressing overlap and over-particularisation

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.

5.31 The number of offence and civil penalty provisions in the *Corporations Act* has increased significantly over time. On 1 January 2022, there were 978 offence provisions and 168 civil penalty provisions, a 62% and 500% increase respectively over 20 years.[59] The ALRC's analysis suggests that the high level of prescription in existing corporations and financial services legislation, discussed in Interim Report A, is matched by a large number of individual offence and civil penalty provisions attached to individual obligations and prohibitions. Many of these provisions are highly particularised, such that they are drafted so as to apply to a very specific set of circumstances (a particular actor, document, financial product), and a number of them cover much the same ground.[60] Available data suggests that a majority of these provisions are rarely enforced in any formal way.[61]

5.32 More than 36% of the offence provisions in the *Corporations Act* attract a maximum fine of 50 penalty units or less for an individual (350 of 978 offences), with an additional 14% subject to a fine of 60 penalty units (141 of 978 offences). This

58 See, for example, the multiple offences contained in Div 2, Subdivs D and DA of the *ASIC Act*, which are also civil penalty provisions under s 12DB of the *ASIC Act*. Note also that certain breaches of the *ASIC Act* engage licensing conditions and breach reporting obligations under the *Corporations Act*. See *Corporations Act 2001* (Cth) ss 761A (definition of 'financial services law'), 912A(1)(c).

59 See Australian Law Reform Commission, 'Corporations Act Offence and Penalty Architecture' (n 47) [15]–[16].

60 See below [5.64]–[5.67].

61 See below [5.72]–[5.73].

means that, under the proposed legislative model, half of the existing offences in the *Corporations Act*, if retained, could be moved to rulebooks without significantly contravening existing guidance.[62] However, the large number of remaining offence and civil penalty provisions with higher penalties might appear to pose a dilemma for the proposed legislative model. If detail in the primary legislation were to be moved to delegated legislation, the transfer of all associated offence and penalty provisions to delegated legislation would offend existing guidance on maximum penalties, and risk a lack of appropriate parliamentary oversight. Accordingly, this is not the approach being proposed by the ALRC.

5.33 The ALRC's analysis of academic commentary, stakeholder consultations, legislative data, and enforcement data suggests that having a large number of very detailed, sometimes overlapping, offence and civil penalty provisions does not lead to better compliance or more effective enforcement. To the contrary, as discussed further in the next section, the high level of prescription and potential overlap can make enforcement through the courts more difficult. The proposed legislative model provides an opportunity to streamline offence and penalty provisions within existing policy settings, while retaining sufficient flexibility for responsive regulation.

5.34 **Proposal B15** provides for a consolidation of offence and civil penalty provisions. Consolidation comfortably fits within the Terms of Reference as they relate to managing legislative complexity and flexibility. Consolidating offences so as to streamline the legislation in this way 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 itself in different contexts.

Examples of consolidation in Prototype Legislation B

5.35 Examples of offence and civil penalty provisions that would consolidate existing overlapping provisions concerning disclosure are set out in Prototype Legislation B.[63] 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) would replace seven existing provisions in the *Corporations Act* (five offence provisions and two civil penalty provisions from Chapter 6D and Part 7.9).[64] This is achieved by using the same overarching provisions to cover both securities

62 Current guidance on delegation recognises that it is appropriate for offence provisions up to 50 penalty units to be created in delegated legislation (see above [5.20]). For offence provisions in the *Corporations Act* where the fine is currently set at 60 penalty units (141 offence provisions as at 1 January 2022), inclusion in rules would either require reducing penalties by ten penalty units (at current rates from $13,320 to $11,000), or accepting a small degree of flexibility in the delegation guidance for existing offences. However, note the view of the ALRC expressed in a previous inquiry that such provisions should be rationalised and much of such conduct decriminalised: Australian Law Reform Commission, *Corporate Criminal Responsibility* (n 1) ch 5.

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

64 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).

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.

5.36 Two additional sections in Prototype Legislation B criminalise giving defective disclosure information orally in advance of providing a disclosure document.[65] These offence provisions are specified at a more general level than equivalent existing provisions,[66] and the prototype Act provides the framework for rules to specify the circumstances in which such information may be given.[67] This results in a significantly 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.[68] The prototype provisions also allow further tailoring for different products or contexts in rules if required.

5.37 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.[69] This highlights another benefit of the proposed legislative model: it promotes consistency in criminal and civil consequences attaching to the same kinds of conduct.[70] 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.[71]

5.38 At the same time, the proposed legislative model can accommodate particularised offences with low penalties being set out in rules.[72] Some such offences could reproduce existing strict liability offences, for which an infringement notice can be given under the existing law.[73]

5.39 The Draft Guidance, reflecting existing guidance, recognises that the Delegated Legislation Scrutiny Committee will expect particular safeguards to attach to the inclusion of strict liability provisions in delegated legislation (see **Appendix E** [E.70]). The consultation provisions relating to the proposed legislative model are one such

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

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

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

68 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*.

69 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) (two years imprisonment) of the *Corporations Act*, with different knowledge elements and defences.

70 An aim encouraged by, for example, the ASIC Enforcement Review: Australian Government (n 23) 59–68.

71 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.*

72 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).

73 See *Corporations Act 2001* (Cth) s 1317DAN. This would need to be amended to allow infringement notices to be given for strict liability offences in rules, if this was the desired approach.

safeguard (**Proposal B9**). Parliament could also legislate for additional safeguards, such as requirements for affirmative resolution in relation to the creation of any strict liability offences in rules, or requirements for a specific delegation of power to create strict liability offences in relation to particular matters.[74] It would also be open to the Government as a matter of policy to decide that certain rules — including, for example those imposing strict liability offences — should be treated as though they were 'tied work' under the *Legal Services Directions 2017* (Cth), such that they would be drafted by OPC.[75]

Guidance on appropriate delegation of content

5.40 This section discusses **Question B13** in relation to offences and civil penalties.

5.41 A key issue for implementing the proposed legislative model is the extent to which the content of offence and civil penalty provisions created in the *Corporations Act* may appropriately be contained in rules. This is because current legislation imposes significant criminal and civil liability for failure to follow prescriptive requirements directed at the same purpose (such as disclosure) but tailored to different contexts, products, and services. Under the proposed legislative model, many of these prescriptive requirements would be moved from the Act to thematic rulebooks, but the specific offence and penalty consequences attached to them are too high to be created by rules in accordance with existing guidance. As such, there would be circumstances in which it would be 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.

5.42 As discussed above, existing guidance on the drafting of offences emphasises that, in general, the content of an offence set out in an Act should be clear from the provision itself.[76] However, there are circumstances in which the guidance recognises that it is appropriate for the content of offences created in primary legislation to be set out in delegated legislation. The *Legislation Handbook* also recognises that, although delegated legislation should generally not impose

> obligations on individuals or organisations to undertake certain activities (eg to provide information or submit documentation) [the] detail of the information or documentation required may be included in subordinate legislation.[77]

74 See [4.33]–[4.69] for a discussion of safeguards and procedures, including the affirmative resolution procedure.
75 See [2.84].
76 See above [5.22]–[5.25].
77 Department of the Prime Minister and Cabinet (Cth) (n 6) 2.

5.43 The *Corporations Act* presently has numerous examples of provisions creating offences and civil penalties for which the detail is set out in delegated legislation.[78] In particular, very broad delegation of content has occurred in relation to a number of sets of existing ASIC rules.[79] The *Corporations Act* makes *any* breach of those rules liable to a civil penalty calculated under the general formula in s 1317G (a maximum of 5,000 penalty units or three times the benefit derived from the contravention for an individual).

5.44 Enabling rules to prescribe the content of certain offence and civil penalty provisions would be inevitable and appropriate under the proposed legislative model. It would be inevitable because of the extent of detailed prescription required in rules in order to adapt the regulatory regime to different contexts. It would be appropriate because the rationales underlying restrictions on the delegation of content would be best served by locating the delegated content in an identifiable set of rulebooks with appropriate additional safeguards (such as consultation with the proposed Rules Advisory Committee).[80] The proposed legislative model would impose a discipline on the structuring of principles and prescription relating to penalties and offences that would support navigability and democratic accountability, while allowing for flexibility and adaptability to changing circumstances.

Examples of delegation of content in Prototype Legislation B

5.45 The parts of the Act in Prototype Legislation B related to defective disclosure include an example of quite a significant — but justifiable — delegation of content, which itself reflects the current law. Under Prototype Legislation B, disclosure would be defective if, among other things, it 'does not include particular material required by a provision of this Part or of the financial services rules'.[81] This is similar to the position under the existing law, in that disclosure is currently deemed defective (and can give rise to criminal offences and civil penalty proceedings) if it does not meet the requirements set out in the Act and regulations, as notionally amended by delegated legislation.[82] Both the existing law and Prototype Legislation B include a materiality

78 These include, for example, ss 738Q (failure of a crowd sourced funding (CSF) intermediary to conduct checks prescribed by regulations to a reasonable standard before publishing a CSF offer document is a strict liability offence subject to a fine of 50 penalty units); 949B(2) (failure to comply with regulations made under the section as to additional disclosure requirements for particular types of financial services is an offence subject to one year imprisonment); 921E and 921Q (breach of the Financial Planners and Advisers Code of Ethics (made by legislative instrument) attracts a 'restricted' civil penalty); 1101AC (breach of an enforceable code provision by a person holding themselves out as complying with an approved code of conduct attracts civil penalty liability subject to a maximum pecuniary penalty of 300 penalty units).

79 See, eg, *Corporations Act 2001* (Cth) ss 798H(1) (market integrity rules), 901E(1) (derivative transaction rules), 903D (derivative trade repository rules), 908CF(1) (financial benchmark rules and compelled financial benchmark rules), 981M(1) (client money reporting rules) .

80 The underlying rationales are accessibility of the law and respecting Parliament's role in attaching penalties to conduct. As to safeguards generally, see **Chapter 4**.

81 Prototype Legislation B, Act, s 1135.

82 *Corporations Act 2001* (Cth) ss 711(8), 728(1)(b), 1013C(1)(a)(i), 1013D(k), 1021B(1). Note, however, the proposed legislative model does not envisage a role for regulations.

threshold, so that the provisions do not pick up inconsequential discrepancies.[83] Although this would be a significant delegation of content, it would be appropriate because the content would be limited to product-specific technical detail set out in a single set of rules, and subject to significant consultation requirements.

5.46 Other general offences in the Act in Prototype Legislation B that delegate content to rules, such as offences in ss 1145 and 1152 concerning the lodging of documents and keeping of records, employ an additional mechanism to limit the conduct to which the offence applies. These provisions require that any rule to which the offence applies specifically refer to, and engage, the relevant provision in the Act.[84] This is another way of ensuring that appropriate consideration and scrutiny is applied to the imposition of penalties for conduct set out in rules. It also ensures that the offence or penalty is visible to the regulated community, and that inconsequential or minor breaches of rules are not inadvertently caught by general offences in the Act.

Key features of the Draft Guidance

5.47 **Question B13** asks whether the Draft Guidance in relation to delegation of the content of offence and civil penalty provisions adequately captures the appropriate principles.[85]

5.48 The Draft Guidance generally reflects existing guidance, with three additions. First, unlike existing guidance, it includes civil penalty provisions within its scope. This is because civil penalties have a significant impact on individual rights, and therefore raise similar concerns to offences in relation to accessibility of the law and democratic accountability. Nevertheless, the Draft Guidance adopts the position that it will generally be easier to justify the delegation of the content of civil penalty provisions than the content of offences. This is because the imposition of a civil penalty does not lead to a criminal conviction, nor the prospect of imprisonment, and is required by statute and case law to be appropriately adapted to the particular circumstances of the contravention.[86]

5.49 Under the *Corporations Act,* for example, there are in-built 'material prejudice' and seriousness thresholds for imposing a pecuniary penalty under many civil penalty provisions,[87] and a very wide range of available penalties that are to be determined taking into account 'all relevant matters'.[88] 'Relevant matters' referred to in the Act include 'the nature and extent of the contravention', 'the nature and extent of any loss or damage', and whether the person has previously been 'found by a court … to have engaged in similar conduct'.[89] Alongside these statutory

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83 See Prototype Legislation B, Act, s 1135(1)(b) and *Corporations Act 2001* (Cth) ss 728(3), 1021B.
84 A similar approach is taken in different regulatory spheres: see, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 25; *Navigation Act 2012* (Cth) ss 55(3)–(4).
85 See **Appendix E** [E.71]–[E.80].
86 See, eg, *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 82(6).
87 *Corporations Act 2001* (Cth) ss 1317G(1)(b)–(d).
88 Ibid s 1317G(6).
89 Ibid.

factors, the courts have identified factors that inform an assessment of whether a pecuniary penalty has an 'appropriate deterrent value'.[90] These relate to both the 'character of the contravening conduct' (such as whether it was deliberate, and/or carried out by senior management), and the 'character of the contravenor' (such as the contravenor's size, market share, and culture of compliance).[91] Under the *Corporations Act*, civil penalty provisions are also subject to a 'safe harbour' which provides relief where a person has 'acted honestly' and 'ought fairly to be excused'.[92]

5.50 Secondly, the Draft Guidance includes specific provision for delegation of the content of civil penalty provisions when a provision relates to the 'contravention of a specific set of highly visible and easily identifiable regulatory rules or codes of conduct'.[93] This reflects the current position in corporations and financial services legislation, as discussed above at [5.43] in relation to ASIC rules and particular codes of conduct.

5.51 This guidance is not intended to result in the wholesale delegation of civil penalty liability for breach of a 'rulebook'. It would generally be inappropriate under the proposed legislative model to simply provide in the Act that any breach of any rule made under the Act is subject to civil penalty liability. Instead, the Act could provide that breach of a particular subset of rules (that should be highly visible for participants in particular areas of regulated activity) is subject to civil penalty liability. Acceptance of such rules or codes of conduct to participate in the area of activity is analogous to accepting conditions on a licence or authorisation to operate.[94]

5.52 Thirdly, existing guidance states that it is generally easier to justify locating offence and civil penalty content in regulations, rather than in other kinds of legislative instruments. The Draft Guidance maintains this position, but notes that, where an Act delegates content directly to a different type of instrument (such as rules), it may be appropriate to delegate offence and civil penalty content to such an instrument. Accordingly, rules would be the appropriate location for delegated offence and civil penalty content under the proposed legislative model. This is the case in some other legislative schemes, such as offence and civil penalty content delegated to Marine Orders under the *Navigation Act*.[95]

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90 *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599 [18] (Kiefel CJ, Gageler, Keane, Gordon, Steward, and Gleeson JJ).

91 Ibid [18]–[19] (Kiefel CJ, Gageler, Keane, Gordon, Steward, and Gleeson JJ), citing with approval *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,152–52,153 (French J). These factors are commonly referred to as the 'French factors'. Note that *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599 concerned s 546 of the *Fair Work Act 2009* (Cth), which provides simply that the court may order a person to pay a pecuniary penalty that the court considers is 'appropriate'; cf *Corporations Act 2001* (Cth) s 1317G(6).

92 *Corporations Act 2001* (Cth) s 1317S.

93 See **Appendix E** [E.73].

94 See above [5.26].

95 See, eg, *Navigation Act 2012* (Cth) s 75; *Marine Order 11 (Living and Working Conditions on Vessels) 2015* (Cth) div 5. Note the definition of 'regulations' in the *Navigation Act* includes, unless otherwise specified, 'Marine Orders': *Navigation Act 2012* (Cth) s 14.

A role for evidential provisions?

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?

5.53 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 attach to any breach of those obligations.

5.54 The previous sections contemplate three categories of potential consequences for breach of a specific requirement in a rulebook:

- a relatively small criminal or civil penalty (50 penalty units or less) created in the rulebook;
- breach of an offence or civil penalty provision created in the primary legislation; or
- other administrative action or private civil action for loss.

5.55 There may be another option for situations in which these alternatives are not considered appropriate. The ALRC seeks stakeholder feedback on whether it would be appropriate to adopt 'evidential provisions' in some areas, similar to the approach under the *FSM Act* (UK). Under that scheme, certain rules ('evidential provisions') are themselves unenforceable, but breach of (or compliance with) those rules may evidence a breach of (or compliance with) specified enforceable provisions.[96] An example of an evidential rule in the FCA Handbook tending to show contravention is:

> An attempt by the firm to misdescribe the customer's purpose or to encourage the customer to tailor the amount he wishes to borrow so that [a specified rule] does not apply may be relied on as tending to show contravention of [the rule that a firm must act in the customer's best interests].[97]

5.56 An example of a provision evidencing compliance is:

> Making the disclosures required by this chapter available on a website will tend to establish compliance with the [specified rule requiring publication of information].[98]

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96 See *Financial Services and Markets Act 2000* (UK) s 138C. The FCA Handbook's glossary defines 'evidential provisions' 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)'.

97 Financial Conduct Authority (UK), *FCA Handbook* MCOB 4.7A.16.

98 Ibid MIFIDPRU 8.1.16.

5.57 The use of evidential provisions in the FCA Handbook is relatively infrequent: while the Handbook contains over 5,000 enforceable provisions, and over 5,000 guidance provisions, it contains only 79 evidential provisions. Review of two of the leading UK case databases, ICLR.3 and Westlaw UK, reveals these provisions have been cited in very few published judgments.[99]

5.58 In considering the potential role of evidential provisions within the proposed legislative model, it is also important to recognise the very different regulatory landscape in the UK. Contravention of most rules within the FCA Handbook can attract enforcement action, including a fine imposed by the regulator.[100] Designating a rule as an evidential provision within the FCA Handbook essentially removes that provision from the body of rules that may be directly enforced. In Australia, the reverse is generally true: an obligation or prohibition does not attract a penalty (criminal or civil) unless it is specifically enacted and the maximum penalty is specified for the particular breach.

5.59 Evidential provisions have been used in a number of UK statutes since at least the 1930s.[101] Some evidential provisions tend to indicate breach of rules at the same level of the hierarchy (such as within the FCA Handbook), while other evidential provisions in delegated legislation tend to prove breach of the relevant primary legislation.[102] While evidential provisions do not appear to be a recognised drafting convention within Australia, several legislative schemes contain provisions that bear varying degrees of resemblance to evidential provisions. For example, the business judgement rule set out under s 180(2) of the *Corporations Act* provides detail as to the type of conduct that will be taken to meet the requirement to act with care and diligence set out in s 180(1).[103]

5.60 Under the proposed legislative model, evidential provisions could be used, for example:

- to specify methods of publication that would tend to establish compliance with more generally-expressed requirements (such as that information be published in a manner that results in it being reasonably accessible to the public and reasonably prominent);[104] and

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99 See, eg, *R (Critchley) v Bank of Scotland plc* [2019] EWHC (Admin) 3036; *Spreadex Ltd v Sekhon* [2008] EWHC 1136; *R (British Bankers' Association) v Financial Services Authority* [2011] EWHC 999; *Winterflood Securities Ltd v Financial Services Authority* [2010] EWCA Civ 423; *Mason v Godiva Mortgages Ltd* [2018] EWHC 3227.

100 Something that is not possible in Australia: see above [5.9] n 2.

101 See Gabriele Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (Sweet and Maxwell, 2nd ed, 1987) 6–8. See *Road Traffic Act 1930* (UK) s 45(4).

102 The *Road Traffic Act 1988* (UK) s 38(7), *Animal Welfare Act 2006* (UK) s 14(4), and *Fire Safety Act 2021* (UK) s 3(2) each provide that breach of relevant codes or regulations is evidence of a contravention of the Act.

103 See also, for example, *Human Reproductive Technology Act 1991* (WA) s 15.

104 For example, a principled publication standard would have been included in various provisions of the *Corporations Act* and other corporations and financial services legislation if the Treasury Laws Amendment (Modernising Business Communications) Bill 2022 (Cth) had been passed: see Sch 3 Part 1 of that Bill.

- as an alternative to existing prescriptive provisions setting out how a Crowd-sourced Funding ('CSF') intermediary should conduct checks to a 'reasonable standard' before publishing a CSF offer document.[105] Instead, the Act could include a general obligation to conduct such checks to a reasonable standard, and rules could include an evidential provision describing conduct that would tend to establish compliance with that standard.

5.61 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),[106] and would avoid the need for multiple (and potentially significant) penalty provisions to be contained in rules under the proposed legislative model. 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, relatively novel as they are in the Australian context, could play a helpful role for regulators and regulated communities under the proposed legislative model.

Benefits of the model for offences and penalties

5.62 The previous section outlined how the existing law, including offences and penalties, could be translated into the proposed legislative model within existing policy settings. This final section briefly discusses a number of benefits, in relation to offences and penalties, that application of the proposed legislative model would bring for navigability, democratic accountability, and compliance. These include:

- enhancing compliance and enforcement by rationalising, reducing over-prescription, and removing overlap from offence and penalty provisions, and separating high level obligations from prescriptive detail;
- removing the power to notionally amend offence and civil penalty provisions in delegated legislation; and
- improving the visibility of offence and penalty provisions.

105 See *Corporations Act 2001* (Cth) s 738Q(1).

106 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) rec 7.4.

Enhancing compliance and enforcement through rationalisation

5.63 The previous section touched on the significant increase in offence and civil penalty provisions within the *Corporations Act* over the past 20 years.[107] ALRC analysis shows that the large number of provisions has two key drivers. The first is dual-track, or sometimes tri-track, regulation (see above [5.16]), an issue addressed by the ALRC in its report on *Corporate Criminal Responsibility*.[108] The second is a high level of prescription and particularisation of such provisions, and overlap between provisions within the *Corporations Act* and *ASIC Act*. This leads to multiple provisions covering essentially the same conduct.

The problems of over-particularisation and overlap

5.64 In Interim Report A, the ALRC showed how a high level of prescription contributes to complexity in corporations and financial services legislation.[109] The ALRC's analysis of offence and penalty provisions in the *Corporations Act* shows how the level of prescription is matched by correspondingly particularised offence and penalty provisions. This leads to a significant degree of overlap, where essentially the same conduct is proscribed in slightly different ways.

5.65 A fundamental cause of overlap involves the 'grafting' of particulars onto a core prohibition over time.[110] 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 5.1** below.

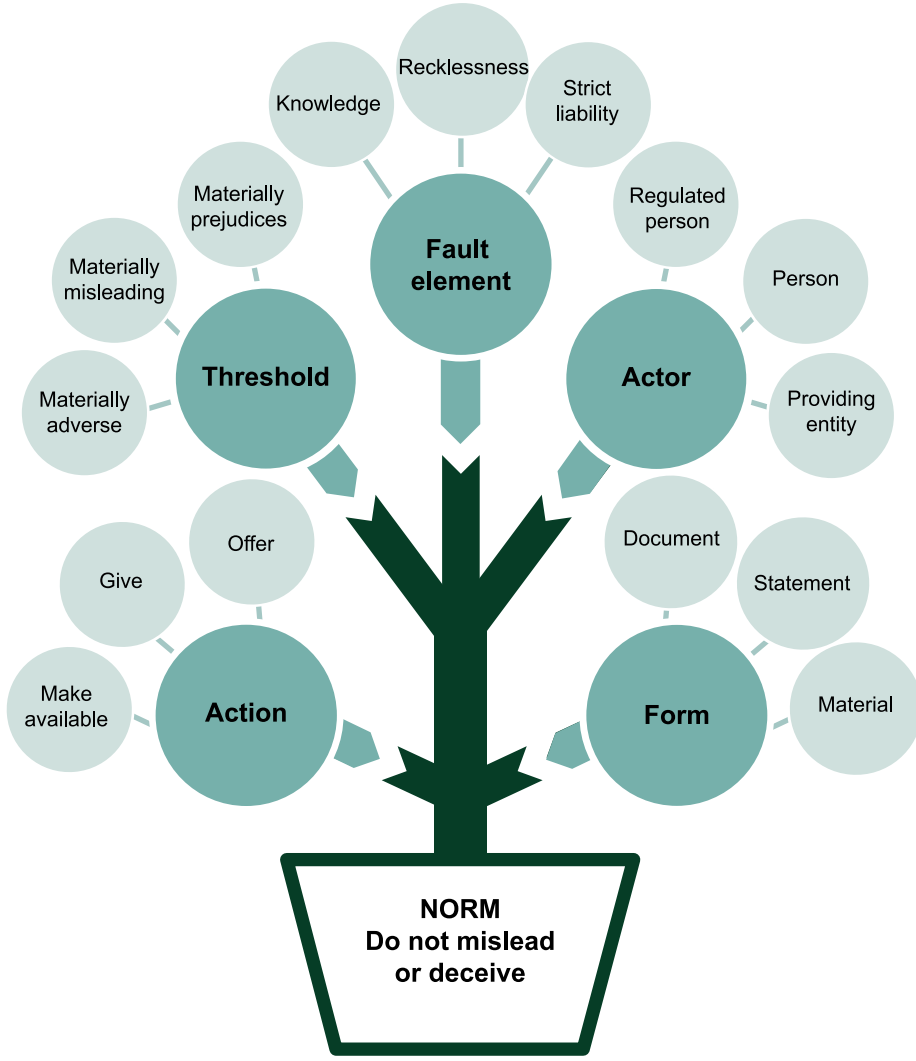
107 See above [5.31].

108 Australian Law Reform Commission, *Corporate Criminal Responsibility* (n 1) ch 5. See also Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (n 21) [8.171].

109 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.87]–[3.89], [7.96], [9.90]–[9.99].

110 See Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 106) 495.

Figure 5.1: Particularisation of misleading or deceptive conduct



5.66 At the core of prohibitions against defective disclosure is the norm that conduct should not mislead or deceive.[111] This was identified by the Financial Services Royal Commission as a fundamental norm that should be identified expressly in legislation governing financial services entities.[112] However, under the current legislative framework, this norm is at risk of being

111 In the context of defective disclosure, this norm is part of a higher level objective to address information asymmetry, which includes material omissions that are misleading in effect. See Hilary A Sale, 'Disclosure's Purpose' (2019) 107(4) *Georgetown Law Journal* 1045, 1048–9.

112 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 106) 376, 496 (rec 7.4).

> obscured by the repeated introduction of variations on the theme, through the use of different words and phrases to proscribe similar, if not the same, behaviour.[113]

5.67 As at 1 July 2022, 55 provisions in the *Corporations Act* create offences and civil penalties relating to defective disclosure (48), misleading and deceptive conduct (1), false and misleading documents (4), and false and misleading statements (2).[114] One example scenario that illustrates the relative proliferation of provisions in Australia is comparison of disclosure for a managed investment scheme under Australian and New Zealand legislation. As at 1 July 2022, there were more than three times the number of relevant offence and civil penalty provisions relating to the content of disclosure documents and steps to be taken in the event of defective disclosure in the *Corporations Act* (13), compared to the *FMC Act* (NZ) (4).[115]

Impacts on compliance and enforcement

5.68 Over-particularisation and overlap hinder both compliance and enforcement. As Professor Bant and Professor Paterson have noted, the current legislation

> wholly fails as a way of communicating the law to ordinary people, the businesses and citizens. … It also provides an endless supply of 'stall and evade' opportunities for wrongdoers who can clog up the courts with technical and strategic debates over how to interpret the labyrinth.[116]

5.69 By targeting each provision to a specific set of circumstances, the aim of particularisation is to afford certainty of application and meaning.[117] As identified by the Financial Services Royal Commission, however, an unintended effect of drafting provisions 'to deal with every kind of case imaginable and put each beyond dispute' is that the ultimate aim of the law may be missed:

> So many wires are strung between the fence posts that they inevitably overlap, intersect and leave gaps. And, instead of entities meeting the intent of the law, they meet the terms in which it is expressed.[118]

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113 Joseph Sabbagh, Elise Bant and Jeannie Marie Paterson, 'Mapping Misleading Conduct: Challenges in Legislative Design' (2022) 49(2) *University of Western Australia Law Review* 144, 146. See also Australian Law Reform Commission, 'Unconscionability and Misleading or Deceptive Conduct' (Background Paper FSL9, forthcoming).

114 Across *Corporations Act 2001* (Cth) pts 6D, 7.7, 7.9, 7.10, 9.4. For a breakdown of these provisions, see Australian Law Reform Commission, 'Offences and penalties related to defective disclosure' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Offences-and-penalties-defective-disclosure.xlsx>.

115 *Corporations Act 2001* (Cth) ss 1016A(2), 1016E(2), 1021D(1)–(2), 1021E(5), (8), 1021F(1), s 1021H(1), 1021J(1)–(3), 1021L(1)–(2); *Financial Markets Conduct Act 2013* (NZ) ss 57, 60, 62, 80.

116 Elise Bant and Jeannie Marie Paterson, 'Understanding Hayne. Why Less Is More', *The Conversation* (11 February 2019) <http://theconversation.com>.

117 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 106) 496.

118 Ibid.

5.70 In relation to overlapping misleading conduct provisions, Sabbagh, Bant and Paterson highlight consequences such as

> unnecessarily complex pleadings, duplication of threshold and substantive issues, and dense and expansive written and oral arguments based substantially upon the same conduct.[119]

5.71 Justice Rares in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (In Liq)* observed that particularisation has created 'a plethora of pointlessly technical and befuddling statutory provisions' with a cost to the community, business, parties, their lawyers, and the courts.[120]

5.72 Data on enforcement action taken by ASIC and the Commonwealth Director of Public Prosecutions ('CDPP') supports the conclusion that reducing the number of offence and penalty provisions would not negatively affect formal enforcement action. For example, data collected and analysed by Dr Gilligan and Professor Ramsay show that, between 2009 and 2018, the CDPP brought prosecutions under only 86 unique sections of the *ASIC Act* and *Corporations Act*, with substantial concentration on 19 of those provisions.[121] The majority of the sections prosecuted involved general obligations or prohibitions such as dishonest use of a position to gain an advantage or to cause detriment (s 184(2), 64 cases), prohibited conduct by a person in possession of inside information (s 1043A(1), 55 cases), and making or authorising a statement in a document that is false or misleading (s 1308(2), 49 cases).[122]

5.73 ALRC analysis of preliminary data received from ASIC is consistent with this. Over the period 2015/16–2020/21, the CDPP laid charges under 26 unique sections of the *Corporations Act* (968 counts),[123] with the most frequently charged provisions being directors' duties in relation to good faith, use of position and use of information (s 184, 305 counts), prohibited conduct by a person in possession of inside information (s 1043A, 205 counts),[124] dishonest conduct (s 1041G, 93 counts), and the prohibition on hawking financial products (s 992A(3), 87 counts).[125] ASIC also prosecutes certain summary offences itself, with the permission of the

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119 Sabbagh, Bant and Paterson (n 113) 154–5.

120 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1, summary.

121 George Gilligan and Ian Ramsay, 'Is There Underenforcement of Corporate Criminal Law? An Analysis of Prosecutions under the ASIC Act and Corporations Act: 2009–2018' (2021) 38 *Company and Securities Law Journal* 435, 442. Seven hundred and fifteen prosecutions were brought during the period, and, out of the 86 provisions prosecuted, 19 provisions were applied more than 10 times.

122 For the full list of the 20 provisions used most often see ibid Table 4.

123 Because of the way the statistics were collected, where charges were brought under more than one subsection of the same section (or the subsection was not specified), the total counts have been combined under the section as a whole. In contrast, the data referenced in the article by Gilligan and Ramsay is broken down by subsection: ibid Table 4. In the case of ASIC's preliminary data on prosecutions brought by the CDPP, the charges involved at least 33 specific offences under the 26 sections.

124 The statistics record 92 counts for s 1043A, 90 counts for s 1043A(1), four counts for s 1043A(1)(c), 15 counts for s 1043A(1)(d), and four counts for s 1043A(2).

125 Note that s 992A(3) has subsequently been amended.

CDPP. Over the same period, 2015/16–2020/21, ASIC brought prosecutions under 25 unique sections of the *Corporations Act*.[126]

5.74 In relation to civil penalty proceedings, ALRC analysis of preliminary data from ASIC shows that, in the five year period 2015/16–2020/21, civil penalty proceedings were brought under only 30 unique civil penalty provisions in the *Corporations Act*.[127] The provisions relied on most were the requirement to hold an AFS Licence (s 911A(5B), 57 cases), general obligations of an AFS Licensee (s 912A, 49 cases), directors' and officers' duties (ss 180(1), 181(1) and (2), 182(1) and (2), and 183(1) and (2), 34 cases), and the obligation to be registered if operating certain managed investment schemes (s 601ED(8), 24 cases). In the same period, a total of 12 infringement notices were issued under the *Corporations Act*, all of them concerning continuous disclosure obligations under s 674(2). Thirty-four infringement notices were also given for alleged contravention of the Market Integrity Rules, and one in relation to alleged contravention of the Derivative Transaction Rules.[128]

5.75 Of course, the criminal and civil consequences attached to contravention of other (less frequently litigated) requirements in the *Corporations Act* incentivise compliance with the law, and can be used by a regulator to encourage compliance through other means. However, reliance on such a small number of provisions for court-based enforcement could be seen as evidencing 'under-enforcement' of corporate law.[129] Rationalisation of highly particular offence and penalty provisions that do not currently act as a visible deterrent would contribute to strengthening the perception of credible enforcement required by strategic regulation theory, and public confidence in it. Such rationalisation would also be consistent with the regulators' expressed enforcement priorities, which focus on (for example, in the case of ASIC) 'serious and harmful wrongdoing to deter similar misconduct in the future'.[130]

Ending notional amendment of offence and penalty provisions

5.76 Interim Report A described the difficulties for navigability of the law and democratic accountability created by notional amendments under the current legislative scheme.[131] Those problems are particularly acute in relation to offence and civil penalty provisions because of their significant impact on individual rights. Notional amendment of an offence or civil penalty provision has the effect that the

126 Involving charges in relation to 33 specific offences.

127 In addition, during the same period, proceedings were brought in relation to seven civil penalty provisions under the *ASIC Act* and 23 provisions of the *NCCP Act* and *National Credit Code*. Over the same period, proceedings were *completed* in relation to 32 unique civil penalty provisions.

128 During the same period, 63 infringement notices were issued under the *ASIC Act*, and 213 under the *NCCP Act*.

129 See, eg, Gilligan and Ramsay (n 121).

130 Australian Securities and Investments Commission (n 12) 3.

131 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.136]–[3.141], [10.16], [10.52]–[10.67]. See also Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021).

law as it appears in an Act of Parliament is not, in fact, the law as it stands (whether for a group of individuals or generally). This raises significant rule of law concerns.

5.77 ALRC analysis has identified numerous examples of regulations and ASIC legislative instruments that notionally amend existing offence or civil penalty provisions, some of which are subject to penalties of imprisonment. As at 22 March 2022, the ALRC identified 22 civil penalty provisions and 77 offence provisions that had been notionally amended by regulations (55 provisions) or ASIC instruments (44 provisions). While not all of these notional amendments change the obligations contained in the primary provision, or their scope, many of them do. For example, the *ASIC Corporations (Design and Distribution Obligations — Exchange Traded Products) Instrument 2020/1090* (Cth) extends design and distribution obligations under s 994C(2) of the *Corporations Act* to exchange traded products, attracting imprisonment of up to one year.[132]

5.78 The proposed legislative model would remove notional amendments from the legislative scheme and address the significant rule of law concerns these raise in relation to offences and civil penalties.

Accessibility and oversight of offences subject to imprisonment

5.79 A further, significant, concern about the operation of the existing legislative architecture is the creation, by delegated legislation, of new criminal offences subject to terms of imprisonment. This is contrary to existing guidance on the appropriate use of delegated legislation (see above [5.20]), and is an outlier in Australian legislation.

5.80 Across the Commonwealth statute book, the ALRC has identified only four examples of delegated legislation creating new offences that impose terms of imprisonment, and each of these relates to corporations and financial services legislation. These include the *ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780* (Cth), which notionally amends the *NCCP Act* to include new offences under ss 53A(5) and 53B(6), attracting a maximum penalty of a fine of 100 penalty units, or two years imprisonment (and a civil penalty up to 2,000 penalty units).[133] The other examples are the *ASIC Credit (Notice Requirements for*

132 See also *Corporations Regulations 2001* (Cth) reg 7.7.10AE, which notionally amends s 946B of the *Corporations Act*, including sub-s (3A), which is an offence. Regulation 7.7.10AC similarly notionally amends s 942B(8) of the *Corporations Act*, replacing it with a different offence. In relation to ASIC instruments, see *ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70* (Cth) (notionally amends s 724 of the *Corporations Act*, which is an offence), and *ASIC Corporations (ASIC Close Down Period) Instrument 2018/1034* (Cth) (notionally amends the offence in s 1016B of the *Corporations Act*, which is subject to two years imprisonment).

133 Note that, subsequently, different ss 53A and 53B were inserted into the *NCCP Act*, and the two notionally inserted offences co-exist alongside the new ss 53A and 53B appearing in the Act as amended.

Unlicensed Carried Over Instrument Lenders) Instrument 2020/834 (Cth), the *NCCP Regulations*,[134] and the *Corporations Regulations*.[135]

5.81 The ALRC's analysis has also identified at least one case in which an ASIC instrument may have unsuccessfully attempted to create an offence. The *ASIC Corporations (Short Selling) Instrument 2018/745* (Cth) notionally amends the *Corporations Act* by inserting ss 1020B(7B) and (7H), and includes a note to the effect that a failure to comply is an offence. However, without an additional amendment to include these provisions in Sch 3 of the *Corporations Act*, these may not be valid offences.[136]

5.82 Removal of the power to notionally amend primary legislation, together with adoption of the structured hierarchy provided by the proposed legislative model, should prevent the recurrence of such issues. Even if, contrary to existing guidance, a provision were included in a thematic rulebook creating an offence subject to imprisonment, this would be significantly more visible than an offence created in an ASIC instrument or, arguably, in regulations. The ALRC stresses, however, that offences subject to imprisonment should strictly be reserved for primary legislation, as demonstrated by existing legislative practice.

134 *National Consumer Credit Protection Regulations 2010* (Cth) sch 2 items 2.27 (notionally amending s 52 of the *NCCP Act*), 2.39 (notionally amending ss 74, 75, 75A, 75B, 76 of the *NCCP Act*).

135 *Corporations Regulations 2001* (Cth) reg 7.6.02AGA (notionally amending s 911A of the *Corporations Act*, including by inserting a new offence subject to two years imprisonment, and a new civil penalty provision with a penalty of 2,000 penalty units).

136 *Corporations Act 2001* (Cth) s 1311(1A).

6. Unpacking the Problem

Contents

Introduction

6.1 This chapter seeks to unpack the law design problems which bedevil corporations and financial services laws. In so doing the chapter provides the underlying problem analysis for the proposed legislative model, set out in **Chapter 2**. Using quantitative data, together with qualitative analysis of case studies, this chapter explores different approaches to law design and the use of the legislative hierarchy across the Commonwealth statute book. This chapter builds on the quantitative analysis undertaken in Interim Report A, and is supplemented by several resources published on the ALRC website.

6.2 This chapter situates the design of corporations and financial services legislation within the broader body of Commonwealth law, with particular regard to primary legislation and delegated legislation. The chapter draws out design choices that affect legislative complexity and navigability, and concludes that particular law design choices made in relation to the *Corporations Act* are significant sources of its complexity. As this Interim Report demonstrates, alternative design approaches, which preserve flexibility and adaptability, are available to reduce the complexity of corporations and financial services legislation.

6.3 The key takeaways from the ALRC's data analysis are:

- 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, NCCP Act,* and *ASIC Act* 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.
- Law design practices have struggled to cope with the complexity of the *Corporations Act*, and reforms are often designed and implemented over short timeframes. Subsequent amendments (often notional) and exemptions are then 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 legislative instruments include few, relative to other areas of law. The legislative hierarchy may be more principled and coherent if, for example, the *Corporations Act* was less prescriptive, and low penalty unit offences were in delegated legislation.
- Parliamentary committees' scrutiny concerns may reflect a divergence between Parliament's and the Executive's expectations as to the appropriate design and use of delegated legislation.

6.4 This chapter treats the entire Commonwealth statute book — over 1,200 Acts and more than 17,000 legislative instruments — as data. This has allowed the ALRC to:

- provide a holistic picture of how material is allocated between primary and delegated legislation, and how this departs from existing law design guidance; and
- compare and contrast law design choices across legislation and subject matter.

6.5 The data on which this chapter is based represents the first comprehensive analysis of all Commonwealth delegated legislation. This analysis has been influenced by quantitative and qualitative analysis undertaken in the UK,[1] and updates and enhances some earlier accounts of Australian delegated legislation.[2]

6.6 Quantitative analysis is less nuanced than qualitative analysis. For example, quantitative analysis says little about the extent to which any legislative scheme has achieved its regulatory objectives. Nonetheless, the ALRC's quantitative work complements the extensive qualitative analysis undertaken throughout this Interim Report.[3]

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

2 See, for example, Dennis Pearce AO and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5th ed, 2017) 16–17, which discusses the analyses conducted by the former Senate Standing Committee on Regulations and Ordinances.

3 Further detail on the methodologies adopted to generate the data contained in this chapter is available on the ALRC website: Australian Law Reform Commission, 'Data methodologies' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Data-methodologies.pdf>.

Key concepts

Flow refers to the making of new Acts and legislative instruments within a given time period. For example, '5,088 Acts have been passed since 1990'. The flow of new legislation is a key factor in how users experience the law and determines the speed and extent of change to legislation.

Stock refers to the body of in-force principal legislation at a particular moment in time. For example, 'there were 17,669 instruments in force on 30 June 2022'. The size of the stock influences how easily users navigate the law, as it reflects the scale of the law.

Legislation is **interconnected** to the extent that understanding one part of the legislative framework requires having regard to other parts. For example, in a highly interconnected legislative framework, an Act might provide that the content of a number of definitions will be prescribed in regulations, or that the scope of regulation can be varied by delegated legislation.

Law design and legislative hierarchies

Unrealised benefits of delegated legislation

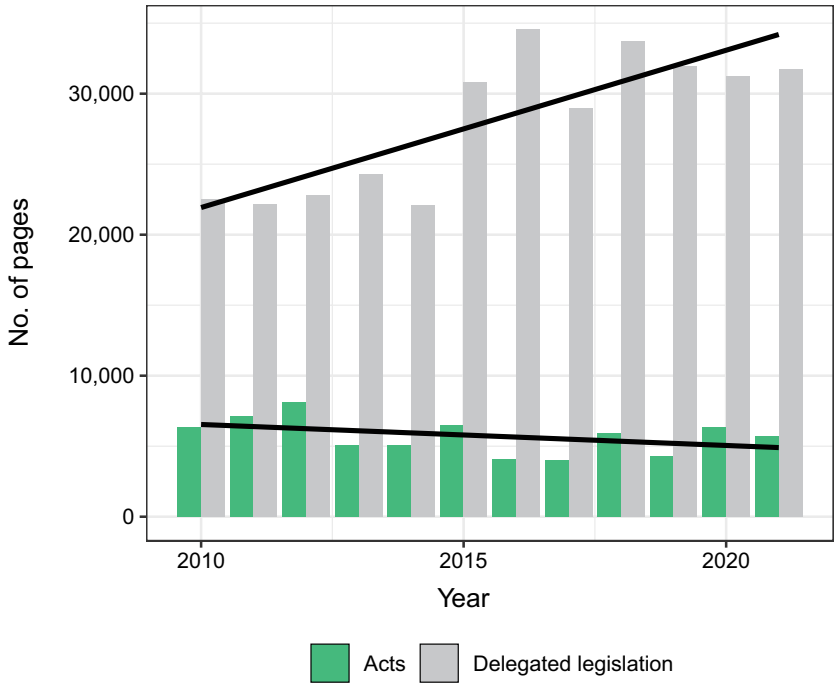
6.7 The *Corporations Act, NCCP Act*, and *ASIC Act* use less delegated legislation (as a percentage of the primary legislation) than a range of other regulatory regimes in which technical expertise, flexibility, and adaptability are similarly important, such as civil aviation, maritime regulation, and prudential regulation. The Financial Services Royal Commission found that highly prescriptive primary legislation has contributed to the complexity of existing law, and delegated legislation might be the appropriate location for greater detail when required.[4] Accordingly, there may be opportunities to use delegated legislation *more* in corporations and financial services legislation, to reduce the level of prescription in primary legislation and achieve overall simplification of the law. This would contribute to the objective emphasised in the Inquiry's Terms of Reference of ensuring

> regulatory flexibility to clarify technical detail and address atypical or unforeseen circumstances and unintended consequences of regulatory arrangements.

6.8 As **Figure 6.1** shows, delegated legislation accounts for the vast majority of the flow of new legislation — and its role has only increased over the past 10 years.

4 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 495.

Figure 6.1: Acts and delegated legislation made each year (2010–21)



6.9 The stock of delegated legislation is also larger than that of primary legislation, although the difference is less extreme than in relation to the flow. Around 58% of all 281,678 pages of legislation currently in force is delegated legislation.

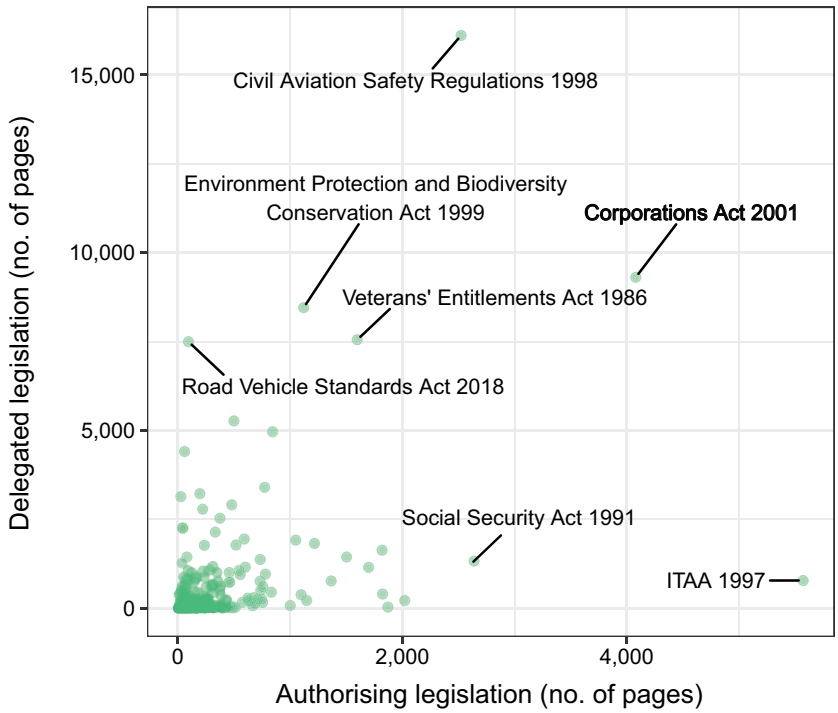
6.10 Only 581 of the 1,228 (47%) currently in-force Acts have delegated legislation made under their empowering provisions. Among those 581 Acts, there are a wide range of practices in how a legislative hierarchy is implemented.

6.11 There are 16 Acts where the volume of enabled delegated legislation is equivalent to more than ten times that of the enabling legislation. Among Acts that enable delegated legislation, 18% have resulted in a body of legislative instruments that is greater than double the size of the Act. Most Acts have authorised a body of delegated legislation that is less than the size of the enabling legislation (amounting to 400 of a total of 581 Acts that permit delegated legislation to be made).

6.12 **Figure 6.2** plots the total page length of each piece of Commonwealth enabling legislation, including regulations that enable other delegated legislation, against the page length of its enabled delegated legislation. **Figure 6.2** highlights that the *Corporations Act* is unusual among Commonwealth legislation — it represents the 'worst of both worlds', in that both primary and delegated legislation are very long. In contrast, other long Acts such as the *Income Tax Assessment Act 1997* (Cth) ('*ITAA 1997*') and the *Social Security Act 1991* (Cth) do not require

the reader to have regard to a vast body of delegated legislation. Conversely, the legislative frameworks established by some shorter Acts such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and *Veterans' Entitlements Act 1986* (Cth) (for example) locate a relatively large amount of material in delegated legislation.

Figure 6.2: Length of enabling legislation relative to length of delegated legislation



6.13 There is no linear relationship between an Act's size or age and the relative volume of its delegated legislation.[5] The extent to which material is located in delegated legislation reflects legislative design choices.

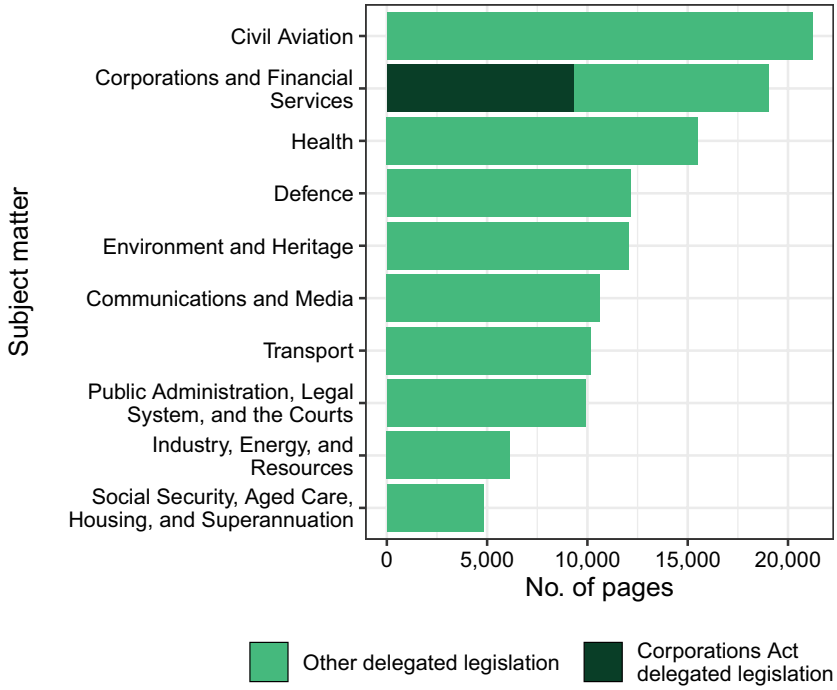
6.14 Compared to several other regulatory regimes, such as civil aviation, work health and safety, superannuation, radio communications, and prudential regulation, the *Corporations Act* authorises significantly less delegated legislation relative to the

5 There is almost no correlation between the size of an Act and its use of delegated legislation relative to the size of the Act (0.019), even when Acts with no delegated legislation are excluded (-0.029). A similarly small correlation (0.07) applies to the relationship between the age of an Act and its volume of delegated legislation. Note that a score of 1 indicates a perfect positive correlation, a score of -1 indicates a perfect negative correlation, and a score of zero indicates no correlation at all.

size of the Act. It appears the *Corporations Act* is not realising the potential benefits of delegated legislation.

6.15 Nonetheless, as **Figure 6.3** shows, the *Corporations Act* has a large volume of delegated legislation in absolute terms, setting aside use relative to the size of the Act. The volume of corporations and financial services delegated legislation also underlines the importance of creating a navigable legislative hierarchy that can adapt and evolve over time. **Figure 6.3** shows the top ten subject matters of delegated legislation, which account for three-quarters of all pages of delegated legislation.

Figure 6.3: Stock of delegated legislation



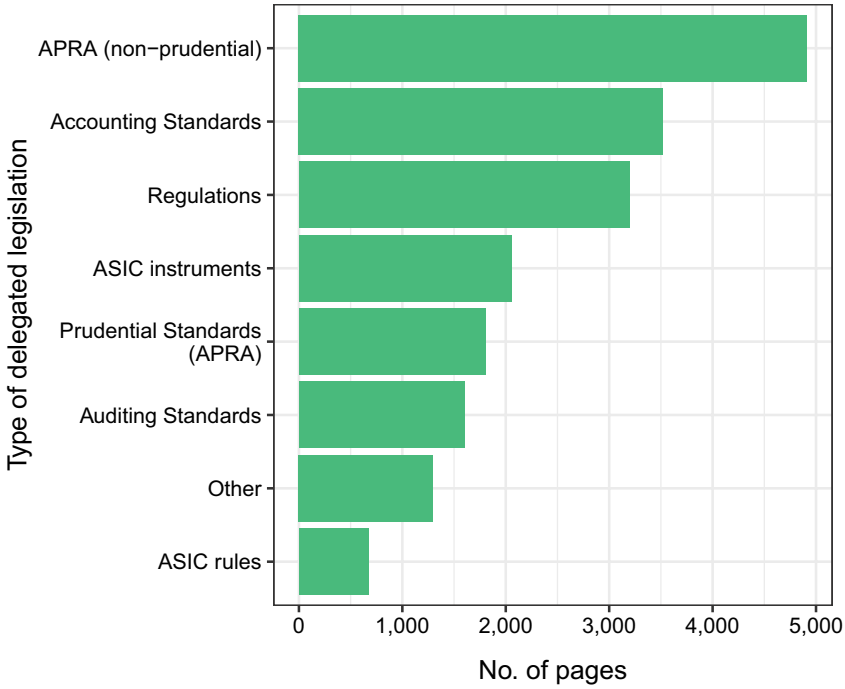
ASIC makes relatively little delegated legislation

6.16 ASIC makes surprisingly few of the legislative instruments regulating corporations and financial services, considering its central role in administering and enforcing key legislation such as the *Corporations Act* and *NCCP Act*. This underlines the extent to which the *Corporations Act* may not be fully realising the benefits of delegated legislation.

The stock of delegated legislation

6.17 **Figure 6.4** situates the total page length of ASIC's stock of legislative instruments relative to other types of corporations and financial services legislative instruments, including those made by APRA and other regulators. ASIC is the author of only around 14% of the pages in the stock of delegated legislation currently regulating corporations and financial services, representing 29% of legislative instruments. A total of 88% of ASIC instruments (75% of pages) are exemptions, notional amendments, or the prescription of detail. The balance (12%) of those instruments (25% of pages) are rules such as the derivative trade repository and market integrity rules. The ALRC and stakeholders have noted that notional amendments make the law more inaccessible and complex.[6]

Figure 6.4: Stock of corporations and financial services delegated legislation



6.18 ASIC is granted dozens of complex exemption and notional amendment powers under the *Corporations Act*. In contrast, APRA, the Australian Accounting Standards Board ('AASB'), and the Auditing and Assurance Standards Board ('AUASB') make all or most of their instruments under a narrow set of rulemaking

6 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.139]; Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [100]–[104]; Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [130], [133]–[135].

powers.[7] It is notable that the AASB, exercising powers under just one section of the *Corporations Act* and in relation to limited subject matter, administers a body of delegated legislation similar to ASIC's in size. This is despite the far broader and more diverse subject matter administered by ASIC in Chapter 7 of the *Corporations Act*. As Prototype Legislation B shows, many provisions of the Act would be amenable to more effective use of delegated legislation.

6.19 **Figure 6.4** also highlights the large stock of corporations and financial services regulations. This reflects the size of the *Corporations Regulations*, which accounts for 41% of the stock of all regulations across the Commonwealth statute book. The *Corporations Act* contains over 880 powers to make regulations, under which a much greater volume of regulations have been made over the past ten years than under the smaller set of regulation-making powers in the *NCCP Act, ASIC Act*, and APRA-related legislation.

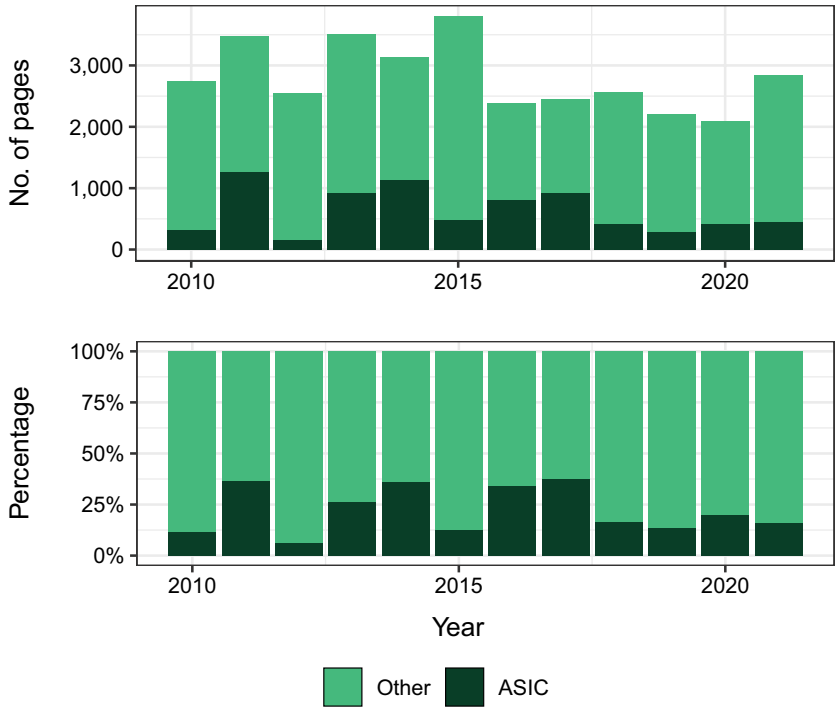
6.20 The *Corporations Regulations* are also exempt from sunsetting. Its size, at over 1,300 pages, is unusual given the general decline in the use of regulations across the statute book. Regulations have accounted for a dwindling minority of the flow of legislative instruments since 2010, and now represent just 19% of the stock of all pages of in-force delegated legislation.

The flow of delegated legislation

6.21 **Figure 6.5** shows the proportion of the flow of delegated legislation made by ASIC each year, and by other agencies responsible for corporations and financial services legislation.

7 The AASB and AUASB, exercising powers under ss 334 and 336 of the *Corporations Act* respectively, make consolidated thematic instruments with respect to legally binding accounting and auditing standards. APRA makes highly technical reporting standards for the collection of data from financial sector entities. These are made under s 13 of the *Financial Sector (Collection of Data) Act 2001* (Cth). APRA also makes prudential standards under sector-specific Acts, such as s 11AF of the *Banking Act 1959* (Cth) and s 230A of the *Life Insurance Act 1995* (Cth).

Figure 6.5: Flow of corporations and financial services delegated legislation



6.22 ASIC's small volume of delegated legislation contrasts with the general position across the Commonwealth statute book, in which only a quarter of legislative instruments were made by ministers or the Governor-General. The balance of the 23,407 legislative instruments made between 2010 and 2021 were made by others such as independent authorities and senior departmental staff.

Frequent amendment of primary legislation

6.23 Acts of Parliament related to the regulation of corporations and financial services have been more frequently amended than the delegated legislation under them. Between 2010 and 2021, 10% of all pages of the flow of legislative instruments related to corporations and financial services. In the same period, 21% of pages of all Acts of Parliament contained amendments to corporations and financial services Acts. This indicates that corporations and financial services primary legislation has been subject to a high degree of change, proportionately more than delegated legislation. The pace of change to primary legislation is particularly notable given many corporations and financial services legislative instruments contain notional amendments to Acts.

6.24 Corporations and financial services legislation accounts for a greater proportion of the flow of Acts than of delegated legislation, perhaps reflecting the greater parliamentary interest in this area of law-making. However, it likely also reflects the prescriptiveness of the *Corporations Act*, which accounts for many of the amendments to corporations and financial services Acts. Reforms to the *Corporations Act* are necessarily made through either amending Acts or notional amendments in legislative instruments. The *Corporations Act* is the sixth-most frequently amended Act of Parliament, with over six amending Acts on average per year since enactment.[8] OPC notes that 'tinkering' with Acts through frequently amending 'an Act, or a provision of an Act, can increase complexity over time'.[9] OPC suggests that appropriate use of delegated legislation may reduce the need for tinkering.[10] The data in this chapter is consistent with the possibility that delegated legislation can support the goal of achieving more 'durable' and less complex Acts,[11] particularly in the context of the *Corporations Act*.

6.25 The frequent amendments to corporations and financial services Acts, most notably the *Corporations Act*, in part reflect the inclusion of excessive detail. For example, the *Corporations Act* currently prescribes the contents of some application forms,[12] which is ordinarily a matter of detail set out in delegated legislation. At the same time, delegated legislation made under the *Corporations Act* includes major offences, civil penalties, and entirely new and unforeseen regulatory regimes.[13] Financial products and services disclosure is a particularly prescriptive area in the *Corporations Act*, and therefore has been subject to frequent notional amendments and exemptions, reflecting a flawed legislative hierarchy. Prototype Legislation B illustrates an alternative legislative hierarchy in which substantial detail related to disclosure appears in rules and a Scoping Order.

The Corporations Act lacks a coherent legislative hierarchy

6.26 The *Corporations Act* does not adopt a coherent legislative hierarchy in its placement of provisions in the Act, delegated legislation, administrative instruments, or regulatory guidance.

8 The only Acts more frequently amended are the *ITAA 1997*, *Social Security Act 1991* (Cth), *Income Tax Assessment Act 1936* (Cth), *Veterans' Entitlements Act 1986* (Cth), and *Social Security (Administration) Act 1999* (Cth).

9 Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [79].

10 Ibid [82].

11 Ibid [81].

12 See, eg, *Corporations Act 2001* (Cth) s 163. See also **Example 8.2** in **Chapter 8**.

13 See **Example 6.1** and **Example 6.2**.

The need to facilitate change through the legislative hierarchy

6.27 Rapid change is a feature of the *Corporations Act*. The flow of corporations and financial services delegated legislation since 2010 (33,708 pages) is double the current stock of delegated legislation (19,069 pages). In contrast, civil aviation-related delegated legislation has been more stable, with the stock of delegated legislation (21,214 pages) being significantly greater than the flow of delegated legislation over the past 12 years (14,166 pages). Health-related delegated legislation has experienced the most frequent change, with the flow of new delegated legislation (133,799 pages) far exceeding the stock (15,505 pages).

6.28 The legislative framework of Chapter 7 of the *Corporations Act* has not facilitated coherent change. Reforms to Chapter 7, particularly through proliferating notional amendments and conditional exemptions, have contributed to excessive complexity. In contrast, much of the change to health-related delegated legislation occurs in longer, consolidated, thematic legislative instruments, such as rules. These health-related instruments sit alongside their authorising Acts but do not appear as highly interconnected as Chapter 7 instruments, which often make little or no sense without close regard to the *Corporations Act*. The lack of a coherent legislative hierarchy means that

> Chapter 7 of the *Corporations Act* lacks an architecture that can adapt to and support changes in regulatory philosophies without generating significant complexity.[14]

6.29 Notional amendments, in particular, have come to take on substantial importance to the *Corporations Act* legislative scheme in managing change, resulting in a blurring of the roles of primary and delegated legislation. Notional amendments were originally envisioned as a tool for enhancing flexibility and 'fleshing out detail'.[15] Instead, as **Example 6.1** and **Example 6.2** show, notional amendments do far more than 'flesh out detail' and have resulted in parallel, often inconsistent, regulatory regimes.

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14 Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022) [5]. See also Nicholas Simoes da Silva and William Isdale, 'Risk and Reform in Australian Financial Services Law' (2022) 96 *Australian Law Journal* 408.

15 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [6.40], [14.179]. See, more recently, Explanatory Memorandum, Treasury Laws Amendment (Cost of Living Support and Other Measures) Bill 2022 (Cth) [4.181].

Example 6.1: Major new obligations in notional amendments

In 2017, ASIC used its notional amendment powers to ban 'flex commissions' in relation to credit contracts.[16] ASIC had found such commissions caused significant consumer harm.[17] The instrument contains new obligations, breach of which attract civil penalties of 2,000 penalty units. The use of notional amendments (rather than other legislative mechanisms) to implement such reforms is an example of the lack of a principled legislative hierarchy in the *Corporations Act*. As is often the case, notional amendments were the only tool ASIC had available to intervene — the legislative hierarchy was not designed to facilitate regulator-led reforms other than through complex notional amendments to the *Corporations Act*.

Example 6.2: Alternative regulatory regimes in notional amendments

Investor Directed Portfolio Services and Managed Discretionary Accounts are substantially regulated by regimes established through notional amendments.[18] These notional amendments do not simply 'flesh out detail' or flexibly tailor the rules in the *Corporations Act*: they largely supplant the provisions of the *Corporations Act*. The alternative regimes have existed outside the *Corporations Act* almost since its enactment.[19] The *Corporations Act* lacks a legislative architecture that can facilitate the development of new or tailored regulatory regimes without complex notional amendments, extensive conditional exemptions, or parliamentary amendments.

Complexity of delegated legislation under the Corporations Act

6.30 Arguably, much of the complexity of the *Corporations Act* stems from just two particular ways in which delegated legislation is used. First, delegated legislation notionally amends the Act and regulations. Secondly, a proliferation of law-making powers means delegated legislation is used in different ways by different law-makers.

16 *ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780* (Cth).

17 Regulation Impact Statement, *Flex commission arrangements in the car finance market* (2017).

18 See, eg, *ASIC Class Order — Investor Directed Portfolio Services Provided Through a Registered Managed Investment Scheme* (CO 13/762) (Cth); *ASIC Corporations (IDPS - Relevant Interests) Instrument 2015/1067* (Cth); *ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968* (Cth); *ASIC Class Order — Investor Directed Portfolio Services* (CO 13/763) (Cth).

19 For example, Managed Discretionary Accounts were first subject to a major new regulatory regime in 2004, through *ASIC Class Order — Managed Discretionary Accounts* (CO 04/194) (Cth). See also, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.159]–[7.162].

6.31 Such proliferating and incoherently designed powers mean that the public cannot reasonably anticipate:

- **who** will make particular rules (such as Parliament, ASIC, or a minister);
- **how** particular rules will be made (such as by amending Acts, conditional exemptions, or notional amendments); and
- **where** those rules will be located (such as in an Act, regulations, or in legislative instruments made by ASIC or a minister).

6.32 A particular reform might be implemented by any one or more of ASIC, Ministers, Parliament, or the Governor-General. The reforms might be implemented through parliamentary amendments, notional amendments, exemptions, or powers to make delegated legislation prescribing matters under the *Corporations Act*. The reforms might then be found in the *Corporations Act*, regulations, or one of the hundreds of other legislative instruments made under the *Corporations Act*.

Notional amendments in corporations and financial services law

6.33 The *Corporations Act* is unique in the extent to which it uses notional amendments. The ALRC has found that there are 82 legislative instruments currently notionally amending the *Corporations Act*,[20] which accounts for almost 42% of the 196 in force instruments containing notional amendments to a Commonwealth Act. These notional amendments are spread across 2,254 pages of delegated legislation. No other Commonwealth Act is affected by notional amendments to the same extent.

6.34 The ALRC's data confirms the complexity created by notional amendments. There are over 1,200 distinct notional amendments currently in force, affecting over 600 provisions of the *Corporations Act* and *Corporations Regulations*.[21] Over half of these notional amendments potentially affect all persons subject to the notionally amended provision, while over 20% of amendments affected a broad group of persons subject to the amended provision. Notional amendments are therefore not an issue affecting only a small group of people. Piecing together this 1,200 piece puzzle with the over 600 affected provisions is an enormous challenge and cost for businesses and legal professionals,[22] a point emphasised in several submissions responding to Interim Report A.[23]

6.35 People are liable to misinterpret the law if they fail to have regard to all relevant notional amendments. The ALRC has found that even commercial publishers appear

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20 This data builds on the analysis included in Interim Report A: Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.136]–[3.141].

21 Australian Law Reform Commission, 'Recommendation 18 — Notional amendments database' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Notional-amendments-database.xlsx>.

22 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.136]–[3.139].

23 See, eg, Stockbrokers and Financial Advisers Association, *Submission 19*; CPA Australia, *Submission 42*.

to struggle to identify or publish all relevant notional amendments in their annotated legislation.

6.36 Managing the stock of notional amendments is also a challenge for Treasury and ASIC, and can result in errors or inconsistencies among Acts and instruments. This reduces the overall quality of legislation and its navigability, and increases complexity.

Example 6.3: Making law gets harder when notional amendments exist

Section 923C was inserted into the *Corporations Act* in 2017 as part of reforms to financial advisers' professional standards.[24] The provision imposed restrictions on the use of the terms 'financial adviser' and 'financial planner'. The provision was to apply from 1 January 2019.[25] However, a design issue was identified in the legislation and a regulation was made to entirely replace s 923C through a notional amendment, commencing on 8 December 2018.[26] In October 2021, Parliament passed an Act that amended s 923C, including by inserting a new s 923C(9A).[27] The amendments to the *Corporations Act* and the notional amendments conflict, and raise questions as to which version of s 923C has the force of law.

Prioritising reform to notional amendments

6.37 Notional amendments are largely limited to specific areas of the *Corporations Act*. Disclosure provisions in Chapter 6D and Parts 7.7 and 7.9 account for 60% of all notional amendments in the *Corporations Act*. There are more than 96,000 disclosure-related words in these Parts of the *Corporations Act*. Disclosure comprises more than 12% of the words in the *Corporations Act*,[28] and 27% of the total words in Chapter 7 appear in Parts 7.7 and 7.9. Disclosure provisions would most immediately benefit from a reformed legislative hierarchy that addresses the source of notional amendments: prescription in the *Corporations Act*.

6.38 Reforms to disclosure provisions would benefit a wide range of persons involved in the creation, distribution, and maintenance of disclosure documents, in addition to regulators and consumer advocates who seek to ensure appropriate and effective disclosure. Reform would also create a legislative hierarchy that may

24 *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth).
25 *Corporations Act 2001* (Cth) s 1546C.
26 *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018* (Cth) reg 7.6.07A.
27 *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (Cth) items 74–5.
28 Excluding transitional provisions in Chapter 10 (as well as endnotes and tables of contents).

be more amenable to adaptation and experimentation as behavioural research into disclosure develops.[29]

6.39 The need for flexibility and frequent updating of disclosure regimes was recognised in the Wallis Inquiry, which recommended that the power to prescribe the content of disclosure documents be given to a regulator.[30] A better approach to law design and the use of the legislative hierarchy offers significant potential benefit in relation to disclosure provisions.

Example 6.4: Reducing notional amendments in disclosure

Moving the content of particular provisions, such as those relating to the form and content of disclosure documents, from the primary legislation into thematic rules made as a legislative instrument would allow frequently amended provisions to be easily adapted to different circumstances. This would avoid the need for the more than 170 notional amendments to disclosure provisions that currently appear in Sch 10A of the *Corporations Regulations*, and could accommodate other tailoring without recourse to notional amendments.[31] Dozens of other notional amendments, such as the 30 notional amendments to s 1017D that appear outside Sch 10A, could be replaced by product-specific rules. The ALRC proposes a move to rules rather than notional amendments in **Chapter 2** of this Interim Report.

Proliferating powers are peculiar to the Corporations Act

6.40 A notable feature of the *Corporations Act* is the number of powers to make delegated legislation it contains, which is significantly more than other Acts.

6.41 The more than 950 powers in the *Corporations Act* to make delegated legislation include:

- more than 880 regulation-making powers in the Act, with even more powers notionally inserted through the *Corporations Regulations*; and
- approximately 68 powers in the Act for ASIC to make delegated legislation, often in the form of 'exemption and modification' powers.

6.42 Proliferating powers to make delegated legislation have been accompanied by proliferating legislative instruments, which the ALRC identified as a cause of

29 See Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022), discussing how disclosure has sought to adapt to changing understandings of how consumers process disclosure documents. The existing framework has not appropriately facilitated this adaptation and the financial product and services disclosure regimes have become increasingly complex as a result.

30 Stan Wallis et al, *Financial System Inquiry* (Final Report, March 1997) 236.

31 See, for example, *Corporations Regulations 2001* (Cth) schs 10C–10E.

complexity in Interim Report A.[32] The 295 ASIC legislative instruments in force on 30 June 2021 were made under a total of 78 powers, 48 of which were in the *Corporations Act* or its related legislative instruments.[33]

6.43 ASIC legislative instruments are also unusually short in their length relative to other regulators' instruments. ASIC legislative instruments range in length from one page to 160 pages. A total of 275 ASIC legislative instruments are less than 20 pages in length. This length reflects the more confined purposes for which ASIC uses legislative instruments, such as to fix particular problems in the *Corporations Act* or to prescribe tailored regulatory regimes for classes of products and persons. ASIC's proliferation of short legislative instruments will likely persist so long as its powers in the *Corporations Act*, framed around notional amendments and exemptions, remain unchanged.

6.44 Moreover, many powers to make delegated legislation remain unused. For example, regulations are not currently in force under more than 300 available regulation-making powers in the *Corporations Act*. The ALRC identified approximately 500 powers that have been exercised over 1,000 times. However, more than 300 powers have been exercised just once. Just 10 powers account for a quarter of all analysed exercises of regulation-making powers. These largely relate to exemptions and notional amendments,[34] the scope of definitions and obligations,[35] and specific details of particular obligations,[36] as well as the general power to make regulations relating to transitional matters in s 1444. Identifying these frequently used powers also highlights areas of the *Corporations Act* that would most benefit from thematic rule-making powers, which would enable provisions to be directly (rather than notionally) amended in delegated legislation.

The consequences of proliferating powers

6.45 The *Corporations Act* is exceptional in both its number of powers and in how they are exercised. Many powers exist for very specific purposes, such as to vary a particular monetary threshold, specify the content of a particular definition, or specifically include a person in a particular provision. Other powers, most notably powers to make exemptions and notional amendments for entire chapters or parts of the *Corporations Act*, have far greater scope. Rule-making powers, though limited in number (fewer than a dozen), offer broader thematic scope than the numerous specific regulation-making powers, but are far narrower than notional amendment powers.

6.46 Though many powers go unused, users of the legislation must spend time determining whether they have been exercised. Users of the legislation must

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32 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.112]–[3.128].

33 For example, the *ASIC Market Integrity Rules (Security Markets) 2017* (Cth) contained several powers.

34 *Corporations Act 2001* (Cth) ss 155, 611, 1020G(1)(c).

35 Ibid ss 761A, 765A(1)(y), 761G(7)(a), 981B.

36 Ibid ss 951C(1)(c), 1017D(5)(g).

often navigate through dozens of ASIC legislative instruments and regulations to understand their rights and obligations in relation to specific subject matter. Reducing and consolidating powers to make delegated legislation under the *Corporations Act* would significantly reduce the complexity that flows from having such an interconnected Act. Enhanced resources for navigability, discussed in **Chapter 9** of this Interim Report, should also reduce complexity.

6.47 Less interconnected approaches to delegated legislation are apparent in regimes such as the *Navigation Act,* which provides that either regulations or AMSA Marine Orders may include provisions relating to key thematic areas.[37] For example, the *Navigation Act* provides that delegated legislation may be made in relation to broad subjects, such as hours of work and rest (s 58), payment of wages (s 59), food and water (s 61), the health of seafarers (s 65), accommodation (s 74), repatriation (s 76), and complaints about employment (s 77).[38] Delegated legislation made under these powers effectively operates as rules, because understanding their operation does not require extensive regard to the *Navigation Act*. Indeed, the *Navigation Act* has a clear legislative hierarchy: it contains no notional amendment powers and s 342(2) provides that Marine Orders that are inconsistent with the Act are 'of no effect to the extent of the inconsistency'.[39] The prescriptive detail in delegated legislation, generally made by AMSA through Marine Orders, is therefore often 'standalone'. In addition to enforcing the *Navigation Act*, AMSA also enforces the legislative instruments it creates.

6.48 Acts that make extensive use of delegated legislation relative to the enabling Act, such as the *Navigation Act*, *Financial Sector (Collection of Data) Act 2001* (Cth), and prudential provisions and standards under the *Banking Act 1959* (Cth), represent a fundamentally different legislative design from that seen in the *Corporations Act*.

The process of law design

6.49 Government and non-government stakeholders have observed to the ALRC that timelines for preparing legislation can significantly affect an Act's design quality and law design choices. While timelines for new policy measures are ultimately a matter for Government, the desire to progress measures quickly can increase legislative complexity and create subsequent problems. This section considers the impact of short timeframes, and the extent to which existing complexity of corporations and financial services law shapes design choices, such as the routine inclusion of powers to make notional amendments.

37 References to 'regulations' in the *Navigation Act* generally include AMSA marine orders: *Navigation Act 2012* (Cth) s 342.

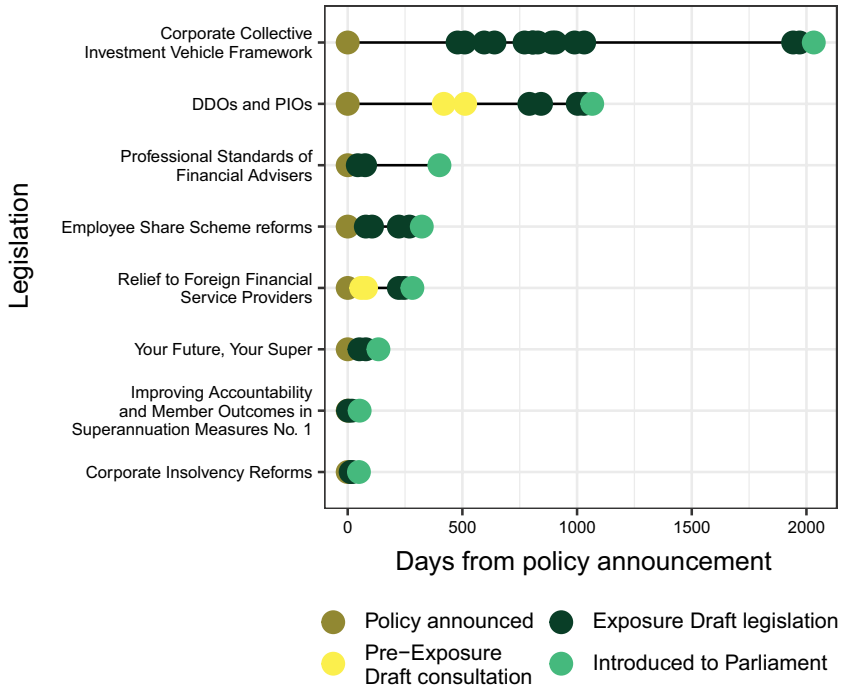
38 See also ibid ss 87, 91, 112.

39 In contrast, many ASIC legislative instruments change the effect of provisions of the *Corporations Act* through notional amendments.

Short timeframes and law design choices

6.50 **Figure 6.6** shows the timeline for selected new policy measures from announcement to a Bill being introduced in Parliament.

Figure 6.6: Timelines from announcement to Parliament



6.51 As is clear from **Figure 6.6** there are significant variations in the time taken or available to develop draft legislation or in which to undertake consultation. Some measures leave a short period of time for developing draft legislation or undertaking consultation after their announcement. Some measures leave far longer for development. Short timeframes appear to influence government departments' design choices.

Example 6.5: Your Future, Your Super reforms

A short time period between policy announcement and release of exposure draft legislation or introduction to Parliament may mean much detail is left to delegated legislation. The 39-page Treasury Laws Amendment (Your Future, Your Super) Bill 2021 (Cth) had less than two months from policy announcement to release of an exposure draft on 26 November 2020. The 50-page draft regulations, implementing the draft Bill's detail, was released on 28 April 2021.

Whether legislative hierarchy decisions in any area of regulation can be best consulted on and settled in under two months is questionable. The Treasury Laws Amendment (Your Future, Your Super) Bill 2021 (Cth) makes extensive references to the regulations for a range of very specific purposes, such as to establish the scope of provisions, specify formulas, and define terms. The Bill also grants APRA a range of administrative and legislative discretions. The design of these discretions and the hierarchy may have benefitted from a longer development period.

6.52 Consultees have noted that once exposure draft legislation has been prepared, it can be challenging to make significant changes, and any changes must be retrofitted to the existing draft. Departments and OPC may lack the resources to rewrite exposure draft legislation. A short timeframe for preparing an exposure draft can therefore have long-lasting impacts — law design appears to suffer from 'path dependency', in which early design choices limit the options available later in the legislation development process and after enactment.

Process and legislation issues

6.53 The ALRC has identified a range of regulations and ASIC instruments that seek to fix errors or unintended consequences in the law.[40] This section examines the prevalence of errors and unintended consequences in corporations and financial services law. These errors may indicate an Act has become too complex to administer, particularly within tight timelines and processes. Seeking to fix errors through notional amendments responds to the symptom (the error) rather than the cause (overwhelming complexity of the *Corporations Act*). Moreover, each notional amendment is itself an additional source of complexity.

6.54 Errors or unintended consequences may be a particular problem for quickly prepared Bills. For example, the Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016 (Cth) was prepared in less than a year, with just two

40 See, eg, *ASIC Corporations (Group Purchasing Bodies) Instrument 2018/751* (Cth); *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* (Cth); *ASIC Corporations (Parent Entity Financial Statements) Instrument 2021/195* (Cth).

months between announcement and exposure draft legislation. ASIC subsequently had to make

> minor technical amendments to the *Corporations Act* to address unintended consequences and to ensure the professional standards reforms apply as intended.[41]

6.55 These measures were introduced through a range of complex notional amendments.

6.56 The complexity and prescription of the *Corporations Act* means even measures developed over a longer period may quickly need to be notionally amended. For example, the new regime for design and distribution obligations was developed over almost three years before introduction to Parliament in 2021.[42] However, it has been notionally amended by three ASIC legislative instruments, to give effect to significant tailoring of the design and distribution obligation provisions for exchange traded products.[43] These were introduced shortly before or on commencement of the regime. It may have been preferable to locate more elements of the design and distribution obligations in delegated legislation, so ASIC could determine and amend the details as required, avoiding the need to notionally amend the *Corporations Act*.[44]

6.57 As **Example 6.6** and **Example 6.7** show, reliance on broad exemption and notional amendment powers to address unintended consequences has been a persistent feature of law-making under the *Corporations Act*. Most recent amendments to the *Corporations Act* include a power to make notional amendments. For example, reforms related to corporate collective investment vehicles included a new power to make notional amendments,[45] which was exercised immediately.[46]

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41 Explanatory Statement, *ASIC Corporations (Professional Standards—Transitional) Instrument 2018/894* (Cth) [2.2].

42 *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth) sch 1.

43 *ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784* (Cth); *ASIC Corporations (Design and Distribution Obligations — Exchange Traded Products) Instrument 2020/1090* (Cth); *ASIC Class Order — Relief for 31 Day Notice Term Deposits* (CO 14/1262) (Cth).

44 Several of the ASIC instruments purport to be temporary pending amendments to the *Corporations Act*. However, as **Example 6.6** shows, instruments intended to implement short term stop-gap measures often remain in place for years.

45 See s 1243A of the *Corporations Act*, as inserted by the *Corporate Collective Investment Vehicle Framework and Other Measures Act 2022* (Cth).

46 The *Corporations and Other Legislation Amendment (Corporate Collective Investment Vehicle Framework) Regulations 2022* (Cth) inserted Part 5D into Sch 10A of the *Corporations Regulations*. Part 5D notionally amends the *Corporations Act*.

Example 6.6: Exemptions and unintended consequences

Almost immediately after commencement of the *Financial Sector Reform Act 2001* (Cth), ASIC introduced six legislative instruments creating exemptions from the 'non-cash payment facility' definition, intending to 'deal with the unintended application' of the definition.[47] The exemptions persist to this day, and were remade in 2016.[48] While the 2016 exemptions were intended to be limited to three years, their expiry date has been repealed and the instrument is now due to sunset on 1 April 2026.

Example 6.7: Fixing errors in the law

A number of regulations and ASIC legislative instruments make notional amendments to fix errors in corporations and financial services legislation. For example:

- *ASIC Corporations (General Advice Warning) Instrument 2015/540* (Cth) fixes an incorrect cross-reference and replaces a reference to 'personal advice' with 'general advice' by notional amendments.
- *ASIC Corporations (AFSL Audit Opinion) Instrument 2015/586* (Cth) notionally 'makes the consequential amendment to regulation 7.8.13 that was missed when Division 4A was inserted in Part 7.8 of the Act'.[49]
- Regulation 7.9.15I of the *Corporations Regulations* notionally amends several cross-references in the *Corporations Act*,[50] which were rendered incorrect by another notional amendment in the regulations.

Notional amendments to fix errors can be long-lasting. For example, the text of s 1012G of the *Corporations Act* has remained unchanged for 18 years, however its content was replaced by a notional amendment in 2004.[51]

Offences and penalties in delegated legislation

6.58 The framing and role of offences and penalties is a key question in designing a legislative hierarchy. Flexible hierarchies often depend on delegating at least some offences and civil penalties. This section considers the current prevalence

47 See, for example, *ASIC Class Order — Travellers' cheques and confirmation of transactions* (CO 02/1075) (Cth). The Government recognised that these instruments were necessary to address the unintended consequences of the *Corporations Act*: Department of the Treasury (Cth), *Refinements to Financial Services Regulation* (Proposals Paper, May 2005) 31.

48 *ASIC Corporations (Non-Cash Payment Facilities) Instrument 2016/211* (Cth).

49 Explanatory Statement, *ASIC Corporations (AFSL Audit Opinion) Instrument 2015/586* (Cth) 1.

50 Regulation 7.9.15I 'amends the reference in subparagraph 1012IA(4)(b)(ii) from subparagraphs 1012G(3)(b)(i) and 1012G(3)(b)(ii) to subparagraphs 1012G(3)(c)(i) and 1012G(3)(c)(ii) respectively': Explanatory Statement, *Corporations Amendment Regulations 2005 (No. 5)* (Cth).

51 Ibid sch 4, item 1.

of offences in legislative instruments, the penalties imposed for breaches, and the extent to which corporations and financial services law is an outlier in this regard.

Offences in delegated legislation

6.59 The AGD Guide to Framing Offences recognises that it is sometimes appropriate for offences and civil penalties to be created in legislative instruments.[52] However, as **Table 6.1** below shows, offences in delegated legislation are concentrated in particular areas of Commonwealth law-making.

Table 6.1: Offences and penalties in delegated legislation by subject

Subject	Offences	Penalty provisions[53]	Median penalty	Average penalty
Agriculture, Food and Fisheries	199	233	10	13
Civil Aviation	1,643	1,802	50	45
Consumers, Markets, and Competition	8	128	300	369
Corporations and Financial Services	**61**	**105**	**60**	**964**
Crime and Security[54]	10	9	5	6
Defence	74	74	20	15
Environment and Heritage	215	281	20	41
Health	53	65	10	19
Industry, Energy, and Resources	83	138	50	120
Maritime	429	1,004	50	48
Public Administration, Legal System, and the Courts	126	127	5	8
Tax and Excise	2	84	30	28
Trade, Customs, Tariffs, and Excises	6	67	20	20

52 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 14, 27.

53 Penalty provisions include both offences and civil penalties, and may include offences that are not clearly expressed as such, but for which a penalty is specified. These offences may not appear in the 'Offences' column.

54 These are crime- and security-related legislative instruments that are not otherwise captured by another category. Most offences in legislative instruments appear in subject-specific legislation.

Subject	Offences	Penalty provisions[53]	Median penalty	Average penalty
Workplace Relations and Human Rights	NA	37	20	16
Other[55]	37	67	5–30	19–33
All legislative instruments	**2,956**	**4,223**	**50**	**88**

6.60 Among offences in delegated legislation analysed by the ALRC, more than half appear in civil aviation-related instruments, typically the *Civil Aviation Safety Regulations 1998* (Cth). Corporations and financial services legislative instruments contain just 2% of these offences. The very low percentage of offences can be contrasted with the very large and growing number of offences in the *Corporations Act*. Legislative instruments made under the *Corporations Act* rarely contain the type of rules to which offences may attach. In contrast, maritime and civil aviation instruments contain extensive rules, which complement obligations in primary legislation. The legislative framework for corporations and financial services would arguably be more principled and coherent if:

- the *Corporations Act* were less prescriptive, containing higher-level norm-based obligations and prohibitions, matched by appropriate (and relatively higher) penalties; and
- delegated legislation contained offences punishable by lower value fines.

Delegated legislation and the design of offences

6.61 It should be noted that not all offences for breach of provisions in delegated legislation will be created in the delegated legislation itself. Acts can provide that breach of a legislative instrument is an offence.[56] For example, s 949B of the *Corporations Act* creates an offence where a person does not comply with certain regulations. Similarly, delegated legislation may notionally amend an offence provision in an Act. Notional amendments are one complex way in which the substance of the offence can be contained in delegated legislation. The ALRC has identified over 1,200 notional amendments to the *Corporations Act*, many of which relate to offence and civil penalty provisions. Examples of offences created in various ways are provided in **Chapter 5**.[57]

55 Includes migration, foreign affairs, public service, communications and media, social security, aged care, housing, and superannuation.
56 See generally [5.23]–[5.27].
57 See [5.76]–[5.80].

Penalties in delegated legislation

6.62 The AGD Guide to Framing Offences suggests penalties for offences contained in delegated legislation should generally not exceed 50 penalty units for an individual and 250 penalty units for a body corporate.[58] Legislative instruments should not be able to create imprisonable offences.[59]

6.63 Data analysis suggests this guidance is generally followed across the statute book. However, financial services-related instruments are a notable exception, in having offences subject to higher penalty units. A total of 43% of penalty provisions in corporations and financial services instruments are subject to penalties above 250 penalty units, with a further 8.4% between 50 and 250 penalty units. Just 8% of offences across non-financial services delegated legislation are subject to penalties above 50 penalty units. Corporations and financial services delegated legislation also contains almost a third (29.7%) of all penalties in delegated legislation equal to or above 500 penalty units.

6.64 Corporations and financial services delegated legislation is an outlier in having high penalty unit offences. For example, reg 28LCC of the *National Consumer Credit Protection Regulations 2010* (Cth) includes a civil penalty of 5,000 penalty units.

6.65 Corporations and financial services legislation is also the only area in which imprisonment is imposed through delegated legislation. The *Corporations Regulations*, the *National Consumer Credit Protection Regulations 2010* (Cth), and two ASIC legislative instruments collectively provide for nine terms of imprisonment between six months and two years.[60]

6.66 Across all legislative instruments approximately 77% of penalty provisions appear in regulations, while the balance appear in other legislative instruments. The proportions are similar in corporations and financial services instruments.

Corporations and financial services penalties in Acts

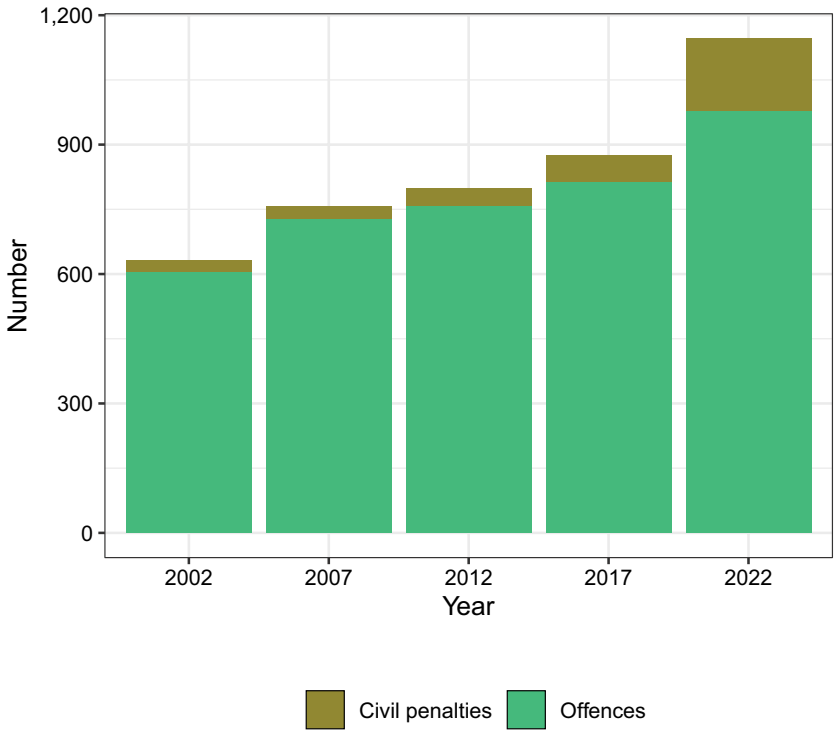
6.67 Beyond delegated legislation, corporations and financial services Acts contain a significant and growing body of offences and civil penalties, as **Figure 6.7** shows in relation to the *Corporations Act*.

58 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 45.

59 Ibid.

60 The ASIC legislative instruments are the *ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780* (Cth) and *ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834* (Cth). See generally [5.79]–[5.82].

Figure 6.7: Corporations Act offence and civil penalty provisions 2002–22



6.68 Corporations and financial services legislation includes some of the highest penalties across the Commonwealth statute book. Some penalties in the *Banking Act 1959* (Cth) are subject to a maximum of 1,000,000 penalty units (currently equivalent to $220 million) for large authorised deposit-taking institutions.[61] **Table 6.2** below shows a breakdown of the number of offences by maximum penalty available in the *Corporations Act*.[62]

6.69 As at 1 January 2022, offences under the *Corporations Act* attracted terms of imprisonment ranging from 3 months to 15 years and, in the absence of provision for imprisonment, maximum fines (for an individual) ranging from 10 penalty units (currently $2,220) to 3,000 penalty units ($666,000).

61 *Banking Act 1959* (Cth) s 37G.

62 This data does not include five offences where the penalty varies according to the particular contravention or the imprisonment depends on whether the breach is a first or second offence.

Table 6.2: Penalties for offences in the Corporations Act

Maximum penalty	Number of offences
Imprisonment	
<1 year	66
1–4 years	219
5–9 years	111
10–14 years	2
15 years	32
Fine (for an individual)	
<50 penalty units	281
50–99 penalty units	210
100–999 penalty units	34
≥1000 penalty units	5

Scrutiny of delegated legislation

6.70 Scrutiny of delegated legislation is typically led by the Delegated Legislation Scrutiny Committee, which scrutinises legislative instruments against a set of principles. The Committee corresponds with relevant ministers and agencies about any concerns it has, and records its concerns in an 'Index of Instruments'. The Committee has published guidelines on the technical scrutiny principles it applies when reviewing legislative instruments.[63] The Bills Scrutiny Committee separately scrutinises enabling provisions in Bills that grant powers to make delegated legislation.

6.71 The following data suggests there may be an increasing disconnect between the expectations of the Senate Scrutiny Committees and the law-making practices of Government departments and agencies. This may be a product of inadequate guidance on law design for departments to employ when drafting instruments, and to which they could refer when pre-empting or responding to the Committee's concerns. **Chapter 3** and **Chapter 4** discuss these issues in greater detail, and **Appendix E** offers an example of consolidated draft guidance that could support more consistent law-making.

63 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (2nd ed, 2022).

Concerns about the content of legislative instruments

6.72 Since 2014, the Delegated Legislation Scrutiny Committee has increasingly raised concerns about legislative instruments. **Table 6.3** shows the proportion of legislative instruments made in a given year that were subject to concerns raised by the Delegated Legislation Scrutiny Committee. As **Table 6.3** shows, ASIC instruments are subject to concerns less frequently than other corporations and financial services legislative instruments, and at a similar rate to all legislative instruments. The exception to this was in 2020, when ASIC produced a range of instruments relating to the COVID-19 pandemic. In that year, 37% of ASIC instruments were subject to Committee concerns, many relating to exemptions from, and notional amendments to, primary legislation. The lack of alternative tools available to ASIC through which to respond to the crisis appears to have necessitated such exemptions and notional amendments.

Table 6.3: Proportion of instruments for which scrutiny concerns raised

Year	ASIC instruments	Non-ASIC corporations financial services (CFS)	Treasury Non-CFS instruments	Non-Treasury and non-CFS Instruments
2014	5%	3%	1%	3%
2015	5%	8%	9%	8%
2016	3%	12%	6%	12%
2017	14%	15%	13%	15%
2018	10%	14%	6%	14%
2019	16%	11%	6%	12%
2020	37%	11%	14%	10%
2021	9%	16%	11%	17%
2014–21	**11%**	**11%**	**9%**	**11%**

6.73 Where concerns are raised, ASIC legislative instruments are often subject to quite significant concerns that may go to the design of the *Corporations Act* and its legislative hierarchy. For example, in the calendar years 2020–21, ASIC instruments accounted for a quarter of all legislative instruments where the Delegated Legislation Scrutiny Committee raised concerns as to whether the content of the instrument was more appropriate for Parliamentary enactment (Principle (j)).

6.74 In 2020, ASIC instruments accounted for six of the 13 instruments about which the Committee raised concerns relating to notional amendments, and two of 10 such instruments in 2021. ASIC was also the author of 13 out of 15 instruments

where concerns about exemptions from primary legislation were raised in 2020, and for one out of 12 in 2021. The Committee raised exemption-related concerns about one other corporations and financial services instrument in 2020 and regarding four in 2021.

Concerns about excessive delegation of power

6.75 Over the past two decades, there has been a general increase in the proportion of concerns reported by the Bills Scrutiny Committee that relate to the inappropriate delegation of legislative power (Principle (iv)). Between November 1998 and October 2001, 15% of concerns reported by the Committee related to inappropriate delegation.[64] This proportion increased to 27% in 2016,[65] 33% in 2020,[66] and 34% in 2021.[67] The increase for the 2020–21 period may be partly explained by legislation enacted in relation to the COVID-19 pandemic. Nonetheless, the Committee appears to have become increasingly concerned about whether the legislative hierarchy has been appropriately designed.

6.76 There has been a similar upward trend in concerns raised by the Delegated Legislation Committee during the past decade. In 2012–13, only 1% of concerns related to matters more appropriate for parliamentary enactment.[68] This increased to 20% in 2019[69] and 21% in 2020,[70] while a further 8% of concerns in 2020 related to delegated legislation that unduly impacted personal rights and liberties.[71]

6.77 Factors other than legislative practice may also have contributed to the increased prevalence of Committee concerns about 'policy' matters being included in delegated legislation — such as a change in the practice or composition of the Committees, or the particular circumstances of the COVID-19 pandemic. For example, in July 2021 there was a change in the Delegated Legislation Scrutiny Committee's mandated practice, allowing it to begin examining delegated legislation that is exempt from parliamentary disallowance.[72] The data nonetheless provides a useful insight into the Parliament's recent practice.

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64 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *The Work of the Committee during the 39th Parliament November 1998 – October 2001* (Parliamentary Paper No. 313, 27 June 2002) app III.

65 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2016* (Annual Report, March 2017) 10.

66 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2020* (12 May 2021) 10.

67 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2021* (30 March 2022) 10.

68 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Report on the work of the committee in 2012–13* (Report no. 118, 11 December 2013) 13.

69 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Annual Report 2019* (Annual Report, 17 June 2020) 17.

70 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Annual Report 2020* (Annual Report, 23 June 2021) 17.

71 Ibid.

72 Senate Standing Order 23 was amended to include paragraph (4A), which extends the Committee's terms of reference to instruments exempt from disallowance.

PART TWO: MAINTENANCE

7. Technical Simplification

Contents

Introduction

7.1 This chapter 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 in the law. The issues identified in this 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.[1]

7.2 Problems identified in this chapter reveal a need to improve processes for maintaining the law, and the extent to which the pace of reforms to corporations and financial services laws has created challenges for such maintenance. Consequently, longstanding issues, such as incorrect cross-references dating back decades, have remained unaddressed. This chapter identifies opportunities for immediate simplification as well as making the case for a long-term focus on the 'care and maintenance' of the law.

Maintaining the accuracy of the law

7.3 A key element of the care and maintenance of the law is a commitment to its accuracy. Processes for maintaining the law's currency have struggled with the pace of reforms and the scale of complexity, resulting in, for example, cross-references in Acts to repealed provisions. As this section demonstrates, processes for maintaining the quality and accuracy of legislation need to be enhanced. A failure to improve processes will result in the further accretion of spent and redundant provisions, particularly given the pace at which new amendments are made to corporations and financial services legislation.

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1 The recommendations in this chapter go to the question of how legislative complexity can be appropriately managed over time, as posed in the **Terms of Reference** for the Inquiry.

Spent and redundant law

7.4 In Interim Report A, the ALRC recommended the repeal of particular redundant definitions and spent provisions.[2] Redundant definitions are definitions that no longer apply or are unnecessary. Spent provisions are provisions that no longer have any relevant legal force.

7.5 The ALRC has identified over 100 spent provisions and cross-references to repealed provisions that are not critical to the legislative scheme. These spent provisions and cross-references cover hundreds of thousands of words in corporations and financial services Acts and legislative instruments, which could be removed. Repealing these provisions can bring real benefits.[3] As the Explanatory Memorandum to the Tax Laws Amendment (Repeal of Inoperative Provisions) Bill 2006 (Cth) explained, there is

> a cost associated with retaining inoperative material in the law because, to know that a particular provision is inoperative, at least involves reading it and … that can take some time.[4]

Recommendation 14 Redundant and spent provisions in corporations and financial services legislation should be repealed, including:

a. spent transitional provisions;

b. spent legislative instruments;

c. redundant definitions;

d. cross-references to repealed provisions; and

e. redundant regulation-making powers.

Recommendation 15 The Department of the Treasury (Cth) and the Australian Securities and Investments Commission should establish an ongoing program to:

a. identify and facilitate the repeal of redundant and spent provisions; and

b. prevent the accumulation of such provisions.

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2 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 460, and recs 2, 4, 6, 13.

3 Nicholas Simoes da Silva and William Isdale, 'Tidying Our House of Law: Bringing the Marie Kondo Philosophy to the Commonwealth Statute Book', *AUSPUBLAW* (16 February 2022) <www.auspublaw.org/blog/2022/02/tidying-our-house-of-law-bringing-the-marie-kondo-philosophy-to-the-commonwealth-statute-book>.

4 Explanatory Memorandum, Tax Laws Amendment (Repeal of Inoperative Provisions) Bill 2006 (Cth) [1.12].

7.6 The ALRC has published a database of spent and redundant provisions on its website.[5] This database is in addition to the redundant definitions identified in Interim Report A, which include terms that are used in only one provision, and commonly used terms defined for historical reasons that are no longer relevant.[6]

7.7 The following section provides examples of redundant provisions identified by the ALRC.

Example 7.1: Redundant declarative provision

Section 1484 of the *Corporations Act* was introduced in 2008 to ensure the validity of certain ASIC legislative instruments made in relation to short-selling. The provision is purely declarative and the ASIC instruments validated under the provision have been repealed or expired for over five years. The processes for repealing time-limited provisions appear to be lacking in corporations and financial services legislation.

Example 7.2: Redundant cross-references

The ALRC has identified approximately 30 cross-references to repealed provisions in the *Corporations Act* and *Corporations Regulations*. For example, s 258E(2) refers to s 738, which was repealed in 2020. Likewise, reg 2K.2.01 refers to s 262(5), which was repealed in 2010. The entire regulation, at 207 words, is redundant following the repeal of s 262(5). These redundant references appear to have been missed in the course of implementing new reforms. Workflow improvements, discussed at [7.9]–[7.11], could avoid these redundancies arising in the law.

5 Australian Law Reform Commission, 'Recommendation 14 — Redundant provisions database', <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Redundant-provisions-database.xlsx>. See also Australian Law Reform Commission, 'Recommendation 14 — Redundant provisions note' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Redundant-provisions.pdf>.

6 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 176, 198, 218, 225, 234, 561–8.

Example 7.3: Redundant legislative instruments

The ALRC has identified several ASIC legislative instruments that are redundant. The *ASIC Credit (AFCA transition) Instrument 2018/448* (Cth) ceased to have effect on 1 July 2019, while the notional amendments in ss 5, 6, 8, and 9 of the *ASIC Corporations (AFCA transition) Instrument 2018/447* (Cth) ceased to apply after 1 July 2019. The ALRC also identified *ASIC Class Order Emissions units: Relief for representatives (CO 12/794)* (Cth), which was recently repealed shortly before it was due to sunset. This is despite the whole instrument becoming redundant on 31 December 2012. It is possible that sunsetting is considered to be the default mechanism for repealing redundant legislative instruments, instead of having processes in place for identifying the redundancy of instruments.

Redundant transitional provisions

7.8 Transitional provisions are critically important — they grant rights and impose obligations during transition periods, and enable complex arrangements for transitioning between legislative regimes. Bennion recalls the story of several collapsed criminal trials following enactment of the *Magistrates' Courts Act 1980* (UK) after prosecutors had failed to have regard to transitional provisions that limited the application of new trial procedures.[7] Maintaining the currency of transitional provisions (including removing them when they become redundant) supports the navigability and accessibility of these provisions, ensuring readers need only have regard to relevant transitional arrangements.

Example 7.4: Redundant transitional arrangements

Part 10.2 Div 1 Subdiv B of the *Corporations Act* regulated the conduct of markets during the transition period after the commencement of the *FSR Act*. The provisions have been spent for over a decade and account for over 5,000 words in the *Corporations Act*. There appear to be very limited or no ongoing processes for repealing such redundant transitional provisions.

7 Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, 2009) 67–8.

Building processes for maintaining relevant legislation

7.9 The ALRC used computational processes to identify redundant provisions. This process involved writing and running a program to search corporations and financial services Acts for references to repealed Acts of Parliament and references to repealed provisions of the *Corporations Act*.[8] The ALRC also identified, computationally, all dates appearing in legislative provisions, the presence of which can indicate a time-limited provision. All results were reviewed manually to confirm redundancy.

7.10 OPC or Treasury could consider building on their existing processes for law improvement (see [7.13]) to identify and repeal redundant provisions. In addition to greater use of technological tools, such as those described above, this could include maintaining an internal register of transitional provisions and time-limited legislative instruments.

7.11 Time-limited provisions should also be clearly indicated in legislation, to promote easy identification and repeal. Treasury and ASIC internal guidance could also include the principle that sunsetting should not be treated as a replacement for maintaining the currency of legislative instruments.

Updating and achieving consistency

Recommendation 16 Corporations and financial services legislation should be amended to address:

a. unclear or incorrect provisions;

b. outdated notes relating to ‘strict liability’; and

c. outdated references to ‘guilty of an offence’.

7.12 A risk when administering legislation as large and rapidly evolving as the *Corporations Act* and *Corporations Regulations* is to focus on new reforms (the ‘flow’ of legislation) at the expense of updating existing provisions (the ‘stock’ of legislation’). As drafting practices evolve, and are reflected in new legislation, this can result in the existing body of legislation remaining unchanged. Inconsistency can slowly creep into the law, and will only be addressed through a commitment to ensuring the quality and currency of existing legislation. A focus on the stock of existing legislation would also enable the prompt identification of unclear or incorrect provisions.

8 This included the names of more than 8,800 repealed Acts of Parliament published on the Federal Register of Legislation.

7.13 Treasury operates a Law Improvement Program, 'which supports the regulatory stewardship of Treasury portfolio legislation and also includes Treasury's regular minor and technical amendments process'.[9] Treasury notes that minor and technical amendments

> remove anomalies, correct unintended outcomes and generally improve the quality of laws. Making such amendments gives priority to the care and maintenance of Treasury portfolio legislation.[10]

7.14 **Recommendation 16** suggests additional specific issues, discussed below, that could be addressed through Treasury's Law Improvement Program. Additionally, the process improvements discussed in this chapter may assist the Law Improvement Program. The ALRC website also includes additional resources for implementing this Recommendation.[11]

Unclear or incorrect provisions

7.15 The ALRC has identified instances of incorrect or unclear drafting. For example, there are two sections numbered 5C.2 in Part 5C of Schedule 10A. There are also multiple references to disclosure for 'managed investment schemes' in Chapter 6D, despite the removal of such schemes from Chapter 6D in 2004.[12] A broader problem is the frequent use of overlapping notional amendment numbers for the same financial products or services.[13] This makes notional amendments even more complex.

Outdated notes and references

7.16 Treasury uses its minor and technical amendments program to implement modern drafting practices in Treasury legislation. Implementing **Recommendation 16** would see the further adoption of modern drafting standards in corporations and financial services legislation.[14]

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9 Department of the Treasury (Cth), 'Improving Corporations and Financial Services Law' (24 August 2022) <https://treasury.gov.au/consultation/c2022-310544>.

10 Explanatory Memorandum, Treasury Laws Amendment (2021 Measures No. 5) Bill 2021 (Cth) [3.3].

11 Australian Law Reform Commission, 'Recommendation 16 — Drafting improvements note' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Drafting-improvements.pdf>.

12 *Corporations Act 2001* (Cth) ss 708(13)(b), 710(1) item 1, 710(2)(b).

13 See, eg, Sch 10A item 8.1 of the *Corporations Act*, which inserts ss 1017D(9)–(17) for retirement savings accounts, and Schedule 10A item 13.1, which inserts the overlapping ss 1017D(8)–(9), also for retirement savings accounts.

14 Explanatory Memorandum, Treasury Laws Amendment (2021 Measures No. 5) Bill 2021 (Cth) [3.5].

Example 7.5: Outdated note

OPC advises against the inclusion of the following note in Acts: 'For strict liability, see section 6.1 of the Criminal Code'.

OPC states that such a note 'must not be included in new offence provisions and should, wherever practicable, be removed from existing offence provisions'.[15]

There are over 300 instances of this note in corporations and financial services legislation.

7.17 In addition to the above example, the *Corporations Act* should be amended to replace all references to a person being 'guilty of an offence' with, as the case may be, 'commits an offence' or 'commit an offence'. Such amendments would be consistent with OPC guidance.[16] Removing references to 'guilty of an offence' would promote consistency in drafting and support the identification of offence provisions across corporations and financial services legislation. The vast majority of offence provisions currently use the 'commits an offence' phraseology, with approximately 50 references to 'guilty of an offence' in the *Corporations Act*. The phrase appears in a limited number of provisions in other corporations and financial services Acts.[17]

15 Office of Parliamentary Counsel (Cth), Drafting Direction 3.5, 'Criminal law and law enforcement' (Document release 4.0, June 2020) [18].

16 Ibid [15].

17 See, eg, the *SIS Act*, where 'guilty of an offence' appears on nine occasions.

8. Simpler Law Design

Contents

Introduction

8.1 In this chapter, the ALRC makes two recommendations and two proposals to reduce the complexity of corporations and financial services legislation through simpler approaches to law design. A key theme identified in this Inquiry is the extent to which the *Corporations Act* and its legislative framework is unnecessarily complex. Unnecessary complexity often stems from poor law design choices that do little to help users understand their rights and obligations under the law, hindering compliance.

8.2 Treasury has undertaken a number of reform initiatives in recent years, such as the Modernising Business Registries and Modernising Business Communications programs. These will result in simpler provisions in the *Corporations Act.* Nevertheless, there remain many instances where unnecessarily complex law design could be simplified, so that the same policy outcomes are achieved in a simpler way.

8.3 The ALRC has applied the following principles in suggesting alternative law design:

a. Prescriptive detail (such as requirements for the form and content of documents) should be located in delegated legislation rather than primary legislation, or, in some instances, should rely on administrative discretion rather than being set out in legislation at all.

b. The wording of similar or identical types of provisions should be as consistent as possible, as this helps the readability and computer-assisted searchability of legislation.

c. Notional amendments, whether in regulations or ASIC legislative instruments, are a very complex law design tool and hinder the readability and findability of the law. Notional amendments should be minimised in favour of textual amendments.[1]

Specific complex provisions

8.4 A range of *Corporations Act* provisions are unnecessarily complex and could be simplified while achieving the same policy objectives. These provisions are often poorly designed and encumbered by excessive prescription or inconsistency. This section provides a high-level overview of simplification measures identified in **Recommendation 17**, as well as examples of how these could be implemented. Resources available on the ALRC website contain detail on implementing the Recommendation.[2] The subject matters identified for simplification in this section are not exhaustive but reflect areas in which the ALRC has conducted thorough analysis.

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

a. the prescribing of forms and other documents;

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

c. the publication of notices and instruments;

d. conditional exemptions;

e. infringement notices and civil penalties;

f. terms defined as having more than one meaning;

g. definitions containing substantive obligations; and

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

8.5 In summary, **Recommendation 17** envisages the following reforms:

- **The prescribing of forms and other documents**: Provisions that prescribe the form and content of documents should be made consistent and less prescriptive, with a preference for principled obligations, delegated legislation, or non-legislative templates.

1 The proposed legislative model, discussed in **Chapter 2**, seeks to address the causes of notional amendments and thereby render them unnecessary.

2 Australian Law Reform Commission, 'Recommendation 17 — Unnecessary complexity note' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Unnecessary-complexity.pdf>.

- **The naming of companies, registrable Australian bodies, foreign companies, and foreign passport funds**: The extensive and prescriptive provisions in the *Corporations Act* and *Corporations Regulations* that determine when a name is 'available' should be replaced by clearly bounded ASIC discretions, with details left to administrative guidance and practice.
- **The publication of notices and instruments**: References to publishing in the Gazette should be replaced with either:
  - a requirement to make the notice or instrument as a legislative or notifiable instrument, as appropriate; or
  - a requirement to publish the notice or instrument on the publication website established under reg 5.6.75 of the *Corporations Regulations*.[3]
- **Conditional exemptions**: Provisions that permit ASIC to impose conditions on an exemption should be standardised, including so that all such provisions specify a consequence for breach of a condition. All provisions that permit exemptions should also ordinarily permit ASIC to impose conditions.[4]
- **Infringement notices and civil penalties**: The *Regulatory Powers (Standard Provisions) Act 2014* (Cth) infringement notice framework provisions should be adopted to standardise the various infringement notice regimes in corporations and financial services legislation. The civil penalties architecture could also be simplified by applying the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) civil penalty framework provisions (see also **Proposal B17**).
- **Terms defined as having more than one meaning**: Definitions should be consistent so that each word and phrase is used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act.[5] Interim Report A identified several defined terms that take on multiple meanings in the *Corporations Act*, such as 'property' and 'rules'.[6]
- **Definitions containing substantive obligations**: Definitions should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes.[7] Interim Report A identified several defined terms that include substantive obligations.[8] These included the definitions of 'special resolution' and 'extraordinary resolution' in s 9 of the *Corporations Act*.
- **Definitions that contain the phrase 'in relation to'**: As highlighted in Interim Report A, definitions that incorporate the phrase 'in relation to' can be difficult

3 Australian Securities and Investments Commission, 'Published Notices' <https://publishednotices.asic.gov.au/>.

4 As discussed in Interim Report A, conditional exemptions are a complex form of lawmaking: Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.55]–[10.58]. In this Interim Report, the ALRC has proposed a legislative model that would reduce the need for conditional exemptions. Nonetheless, conditional exemptions are unlikely to be eliminated, and so it is important to ensure that the provisions that authorise them are consistent and as simple as possible.

5 Ibid [5.5]–[5.34].

6 Ibid.

7 Ibid [4.85], [4.96]–[4.106].

8 Ibid.

to interpret.[9] Instead, it is often simpler and clearer to illustrate the use of the defined term in context within the definition itself.

8.6 On 24 August 2022, Treasury commenced consultation on exposure draft legislation that would implement aspects of the definitions-related elements of **Recommendation 17**.[10] Overall, the draft legislation would reduce the complexity of definitions in corporations and financial services laws.

Approaches to better law design: some examples

8.7 This section provides examples of unnecessary complexity and how it might be reduced.

Excessive prescription

8.8 Excessive prescription can cause unnecessary complexity, and can be dealt with in at least three ways.

8.9 First, sole reliance could be placed on principle-based provisions. This could be achieved either by:

- replacing excessively prescriptive provisions with more principle-based provisions; or
- repealing any excessively prescriptive provisions that operate alongside, or under, principle-based provisions that already exist in relation to particular subject matter.

8.10 Secondly, excessively prescriptive provisions in an Act can be moved into delegated legislation. In particular, provisions that prescribe in great detail the manner in which another provision must be complied with may be more appropriately placed in delegated legislation. For example, many provisions related to the form and content of PDSs for financial products are found in delegated legislation, accompanied by more principled obligations in the *Corporations Act*. However, this approach is inconsistently applied and the Act still contains very prescriptive requirements for PDSs.

9 Ibid [5.49]–[5.81].

10 Exposure Draft, Treasury Laws Amendment (Measures for consultation) Bill 2022: ALRC Financial Services Interim Report.

Example 8.1: Principled publication

A recent Bill (which lapsed with the dissolution of Parliament in April 2022) would have replaced prescriptive provisions related to the publication of certain notices under the *Corporations Act* with a principled obligation.[11] Under the new provisions, notices were to be published 'in a manner that results in the notice being accessible to the public and reasonably prominent'.[12] This more principle-based standard could be overridden by ASIC making a legislative instrument that provided for a more prescriptive form of publication.[13]

8.11 Thirdly, greater reliance could be placed on administrative discretion. It can be argued that some provisions are unnecessarily prescriptive and should not exist in law at all. Decision-makers could, for example, be given greater discretion to assess inappropriate company names or determine the content of documents (see **Examples 8.2** and **8.4**). Prescription in legislation as to the manner and form of a document is desirable when a failure to comply with the manner and form of the document would cause harm and carry legal consequences. It may be beneficial, for example, to prescribe in a legislative instrument the content of a consumer disclosure document that seeks to standardise the form of disclosure when failure to comply is an offence.[14] But the form of many documents, or other types of engagement with regulators, arguably do not need legislative prescription.

Example 8.2: What's in a name?

The provisions relating to the naming of bodies under the *Corporations Act* are unnecessarily complex. For example, sch 6 to the *Corporations Regulations* contains highly prescriptive rules for determining whether a name is 'identical' to that of another body. In addition, sch 6 includes a long list of words and phrases that names cannot contain, or can only contain in certain circumstances. This list is so prescriptive as to prohibit use of names such as 'Sir Donald Bradman'.

This approach to rules for naming means that, while the New Zealand company naming provisions contain just 1,130 words in six sections and one regulation, the Australian naming provisions contain over 5,000 words in more than 17 sections, four regulations, and an entire schedule to the *Corporations Regulations*.

11 See Treasury Laws Amendment (Modernising Business Communications) Bill 2022 (Cth) sch 10 items 10, 12, 14.

12 See, eg, ibid sch 3 item 14 (which proposed to insert s 601CLA(1)(a) into the *Corporations Act*).

13 See, eg, ibid (which proposed to insert s 601CLA(1)(b) into the *Corporations Act*).

14 See, for example, the information statement that must be given by providers of add-on insurance products under s 12DP of the *ASIC Act*. This statement is prescribed in a legislative instrument.

Overall, the naming provisions should be simplified by granting ASIC,[15] which must already decide whether to approve a company name, a discretion to reject names on the basis of certain factors, rather than on the basis of rules in the Act and regulations as to whether a name is 'available'. For example, principle-based provisions that currently appear in the regulations could be moved to the *Corporations Act*, including ASIC's discretion to reject offensive names.[16]

A principle-based discretion for ASIC to reject misleading names could also prevent the need for the prohibition on use of specific words, such as those that indicate the presence of a connection that does not exist.[17] ASIC could also issue guidance requiring that use of certain phrases needs the consent of certain persons.[18] The readability, consistency, and flexibility of the legislation could be enhanced by appropriate discretions in an area where there is limited risk of administrative overreach.[19]

The use of appropriately constrained and legislatively guided administrative discretion can, as former First Parliamentary Counsel Peter Quiggin PSM KC has suggested, 'take the place of a substantial amount of detailed law on how to work out a particular matter'.[20]

Form and content of documents

8.12 The form and content of documents is an area in which over-prescription, and other poor law design choices, can be addressed. More than 150 provisions in the *Corporations Act* require that documents be in a certain form and contain certain content. Various approaches are taken, with differing degrees of prescriptiveness and an overall lack of consistency.

8.13 Provisions in the *Corporations Act* relating to the form and content of documents should be amended to:

a. standardise provisions so that it is clear when a document must be given in a particular form; and

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15 ASIC will, before July 2026, cease to have responsibility for names of companies and other entities under reforms in the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth). The Registrar will take over as the responsible person for hundreds of provisions of the *Corporations Act*. The Registrar is currently the ATO: *Commonwealth Registers (Appointment of Registrars) Instrument 2021* (Cth) s 6.

16 *Corporations Regulations 2001* (Cth) sch 6 item 6203(1).

17 Thereby replacing Sch 6 Parts 2 and 3 of the *Corporations Regulations*.

18 Thereby replacing Sch 6 Parts 4 and 5 of the *Corporations Regulations*.

19 Residual risks can be addressed, as is already the case, through the use of remedies such as Administrative Appeals Tribunal review and judicial review.

20 Peter Quiggin, 'The Spectrum of Drafting — from Black Letter to Coherent Principles' in Graeme Cooper (ed), *Executing an Income Tax* (Australian Tax Research Foundation, Conference Series No 25, 2008) 59, 62.

b. reduce the degree of prescription in the Act and delegated legislation as to the form and content of documents, and rely instead on principled obligations, delegated legislation, or non-legislative templates published by ASIC on its website.

Example 8.3: Standardisation improves navigability

There are inconsistencies in where prescription as to the form of documents is expressed in corporations and financial services legislation. While many provisions of the *Corporations Act* state expressly that documents be in a 'prescribed form',[21] this is not always the case. For example, s 446A(5)(a) does not indicate that the notice required under that provision must be in a prescribed form. Instead, a person must have regard to reg 1.0.03A of the *Corporations Regulations* to identify that the notice in s 446A(5)(a) be in a particular form.

Additional complexity appears in Chapter 7 of the *Corporations Act*. In this Chapter, s 761A provides that 'lodge with ASIC' means 'lodge with ASIC in a prescribed form' where regulations so prescribe. Regulation 1.0.05A then prescribes that all references to 'lodge with ASIC' mean 'lodge with ASIC in a prescribed form'. The definition 'lodge with ASIC' is therefore effectively redundant, and all references to 'lodge with ASIC' effectively mean 'lodge with ASIC in a prescribed form'.

Standardising the approach, such that all provisions requiring a document to be in a prescribed form are clearly indicated in the *Corporations Act*, would improve readability and reduce the extent to which the *Corporations Act* relies on interactions with delegated legislation. Partial implementation of this reform is being introduced by the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth). This Act amends several provisions in the *Corporations Act* that do not presently indicate that a document must be in a prescribed form, to instead clearly indicate the document must meet any requirements in the 'data standards', a type of delegated legislation.

Implementation of the ALRC's suggested simplification would result in the provisions listed in regs 1.0.03A and 1.0.03B of the *Corporations Regulations* that are not affected by the registries modernisation reforms, such as s 446A(5)(a), being amended to clearly indicate that documents must be in a prescribed form. Additionally, all references to 'lodge with ASIC' in Chapter 7 could be replaced with 'lodge with ASIC in a prescribed form', and the definition of 'lodge with ASIC' in s 761A could be repealed, along with reg 1.0.05A.

8.14 As **Example 8.4** shows below, alternative law design approaches to prescribing the content of forms could also result in simpler and less prescriptive legislation.

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

Example 8.4: Excessive prescription in relation to documents

Historically, the *Corporations Act* and its delegated legislation have been highly prescriptive in relation to the form and content of documents. Government has recently moved to make the *Corporations Act* more principled and to use delegated legislation or administrative discretion to prescribe how and when information must be given under provisions of the *Corporations Act*. This trend has recently culminated in the passage of the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth), which uses new 'data standards' made by the Registrar to replace various 'prescriptive rules in primary legislation that are not uniform, technology neutral or governance neutral'.[22] Among other things, data standards can prescribe 'the manner and form in which … information is given to the Registrar'. This reform will commence on or before 1 July 2026.[23]

The principles that underlie the registries modernisation reforms could be extended more broadly to reduce the prescriptiveness of other provisions. In particular, the principle that Acts should not contain 'prescriptive rules' in relation to the form and content of documents could be extended to situations where a document or other information must be given to ASIC or another person. Moreover, some prescription as to the form and content of documents may not require prescription in legislation at all, and could be left instead to administrative instruments such as templates. For example, the prescribed form for applications under s 601DA of the *Corporations Act* is provided by ASIC Form 410, published on its website. Likewise, other Acts deal with application forms by giving discretion to agencies receiving the forms, who publish templates on their websites. For example, many social security forms must be 'in a form approved by the Secretary'.[24] Section 908BD of the *Corporations Act* adopts a similar approach in allowing ASIC to approve the form of applications for a benchmark administrator licence 'in writing'. Sometimes legislation prescribing the form and content of documents is unnecessary, and administrative instruments can suffice.

22 Explanatory Memorandum, Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 (Cth) [1.30].

23 *Treasury Laws Amendment (2022 Measures No. 1) Act 2022* (Cth) sch 4 pt 1. A Proclamation can specify a commencement date before 1 July 2026.

24 See, eg, *Social Security Act 1991* (Cth) ss 957C(2), 1061ZZGC.

Offence and civil penalty structure

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.

8.15 At present, the approach adopted in the *Corporations Act* to creating offences and civil penalties is more complex than in many other Commonwealth Acts. **Proposal B17** offers a simpler approach to law design when creating and identifying offence and civil penalty provisions in the *Corporations Act*. The proposal would mean that all offences and civil penalties in the *Corporations Act* would be clearly identified in the provision containing the offence or civil penalty. This would align the identification of offences and civil penalties in the *Corporations Act* with the approach in other corporations and financial services Acts. It would also eliminate the need for users of the legislation to qualitatively assess whether breach of certain provisions is an offence under the general offence provision in s 1311(1) of the *Corporations Act*.

Existing architecture for identifying offences and civil penalties

8.16 Offences are created and identified in the *Corporations Act* in a number of ways. These do not always operate consistently.

8.17 Section 1311(1) provides that (unless otherwise stated) breach of *any* requirement or prohibition in the *Corporations Act* is an offence under that section. However, s 1311(1A) carves out a large part of the *Corporations Act* from the general operation of s 1311(1). It provides that, for specified parts of the *Corporations Act*, including Chapter 7, an offence is created under s 1311(1) only if a penalty for the provision is listed in sch 3. Schedule 3 also lists penalties for some of the offences created by the general operation of s 1311(1) but not others.[25] Throughout the *Corporations Act*, some sections have notations to indicate that contravention of the section is made an offence by the operation of s 1311(1), but this is not adopted universally.

8.18 Some parts of the *Corporations Act*, including Chapter 7, create offences in specific sections,[26] and the penalties for some, but not all, of these offences are listed in sch 3.[27]

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25 For example, Part 2M.4 of the *Corporations Act* falls under the general provision of s 1311(1), but penalties for offences under that Part are listed in Sch 3. See, for example, s 324BA and 37 additional provisions in Part 2.4M that are listed in Sch 3.

26 See, eg, *Corporations Act 2001* (Cth) pt 7.9 div 7 subdiv A.

27 For example, the penalties for offences created under s 1020AI(3), (5), and (7) of the *Corporations Act* are included in sch 3, while the penalties for ss 198G, 422C(5), 422D(2), and 453F(2), are not listed in sch 3.

8.19 While sch 3 lists a large number of the offence provisions under the *Corporations Act*, it is not comprehensive. By the operation of s 1311F, an offence may also be created without a penalty being specified.[28] It is, therefore, very difficult to identify comprehensively the offence provisions within the *Corporations Act*.

8.20 In contrast to offences, civil penalty provisions under the *Corporations Act* are easier to identify. As discussed in **Chapter 5**, an obligation or prohibition attracts civil penalty liability if it is listed in s 1317E(3). Each relevant provision has a notation directly underneath the section alerting readers to the fact that it is a civil penalty provision under s 1317E. The ALRC considers that this note-based approach is also unnecessarily complex when compared to alternative law design approaches in other Acts, where the civil penalty is clearly created in the provision itself. For example, the *NCCP Act* provides that a civil penalty provision is any provision under which 'the words "civil penalty" and one or more amounts in penalty units are set out at the foot of the subsection (or section)' or another provision identifies 'that the subsection (or section) is a civil penalty provision'.[29] The *Regulatory Powers (Standard Provisions) Act 2014* (Cth) also offers a simpler law design approach, and one that is standard for a number of Commonwealth Acts.

Proposed reforms

8.21 The ALRC proposes a model in which:

- Provisions that attract an offence or civil penalty are drafted to clearly identify that breach of the provision is an offence or may attract a civil penalty.
- All offence and civil penalty provisions clearly specify the consequences of breach, whether pecuniary or otherwise.
- Civil penalty provisions identify whether they are a corporation/scheme civil penalty provision, financial services civil penalty provision, or neither.
- A complete list of all offences and civil penalties is produced and contained in the *Corporations Act* or maintained outside the Act itself, perhaps by ASIC under **Recommendation 19**.

8.22 The ALRC did consider whether the offence architecture in the *Corporations Act* should adopt a similar design to the architecture used for civil penalties. For example, sch 3 could be converted into a comprehensive and legally definitive list of all offence provisions in the *Corporations Act*, and the penalties they attract. This is the effect of the table in s 1317E(3) for civil penalty provisions.

8.23 However, offences and civil penalties are a critical feature of legislation. Clearly identifying offence and civil penalty provisions should therefore be a priority. The *Corporations Act* is unusual in using a schedule to identify most offences. The

28 In practice this only applies to provisions not carved out of s 1311(1) of the *Corporations Act* by s 1311(1A).

29 *National Consumer Credit Protection Act 2009* (Cth) s 5.

approach of using a definition, ('civil penalty provision' in s 1317E), to list all civil penalties is also unnecessarily complex.

From 'notional' to 'actual'

Recommendation 18 Generally applicable notional amendments to corporations and financial services legislation should be replaced with textual amendments to the notionally amended legislation.

8.24 Notional amendments are perhaps the most unnecessarily complex law design feature in corporations and financial services legislation. The *Corporations Act* and *Corporations Regulations* are subject to more than 1,200 distinct notional amendments. The proposed legislative model would see the elimination of notional amendments, which would deliver a simpler legislative framework and hierarchy. However, so long as notional amendments remain a feature of corporations and financial services legislation, Treasury should continually review notional amendments with a view to replacing them with textual amendments as appropriate.

8.25 The ALRC has identified over 500 notional amendments of general application that could be considered for consolidation into the text of the provisions they notionally amend, or otherwise consolidated into the *Corporations Act*.[30] Consolidation would clarify the meaning and effect of the legislation and remove a significant burden on users, who currently must identify and comprehend notional amendments across hundreds of regulations and other legislative instruments. In the longer term, if the proposed legislative model were adopted, some of these consolidated provisions might appropriately be replaced with simplified provisions or delegated legislation in the form of rules.

Reducing notional amendments

8.26 As stakeholders have commented throughout this Inquiry, notional amendments in legislative instruments make the law deeply inaccessible.[31] A person reading the *Corporations Act* or *Corporations Regulations* cannot be confident that the provision they are examining has effect as it is written. The provision may have been notionally omitted or amended, or an additional provision may have been inserted. Such changes may apply only in certain circumstances, or may apply universally.

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30 See Australian Law Reform Commission, 'Recommendation 18 — Notional amendments database' <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Notional-amendments-database.xlsx>.

31 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.139]; Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [100]–[104]; Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [130], [133]–[135].

What's the problem with notional amendments?

Notional amendments mean that the text of an Act or legislative instrument may not reflect its full legal effect. For example, s 912CA of the *Corporations Act* has not had effect in the form it appears since 2009, when it was replaced by amendments in reg 7.6.08C of the *Corporations Regulations*. The notionally amended section provides that regulations can require information be given to APRA, whereas the section as it appears in the *Corporations Act* provides that information be given to ASIC. Similarly, s 708(8)(c) has been notionally amended by reg 6D.5.02 such that a reference to '6 months' in the Act no longer applies and the actual period is '2 years'. The Act's clear textual meaning no longer applies, and users of the legislation must be aware of the relevant notional amendments to understand the effect of the law.

8.27 The ALRC has developed a database of all notional amendments contained in the *Corporations Regulations* and ASIC legislative instruments. The database provides the first comprehensive picture of over 1,200 individual notional amendments to the *Corporations Act*. These notional amendments affect over 350 provisions. Developing the database has highlighted opportunities for targeted reforms to replace selected notional amendments with textual amendments to the legislation they notionally amend.

8.28 Overall, the ALRC has identified at least 100 notional amendments that could be immediately consolidated into the *Corporations Act* or *Corporations Regulations*. Undertaking this consolidation would see the repeal or substantial shortening of several ASIC legislative instruments and dozens of regulations, and would significantly improve the findability and readability of the law in relation to these amended provisions. However, consolidation of notional amendments should not function as a substitute for fundamental reforms to the legislative hierarchy under the proposed legislative model.

Example 8.5: Notional amendments that should be consolidated

APRA has made various longstanding notional amendments to the *Superannuation Industry (Supervision) Regulations 1994* (Cth).[32] The Government could replace these notional amendments with textual amendments by directly amending the regulations.

32 *Superannuation Industry (Supervision) Modification Declaration No 2 of 2007* (Cth); *Superannuation Industry (Supervision) Modification Declaration No 3 of 2007* (Cth); *Superannuation Industry (Supervision) Modification Declaration No 1 of 2008* (Cth); *Superannuation Industry (Supervision) Modification Declaration No 1 of 2014* (Cth); *Superannuation Industry (Supervision) Modification Declaration No 1 of 2015* (Cth).

Wider law design choices

8.29 Corporations and financial services legislation is subject to law design choices made for the broader statute book, some of which may be unnecessarily complex. In particular, the ALRC considers that the default mechanism through which fault elements in offence provisions are identified across the Commonwealth statute book could be simplified.

Proposal B18 Offence provisions in corporations and financial services legislation should be amended to specify any applicable fault element.

8.30 Offence provisions in the *Corporations Act* are subject to Chapter 2 of the *Criminal Code*.[33] Section 5.6 of the *Code* specifies the default fault elements for a criminal offence in a Commonwealth Act as follows:

- for a 'physical element that consists only of conduct, intention is the fault element for that physical element'; and
- for a 'physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element'.

8.31 A provision in a particular Act may specify a different fault element from that indicated in s 5.6 of the *Criminal Code*, or may specify that there is no fault element for a particular element of an offence. The vast majority of *Corporations Act* offences do not specify a fault element, and are therefore subject to s 5.6 of the *Criminal Code*. Evidently, these offences were not drafted with the *Criminal Code* in mind, such that it is not always clear whether a physical element consists of conduct, a circumstance, or a result. Stakeholders have told the ALRC that identifying the relevant fault element for an offence in the *Corporations Act* can be challenging. Some *Corporations Act* offences do specify the fault elements for all or some physical elements in an offence.[34]

8.32 Offences should be capable of being interpreted and understood on their face without extensive and frequent regard to the *Criminal Code*. The current method for identifying a fault element appears unnecessarily complex. Implementation of **Proposal B18** would mean that all offence provisions currently subject to a fault element specified in the *Criminal Code* would instead indicate, on their face, the relevant fault elements (if any). Implementing **Proposal B18** would not entirely displace the role of the *Criminal Code* in relation to offences in the *Corporations Act*. For example, the relevant fault elements would still be defined in the *Criminal Code*, and offences would remain subject to other general principles of criminal responsibility contained in the *Code*.

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33 *Corporations Act 2001* (Cth) s 1308A. The *Criminal Code* appears in the Schedule to the *Criminal Code Act 1995* (Cth).

34 See, eg, *Corporations Act 2001* (Cth) s 1041B.

Implementation

8.33 The ALRC seeks feedback from stakeholders on whether **Proposal B18** would improve the navigability of the law, and whether allocating resources to its implementation would be justified in the short or long term.

8.34 A number of government agencies have suggested that implementation of **Proposal B18** would be a significant undertaking, and would require the specific allocation of resources to its implementation. The proposal also holds broader implications for the Commonwealth statute book, as most provisions use the approach of importing fault elements from the *Criminal Code*.

8.35 The ALRC accepts that implementation of this Proposal would be a significant undertaking. However, the supportive feedback the ALRC has received from legal professionals when exploring this Proposal suggests that the benefits may justify the costs.

8.36 The ALRC also seeks feedback regarding implementation approaches. For example, Treasury could, as a less burdensome measure, adopt a practice of identifying fault elements in all future amendments to corporations and financial services legislation, if it is not practicable to implement the Proposal in relation to the stock of existing offences. While this approach would introduce further inconsistency into the *Corporations Act*, over time a greater proportion of offence provisions would become clearer on their face in relation to fault elements. The ALRC welcomes comments on whether a staged implementation of **Proposal B18** would be appropriate.

9. Enhancing Navigability

Contents

Introduction

9.1 In this chapter, the ALRC recommends that the Government enhance the navigability of three key pieces of corporations and financial services legislation, in light of their particular complexity: the *Corporations Act*, *NCCP Act*, and *ASIC Act*. This would be achieved by the Government, through ASIC, publishing enhanced versions of key corporations and financial services legislation.

9.2 Ordinary publication practices, such as publishing legislation on the Federal Register of Legislation, are not sufficient to ensure the navigability of particularly complex legislative frameworks, especially where there is extensive creation of regulator-made law. Some regulators, such as the FCA in the UK, and the ATO 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 occasionally published selected marked-up provisions of the *Corporations Act* and *Corporations Regulations* that include notional amendments made by delegated legislation.[1]

9.3 Corporations and financial services legislation is spread across hundreds of separate Acts and legislative instruments, all of which are closely interconnected. The Government (including regulators, where relevant) has made certain law design choices, such as using notional amendments and extensive regulations, which make the *Corporations Act* particularly difficult to navigate without further resources. Accordingly, it would be appropriate for the Government to play a leading role in enhancing the navigability of this legislation. It is unreasonable to expect companies and individuals to purchase commercially produced legislative compilations at significant cost as a result of complex law design choices made by the Government.

1 See, for example, the consolidated Div 15 of Part 7.9 of the *Corporations Regulations* in Australian Securities and Investments Commission, *Short Selling* (Regulatory Guide 196, October 2018).

A stewardship mindset

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).

9.4 **Recommendation 19** seeks to improve the navigability of selected corporations and financial services legislation. Significant improvements to navigability could come through improved use of technology and new approaches to publishing legislation. ASIC, as the day-to-day administrator of key Acts,[2] is well positioned to publish materials to help users navigate this vast and diffuse body of law. ASIC would likely need additional resourcing to undertake some of the more ambitious efforts to improve navigability discussed in this section.

9.5 This Recommendation builds on Recommendation 12 and Proposal A12 in Interim Report A, both of which were aimed at improving the accessibility, navigability, and broader user-experience of users of Commonwealth legislation.

9.6 A central theme of this Inquiry has been the importance of legislative stewardship — a long-term commitment to the quality, accessibility, and navigability of legislation by bodies who create and administer Acts and legislative instruments. A stewardship mindset does not simply mean a commitment to reforming legislation — it also means a willingness to develop and enhance non-legislative tools for understanding and navigating legislation, including particularly complex legislation.

9.7 Stakeholders, including the Law Council of Australia, have told the ALRC that more could be done to support the navigability of corporations and financial services legislation. The Law Council of Australia has noted that it

> encourages making the publicly available legislation more user-friendly and would welcome public resources being dedicated to this objective. These types of upfront measures would reduce the incidence of future rescue missions for explorers lost in the maze, including those who may have been led down a section of the path that was not safe for them to be using.[3]

9.8 Academic commentary has also noted that 'there is no readily available version' of the *Corporations Act* 'which integrates, rather than simply cross-references' the

2 Australian Securities and Investments Commission, 'Laws We Administer' <https://asic.gov.au/about-asic/what-we-do/our-role/laws-we-administer>.

3 Law Council of Australia, *Submission 49*.

various legislative instruments that affect the operation of the *Corporations Act*.[4] As Professor Bottomley notes, the 'reader is left to bear the cost of piecing together complex legislative material, with the attendant risk of error or omission'.[5] Van Geelen suggests that the

> executive agency to which a power has been delegated must be both required and resourced to regularly produce official consolidated versions of the relevant regime, including all relevant law as contained in the primary legislation, regulations, and any delegated legislation such as instruments.[6]

9.9 While **Recommendation 19** is intended in part as an interim measure pending implementation of the proposed legislative model, improved tools for navigability should have an ongoing role.

9.10 The ALRC has considered the role that various regulators currently play in supporting the navigability of the legislation they create or administer. As **Table 9.1** shows, regulators can significantly enhance legislative navigability, beyond their role in generating regulatory guidance. The FCA, through creating and maintaining its 'Handbook', represents a possible 'gold standard' in regulators' commitment to navigability. The Handbook is a highly annotated and searchable compilation of all statutory instruments made by the FCA. Several Australian regulators demonstrate a similar commitment to navigability.

Table 9.1: Regulators and the navigability of legislation

Regulator (alphabetical)	Example activities promoting navigability
Australian Maritime Safety Authority	Maintains an index of all Marine Orders and exemptions created by AMSA. This index contains summaries of the instruments, including their effect and scope. Publishes an annual plan for all planned changes to their body of administered legislation, and a summary of changes for the preceding years. Publishes Marine Notices, which include general guidance on understanding and complying with the law.

4 Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker' (2011) 39(1) *Federal Law Review* 1, 30.

5 Ibid.

6 Tess Van Geelen, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, 313.

Regulator (alphabetical)	Example activities promoting navigability
Australian Prudential Regulation Authority	Maintains a list of all prudential and reporting standards, as well as guidance on each standard, which are applicable to sectors regulated by APRA. Documents are sorted by regulated sector. Publishes links to reporting standards and non-prudential legislative instruments, as well as to other legislation relevant to each regulated sector. Publishes a range of letters, notes, and advice for regulated entities.
Australian Securities and Investments Commission	Publishes a list of all legislative instruments made by ASIC, ordered by year. Publishes the ASIC Gazette as a PDF, which includes individual relief instruments published as unsearchable images. Publishes regulatory guides and information sheets. Maintains product- and industry-specific webpages, some of which contain links to relevant legislative instruments.
Australian Taxation Office	Maintains a searchable and categorised database of all instruments and documents generated by the ATO. This includes ATO law aids, public rulings, legislative instruments, practical compliance guidelines, and ATO interpretive decisions. Maintains, in the same database, searchable versions of case law and legislation that is administered but not created by the ATO. This includes important tax-related court cases and annotated versions of taxation legislation.

Regulator (alphabetical)	Example activities promoting navigability
Civil Aviation Safety Authority	Maintains a database of the legislative and non-legislative instruments created by the Civil Aviation Safety Authority ('CASA') that is searchable by type of instrument, purpose, and the authorising legislation. Each instrument is summarised in its effect and application. Maintains searchable versions of the legislation administered but not created by CASA, including the *Civil Aviation Safety Regulations 1998* (Cth) and *Civil Aviation Regulations 1988* (Cth). CASA includes additional information about the operation of each provision, including who is affected and whether any CASA legislative instruments relate to the operation of particular provisions of the regulations. Publishes various guidance documents to help people understand and comply with the law.
Financial Conduct Authority (UK)	Maintains the FCA Handbook, which integrates legislative materials such as regulations, regulator-made legal instruments, regulator guidance, and evidential provisions, in one location. The Handbook is modular, in that it can be accessed in a hierarchical form that reflects the numbering of rules or through a topic-based table of contents. Functionality built into the online version of the Handbook also allows readers to 'switch on and off' each of rules, guidance, evidential provisions, and UK legislative material, to tailor search results that are relevant to the user. Publishes additional guidance on financial services law.

Resources to improve navigability

9.11 Since the publication of Interim Report A, the ALRC has engaged further with stakeholders on the navigability of the *Corporations Act* and related legislation. The ALRC has also conducted further data analysis on the interconnectedness of the *Corporations Act* with other legislation. This engagement and research have highlighted the benefits of developing non-legislative materials that would help users of the *Corporations Act* and related legislation navigate the legislative framework.

9.12 New navigability materials would differ from existing ASIC guidance in their format, content, and purpose. New materials would be published not as Regulatory Guides, but would instead be contained in non-authoritative annotated versions of the legislation, in consolidated legislative texts, or in tables. These materials would not be intended to guide or shape industry behaviour. Instead, these resources

would be aimed purely at supporting the navigability of the legislation, and assisting users in identifying and comprehending the legislation.

9.13 These materials should be developed over time, based on user feedback and any user-experience research undertaken in relation to Recommendation 12 in Interim Report A.

New materials

9.14 The materials listed in **Example 9.1** could improve navigability and comprehensibility of ASIC-administered legislation. However, the materials are not ends in themselves. Instead, the new materials offer a basis for more ambitious and comprehensive reforms. Such reforms may include creating more searchable databases of ASIC-administered legislation and the development of publicly accessible annotated versions of legislation such as the *Corporations Act*.

Example 9.1: Materials ASIC could consider publishing

a. A table of all regulation-making and other legislative instrument-making powers in ASIC-administered Acts and legislative instruments. This would help users identify where ASIC-made instruments and regulations may affect the operation of ASIC-administered legislation.

b. A table of all provisions affected by the operation of delegated legislation, and those provisions that authorise the delegated legislation. This would help users identify where provisions are in fact affected by the operation of delegated legislation.

c. A table of all offences and civil penalties in ASIC-administered Acts and legislative instruments. Schedule 3 provides a helpful if incomplete summary of offences in the *Corporations Act*. A table of all offences and civil penalties, perhaps including annotations as to who they affect and other relevant information, would enable users to more easily identify all offence and civil penalty provisions.

d. A table of all notional amendments to ASIC-administered Acts and legislative instruments. The ALRC's database of notional amendments includes over 1,200 distinct amendments to over 350 provisions of the *Corporations Act* and *Corporations Regulations*. If ASIC were to publish such a table, then users of the legislation would not have to piece together these notional amendments themselves, spread as they are across more than 100 legislative instruments and hundreds of regulations.

e. A table of all ASIC discretionary powers in ASIC-administered Acts. This would help users identify ASIC powers that may be relevant and useful to their situation. This would supplement the more limited, tailored, and substantive discussion of ASIC powers in particular regulatory guides.

9.15 Obtaining data on the extent to which provisions are affected by the operation of delegated legislation would lay the basis for at least one reform that would bring immediate benefits to readability and navigability. This reform is the introduction of notes in the *Corporations Act* to flag when delegated legislation has affected a particular provision. For example, s 994B(1)(c) could be annotated as per the following underlined text:

> (1) … a person must make a target market determination for a financial product if: …
>
> > (c) regulations made for the purpose of this paragraph require the person to make a target market determination for the product.
>
> Note 1: Regulations have been made under section 994B(1)(c): Part 7.8A, Division 2 of the *Corporations Regulations*.

9.16 Likewise:

> (2) ASIC may declare that a specified facility, interest or other thing is not a financial product for the purposes of this Chapter. The declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
>
> Note 1: ASIC has made a legislative instrument under this section: *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211*.

9.17 The ALRC recognises that, in the short-term, the Federal Register of Legislation may not be set up to handle rapidly changing annotation to Commonwealth legislation such as the *Corporations Act*. However, legislation annotated and maintained by ASIC, though non-authoritative, would add significant value. For example, the ASIC version could be annotated to indicate the use of defined terms, and embed hyperlinks in cross-references to other provisions.

Appendix A
List of Consultations and Events
November 2021 – August 2022

Consultees

	Name	Consultee location
1	Avant Mutual	Sydney
2	Professor Pamela Hanrahan, University of New South Wales	Sydney
3	Emeritus Professor Stephen Bottomley, Australian National University	Canberra
4	Mortgage and Finance Association of Australia	Sydney
5	Consumer Action Law Centre	Melbourne
6	Association of Financial Advisers	Various
7	Chartered Accountants Australia & New Zealand	Various
8	CPA Australia	Various
9	Financial Planning Association of Australia	Various
10	Financial Services Council	Various
11	Financial Services Institute of Australasia (FINSIA)	Various
12	Institute of Public Accountants	Various
13	SMSF Association	Various
14	Stockbrokers and Investment Advisers Association (formerly Stockbrokers and Financial Advisers Association)	Various
15	Law Council of Australia	Canberra
16	Pip Bell, PMC Legal	Sydney
17	Anne Murphy Cruise, Macquarie Group	Melbourne
18	Rebecca Maslen-Stannage, Herbert Smith Freehills	Sydney

	Name	Consultee location
19	Vince Battaglia, Hall and Wilcox	Sydney
20	Glenda Hanson, King & Wood Mallesons	Sydney
21	Andrew Ham, Hunt & Hunt Lawyers	Melbourne
22	John Keeves, Johnson Winter & Slattery	Adelaide
23	Legislation Act Review Committee	Canberra
24	Department of the Treasury (Cth)	Canberra
25	MetLife Australia	Sydney
26	Office of Parliamentary Counsel (Cth)	Canberra
27	Australian Securities and Investments Commission	Various
28	Quality of Advice Review team	Various
29	Department of Social Services (Cth)	Canberra
30	Secretariat, Senate Standing Committee for the Scrutiny of Bills and Senate Standing Committee for the Scrutiny of Delegated Legislation	Canberra
31	Department of Health and Aged Care (Cth)	Canberra
32	Professor Julia Black CBE, London School of Economics and Political Science	London
33	Hon Justice Robert Bromwich, Federal Court of Australia	Brisbane
34	Professor Ian Enright, Australian College of Insurance Studies	Sydney
35	Australian Prudential Regulation Authority	Various
36	Australian Taxation Office	Canberra
37	Office of the Queensland Parliamentary Counsel	Canberra
38	Department of Agriculture (Cth)	Canberra
39	Civil Aviation Safety Authority (Cth)	Canberra
40	Australian Maritime Safety Authority	Canberra
41	Department of Home Affairs (Cth)	Canberra
42	Dr Jason Allen, Stirling and Rose	Sydney
43	Pia Andrews, Amazon Web Services	Broome

	Name	Consultee location
44	Hannah Glass, King & Wood Mallesons	Melbourne
45	Penny Nikoloudis, Allens Linklaters	Melbourne
46	Michael Mathieson, Allens Linklaters	Sydney
47	Professor Bryan Horrigan, Monash University	Melbourne
48	Professor Paul Latimer, Swinburne University	Melbourne
49	Australian Retail Credit Association	Melbourne
50	Laurence White, Victorian Bar	Melbourne
51	Associate Professor Scott Donald, University of New South Wales	Sydney
52	Andrew Bradley, Herbert Smith Freehills	Sydney
53	Fiona Smedley, Herbert Smith Freehills	Sydney
54	Michael Vrisakis, Herbert Smith Freehills	Sydney
55	Maged Girgis, Herbert Smith Freehills	Sydney
56	Tamanna Islam, Herbert Smith Freehills	Sydney
57	Kate Mulligan, King Irving	Sydney
58	Kristijan Vicoroski, King Irving	Sydney
59	Alycia Mills, King Irving	Sydney
60	Simun Soljo, Allens Linklaters	Sydney
61	Commonwealth Bank of Australia	Sydney
62	Consumers' Federation of Australia	Sydney
63	COTA (formerly Council on the Ageing)	Sydney
64	CHOICE	Sydney
65	Financial Counselling Australia	Sydney
66	Financial Rights Legal Centre	Sydney
67	Indigenous Consumer Assistance Network	Sydney
68	Legal Aid NSW	Sydney
69	Super Consumers Australia	Sydney
70	Justin Williams SC, NSW Bar	Sydney

	Name	Consultee location
71	Gabrielle Bashir SC, NSW Bar	Sydney
72	Australian Banking Association	Sydney
73	ANZ	Melbourne
74	Administrative Law Section, Attorney-General's Department (Cth)	Canberra

Events

Date	Host Organisation	Event Name
Australian Law Reform Commission events		
27 January 2022	Australian Law Reform Commission	(Re)viewing Twin Peaks in Australia and Abroad
10 February 2022	Australian Law Reform Commission	Reducing Complexity: Why? Where? How?
24 May 2022	Australian Law Reform Commission	What goes where? A comparative discussion of the legislative puzzle
17 June 2022	Australian Law Reform Commission	What we've heard and where to next: Feedback on Interim Report A of the Financial Services Legislation Inquiry
Other events		
25 November 2021	Ross Parsons Centre, University of Sydney	Common Mistakes in Using National Uniform Legislation (Attended)
16–18 February 2022	Australian National University	Public Law and Inequality Legislation (Attended)
22 March 2022	Centre for Ethics and Law, University College London	Regulating Digital and Crypto-finance: A Conversation Across Borders (Presented)
30 March 2022	Melbourne Law School	Corporate Law and Governance in the 21st Century: A Symposium in Honour of Professor Ian Ramsay (Presented)

Date	Host Organisation	Event Name
25 May 2022	Stockbrokers and Investment Advisers Association	Stockbrokers and Investment Advisers Association Conference (Presented)
23 June 2022	Clyde & Co	Review of the Legislative Framework for Corporations and Financial Services Regulation (Presented)
4–5 June 2022	Law Council of Australia	2022 Corporations Law Workshop (Presented)
6 June 2022	Conexus Financial	Licensee Summit 2022 (Presented)
3–5 July 2022	Society of Corporate Law Academics	Re: The Corporation — Re-Thinking, Re-Forming, Re-Imagining (Presented)
21 July 2022	Insignia Financial	Consultum National Conference 2022
25 August 2022	Insignia Financial	RI Connect Conference 2022
Various	Law Council of Australia	Business Law Section, Corporations Committee meetings (Presented)

Appendix B
Primary Sources

Australian legislation

Commonwealth Acts

Administrative Decisions (Judicial Review) Act 1977 (Cth).

Australian Constitution.

Australian Securities and Investments Commission Act 2001 (Cth).

Banking Act 1959 (Cth).

Biosecurity Act 2015 (Cth).

Broadcasting Services Act 1992 (Cth).

Civil Aviation Act 1988 (Cth).

Competition and Consumer Act 2010 (Cth) sch 2 ('*Australian Consumer Law*').

Corporate Collective Investment Vehicle Framework and Other Measures Act 2022 (Cth).

Corporations Act 2001 (Cth).

Corporations Amendment (Professional Standards of Financial Advisers) Act 2017 (Cth).

Environment Protection and Biodiversity Conservation Act 1999 (Cth).

Federal Court of Australia Act 1976 (Cth).

Financial Sector (Collection of Data) Act 2001 (Cth).

Financial Sector Reform (Hayne Royal Commission Response — Better Advice) Act 2021 (Cth).

Financial Services Reform Act 2001 (Cth).

Food Standards Australia New Zealand Act 1991 (Cth).

Great Barrier Reef Marine Park Act 1975 (Cth).

Income Tax Assessment Act 1997 (Cth).

Judiciary Act 1903 (Cth).

Legislation Act 2003 (Cth).

Life Insurance Act 1995 (Cth).

National Consumer Credit Protection Act 2009 (Cth).

National Consumer Credit Protection Regulations 2010 (Cth).

National Measurement Act 1960 (Cth).

Navigation Act 2012 (Cth).

Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 (Cth).

Regulatory Powers (Standard Provisions) Act 2014 (Cth).

Social Security (Administration) Act 1999 (Cth).

Social Security Act 1991 (Cth).

Superannuation Industry (Supervision) Act 1993 (Cth).

Treasury Laws Amendment (2022 Measures No. 1) Act 2022 (Cth).

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Cth).

Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020 (Cth).

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

Veterans' Entitlements Act 1986 (Cth).

Commonwealth legislative instruments

ASIC Class Order — Investor Directed Portfolio Services (CO 13/763) (Cth).

ASIC Class Order — Investor Directed Portfolio Services Provided Through a Registered Managed Investment Scheme (CO 13/762) (Cth).

ASIC Class Order — Managed Discretionary Accounts (CO 04/194) (Cth).

ASIC Class Order — Relief for 31 Day Notice Term Deposits (CO 14/1262) (Cth).

ASIC Class Order — Travellers' cheques and confirmation of transactions (CO 02/1075) (Cth).

ASIC Corporations (AFSL Audit Opinion) Instrument 2015/586 (Cth).

ASIC Corporations (ASIC Close Down Period) Instrument 2018/1034 (Cth).

ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 (Cth).

ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784 (Cth).

ASIC Corporations (Design and Distribution Obligations — Exchange Traded Products) Instrument 2020/1090 (Cth).

ASIC Corporations (General Advice Warning) Instrument 2015/540 (Cth).

ASIC Corporations (Group Purchasing Bodies) Instrument 2018/751 (Cth).

ASIC Corporations (IDPS — Relevant Interests) Instrument 2015/1067 (Cth).

ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968 (Cth).

ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70 (Cth).

ASIC Corporations (Non-Cash Payment Facilities) Instrument 2016/211 (Cth).

ASIC Corporations (Parent Entity Financial Statements) Instrument 2021/195 (Cth).

ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649 (Cth).

ASIC Corporations (Short Selling) Instrument 2018/745 (Cth).

ASIC Corporations (Time-Sharing Schemes) Instrument 2017/272 (Cth).

ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 (Cth).

ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834 (Cth).

Civil Aviation Regulations 1988 (Cth).

Civil Aviation Safety Regulations 1998 (Cth).

Commonwealth Registers (Appointment of Registrars) Instrument 2021 (Cth).

Competition and Consumer (Industry Code — Electricity Retail) Regulations 2019 (Cth).

Corporations (Passport) Rules 2018 (Cth).

Corporations and Other Legislation Amendment (Corporate Collective Investment Vehicle Framework) Regulations 2022 (Cth).

Corporations Regulations 2001 (Cth).

Legal Services Directions 2017 (Cth).

List of Exempt Native Species Instrument 2001 (Cth).

Marine Order 11 (Living and Working Conditions on Vessels) 2015 (Cth).

National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2018 (No. 2) (Cth).

National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2022 (No. 4) (Cth).

National Health (Listing of Pharmaceutical Benefits) Instrument 2012 (Cth).

Superannuation Industry (Supervision) Modification Declaration No 1 of 2008 (Cth).

Superannuation Industry (Supervision) Modification Declaration No 1 of 2014 (Cth).

Superannuation Industry (Supervision) Modification Declaration No 1 of 2015 (Cth).

Superannuation Industry (Supervision) Modification Declaration No 2 of 2007 (Cth).

Superannuation Industry (Supervision) Modification Declaration No 3 of 2007 (Cth).

Superannuation Industry (Supervision) Regulations 1994 (Cth).

Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018 (Cth).

State and Territory Acts

Human Reproductive Technology Act 1991 (WA).

Australian case law

Alexander v Minister for Home Affairs (2022) 96 ALJR 560.

Australian Building and Construction Commissioner v Pattinson (2022) 399 ALR 599.

Australian Securities and Investments Commission v DB Management Pty Ltd (2000) 199 CLR 321.

Australian Securities and Investments Commission v Kobelt (2019) 267 CLR 1.

Australian Securities Commission v Kippe (1996) 67 FCR 499.

Cigno Pty Ltd v Australian Securities and Investments Commission (2021) 287 FCR 650.

Maritime Union of Australia v Minister for Immigration and Border Protection (2016) 259 CLR 431.

McWilliam v Civil Aviation Safety Authority (2004) 142 FCR 74.

Minister of Industry and Commerce v Tooheys Ltd (1982) 60 FLR 325.

Plaintiff M47/2012 v Director General of Security (2012) 251 CLR 1.

Public Service and Professional Officers' Association Amalgamated Union (NSW) v New South Wales (2014) 242 IR 338.

RG Capital Radio Ltd v Australian Broadcasting Authority (2001) 113 FCR 185.

The Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan (1931) 46 CLR 73.

Trade Practices Commission v CSR Ltd [1991] ATPR ¶41-076.

Watson v Lee (1979) 144 CLR 374.

Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) (2012) 301 ALR 1.

Yougarla v Western Australia (2001) 207 CLR 344.

Foreign legislation

Animal Welfare Act 2006 (UK).

European Union (Withdrawal Agreement) Act 2020 (UK).

European Union (Withdrawal) Act 2018 (UK).

Financial Markets Conduct Act 2013 (NZ).

Financial Services and Markets Act 2000 (UK).

Fire Safety Act 2021 (UK).

Grundgesetz — Basic Law for the Federal Republic of Germany (Germany).

Magistrates' Courts Act 1980 (UK).

Road Traffic Act 1930 (UK).

Road Traffic Act 1988 (UK).

Securities Act, RSBC 1996, c 418.

Securities Act, RSO 1990, c S-5.

Foreign case law

Mason v Godiva Mortgages Ltd [2018] EWHC 3227.

R (British Bankers' Association) v Financial Services Authority [2011] EWHC 999.

R (Critchley) v Bank of Scotland plc [2019] EWHC (Admin) 3036.

Spreadex Ltd v Sekhon [2008] EWHC 1136.

The Queen v Burah (1878) 3 App Cas 889.

Winterflood Securities Ltd v Financial Services Authority [2010] EWCA Civ 423.

Appendix C
Example Delegated Law-Making Provisions

The powers set out in this table are organised by reference to the Part or Chapter of the *Corporations Act* to which they relate. Exemption and modification (notional amendment) powers may typically be exercised in relation to provisions of the relevant Part, provisions of the *Corporations Regulations* or other instruments made for the purposes of the relevant Part, and definitions in the Act or regulations as they relate to the relevant Part.[1]

***Corporations Act* Part or Chapter**	**Enabling provision**	
Part 7.2 (Licensing of financial markets)	s 791C	Minister may exempt by legislative instrument[2]
Part 7.2A (Supervision of financial markets)	s 798G	ASIC may make rules (market integrity rules)
	s 798L	Regulations may exempt or modify
	s 798M	Minister may exempt by legislative instrument[3]
Part 7.3 (Licensing of clearing and settlement facilities)	s 820C	Minister may exempt by legislative instrument[4]
Part 7.4 (Limits on involvement with licensees)	s 854B	Regulations may exempt or modify
Part 7.5 (Compensation regimes for financial markets)	s 893A	Regulations may exempt or modify
	s 893B	Minister may exempt by legislative instrument[5]

1 See, eg, *Corporations Act 2001* (Cth) ss 761H(4), 1020F(7)(a).
2 An exemption relating to a class is a legislative instrument: ibid s 791C(4).
3 An exemption relating to a class is a legislative instrument: ibid s 798M(4).
4 An exemption relating to a class is a legislative instrument: ibid s 820C(4).
5 An exemption relating to a class is a legislative instrument: ibid s 893B(4).

***Corporations Act* Part or Chapter**	**Enabling provision**	
Part 7.5A (Regulation of derivative transactions and derivative trade repositories)	s 901A	ASIC may make rules (derivative transaction rules)
	s 903A	ASIC may make rules (derivative trade repository rules)
	s 906A	Regulations may impose obligations and confer powers
	s 907D	ASIC may exempt by legislative instrument[6]
	s 907E	Regulations may exempt or modify
Part 7.5B (Regulation of financial benchmarks)	s 908CA	ASIC may make rules (financial benchmark rules)
	s 908CD	ASIC may make rules (compelled financial benchmark rules)
	s 908EB	Regulations or ASIC may exempt[7]
Part 7.6 (Licensing of providers of financial services)	s 926A	ASIC may exempt or modify by legislative instrument (excluding Divs 4 and 8)
	s 926B	Regulations may exempt or modify
Part 7.7 (Financial services disclosure)	s 951B	ASIC may exempt or modify by legislative instrument
	s 951C	Regulations may exempt or modify
Part 7.8 (Other provisions related to conduct)	s 992B	ASIC may exempt or modify by legislative instrument
	s 992C	Regulations may exempt or modify
Part 7.8A (Design and distribution requirements)	ss 994B(1)(c), (3)(f)	Regulations may require a person to make a target market determination or exclude kinds of financial product from the obligation to make a target market determination[8]
	s 994L(2)	ASIC may exempt or modify by legislative instrument[9]

6 An exemption relating to a class is a legislative instrument: ibid s 907D(4).
7 An exemption relating to a class, if made by ASIC, is a legislative instrument: ibid s 908EB(4).
8 See, eg, *Corporations Regulations 2001* (Cth) pt 7.8A divs 2, 3.
9 Note that regulations made pursuant to s 1368 of the *Corporations Act* may also provide for exemptions from Part 7: see, eg, ibid pt 7.8A reg 7.8A.25.

***Corporations Act* Part or Chapter**	**Enabling provision**	
Part 7.9 (Financial product disclosure and other provisions)	s 1020F	ASIC may exempt or modify by legislative instrument
	s 1020G	Regulations may exempt or modify
Part 7.10 (Market misconduct and other prohibited conduct)	s 1045A	Regulations may exempt or modify
Part 7.11 (Title and transfer)	s 1075A	ASIC may exempt or modify by legislative instrument
Chapter 6D (Fundraising) Chapter 7 (Financial services and markets)	s 1368	Regulations may exempt

Appendix D
Table of Existing Guidance

Existing guidance on allocating matters in the legislative hierarchy

Document and author	Summary and extracts
Legislation Handbook Department of the Prime Minister and Cabinet	• The *Legislation Handbook* notes that 'it is not possible or desirable to provide a prescriptive list of matters suitable for inclusion in primary legislation and matters suitable for inclusion in subordinate legislation'. Nevertheless, it lists 12 'examples of matters generally implemented only through Acts of Parliament'.[1] These are: (a) appropriations of money; (b) significant questions of policy including significant new policy or fundamental changes to existing policy; (c) rules which have a significant impact on human rights and personal liberties; (d) provisions imposing obligations on individuals or organisations to undertake certain activities (eg to provide information or submit documentation, noting that the detail of the information or documentation required may be included in subordinate legislation) or desist from activities (eg to prohibit an activity and impose penalties or sanctions for engaging in an activity); (e) provisions creating offences or civil penalties which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations); (f) provisions imposing administrative penalties for regulatory offences (administrative penalties are imposed automatically by force of law instead of being imposed by a court); (g) provisions imposing taxes or levies; (h) provisions imposing high or substantial fees and charges; (i) provisions authorising the borrowing of funds; (j) procedural matters that go to the essence of the legislative scheme; (k) provisions creating statutory entities (noting that some details of the operations of a statutory entity would be appropriately dealt with in subordinate legislation); and (l) amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act needs to be examined against these criteria when an amendment is required).[2]

1 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [1.10].
2 Ibid (citations omitted).

Document and author	Summary and extracts
Legislation Handbook Department of the Prime Minister and Cabinet *(Continued)*	• The *Legislation Handbook* notes that > the decision as to whether a particular matter could be included in primary or subordinate legislation may well be influenced by the nature of the subject matter and a variety of other factors. Departments are required to consult OPC about the appropriateness of including particular matters in primary or subordinate legislation.[3] • The *Legislation Handbook* also contains the following guidance: > Matters of detail and matters which may change frequently are best dealt with by subordinate legislation, for example: > (a) fees to be paid for various services; and > (b) addresses where applications are to be lodged. > A variety of other matters may be included in subordinate legislation in order to streamline the primary legislation. However, the desirability of simplifying primary legislation is only one consideration in this area, and others (such as parliamentary control of certain matters) may be more important in particular cases ... OPC client advisers can advise on this issue when instructions are being prepared. The drafter may also wish to discuss the location of certain provisions during the drafting process.[4] • The list of examples contained in the *Legislation Handbook* is based upon an earlier list of matters that should generally be contained in primary legislation and which the Administrative Review Council (in 1992) recommended be incorporated into the Handbook: ○ significant questions of policy including new policy or fundamental changes to existing policy; ○ rules which have a significant impact on individual rights and liberties; ○ provisions creating offences which impose significant criminal penalties (imprisonment or fines of more than $1,000 for individuals or more than $5,000 for corporations); ○ administrative penalties for regulatory offences; ○ provisions imposing taxes; ○ significant fees and charges (more than $1,000); ○ procedural matters that go to the essence of the legislative scheme; and ○ amendments to Acts of Parliament.[5]

3 Ibid [1.11].
4 Ibid [5.65]–[5.66].
5 Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, 1992) rec 2.

Document and author	Summary and extracts
A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers Attorney-General's Department (Cth)	• The Guide contains principles and guidance relating to delegated legislation and criminal offences.[6] In particular, whether it is appropriate for the content of offences to be contained in delegated legislation[7] and appropriate safeguards in such cases.[8]
Guidelines (2nd Edition) Senate Standing Committee for the Scrutiny of Bills	• The Guidelines discuss principles applied by the Committee when scrutinising Bills. Principle (iv) 'requires the [C]ommittee to scrutinise each bill as to whether it inappropriately delegates legislative powers'.[9] Particular issues of concern to the Committee include Bills that allow for delegated legislation to create offences and civil penalties, to set the rate of a tax or fee, or to include 'significant matters'.[10] • 'Significant matters' include: ○ key elements of new policies or fundamental changes to existing policies; ○ matters which may have a significant impact on personal rights and liberties including the exercise of coercive or intrusive powers or the imposition of significant penalties; ○ provisions which may impose obligations to undertake or desist from certain activities; and ○ procedural matters that go to the essence of a legislative scheme.[11] • The Guidelines also state that the Committee has significant scrutiny concerns with framework provisions, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme.[12]

6 These principles and guidance are discussed in greater detail in **Chapter 5**.
7 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 26–7.
8 Ibid 28–9.
9 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Guidelines* (2nd ed, 2022) 17.
10 Ibid.
11 Ibid 18–19.
12 Ibid 19. In applying this principle, the Committee has accepted that provisions of this type may be permissible if there is a sound justification: see, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest 12 of 2020, 18 September 2020).

Document and author	Summary and extracts
Guidelines (2nd Edition) Senate Standing Committee for the Scrutiny of Delegated Legislation	• The Guidelines discuss principles applied by the Committee when scrutinising delegated legislation.[13] Under Principle (j), the Committee scrutinises delegated legislation 'as to whether it contains matters more appropriate for parliamentary enactment'.[14] This principle > is underpinned by the concern that significant matters should be included in primary legislation, which is subject to a greater level of parliamentary oversight than delegated legislation.[15] • The Committee has expressed concern regarding delegated legislation which: ○ establishes 'significant elements of a regulatory scheme'; ○ imposes 'significant penalties', or taxes and levies; or ○ has 'a significant impact on personal rights and liberties'.[16] • The Committee has previously 'set out criteria to assist it in applying' Principle (j), noting that it might be invoked where delegated legislation: • manifests itself as a fundamental change in the law, intended to alter and redefine rights, obligations and liabilities; • is a lengthy and complex legal document; • introduces innovation of a major kind into the pre-existing legal, social or financial concepts; • impinges in a major way on the community; • is calculated to bring about radical changes in relationships or attitudes of people in a particular aspect of the life of the community; • is part of a major uniform, or partially uniform, scheme which has been the subject of debate and analysis in one or more of the State or Territory Parliaments but not in the Commonwealth Parliament; and • takes away, reduces, circumscribes or qualifies fundamental rights and liberties traditionally enjoyed in a free and democratic society.[17]

13 Given the Committee's focus on delegated legislation, many of its other principles are relevant more generally to the delegation of legislative power, and are discussed in more detail in **Chapter 4**.

14 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (2nd ed, 2022) 31.

15 Ibid.

16 Ibid.

17 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *77th Report, Legislation Considered July 1984–June 1985* (1986) [15].

Document and author	Summary and extracts
Guidelines (2nd Edition) Senate Standing Committee for the Scrutiny of Delegated Legislation *(Continued)*	• Under Principle (l), the Committee scrutinises delegated legislation 'as to whether it contains amendments or modifications to primary legislation, or it exempts persons or entities from the operation of primary legislation'.[18] In the Committee's view: > Provisions in delegated legislation which amend or modify primary legislation, or exempt persons or entities from the operation of primary legislation, may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the executive. Such provisions should not ordinarily be included in delegated legislation and the committee will take a strong view on the inclusion of these provisions in executive-made law.[19]
Drafting Direction 3.8 — Subordinate legislation Office of Parliamentary Counsel (Cth)	• Drafting Direction 3.8 'notes some considerations, and sets out some standard forms, for drafting provisions of legislation dealing with subordinate legislation'.[20] • The Direction includes guidance as to the allocation of matters between regulations other types of legislative instrument, noting that 'material covering the following should be included in regulations unless there is a strong justification for prescribing those provisions in another type of legislative instrument': ○ offence provisions; ○ powers of arrest or detention; ○ entry provisions; ○ search provisions; ○ seizure provisions; ○ civil penalties; ○ impositions of taxes; ○ setting the amount of an appropriation; and ○ amendments to the text of an Act.[21]

18 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 14) 36.
19 Ibid.
20 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [1]. The considerations relevant to delegating legislative power are discussed in **Chapter 4**.
21 Ibid [4].

Document and author	Summary and extracts
Reducing complexity in legislation Office of Parliamentary Counsel (Cth)	• This document contains guidance aimed at avoiding or reducing complexity in legislation. The guidance notes that: ○ 'Inappropriate detail can extend the length of a Bill and take attention away from core provisions, thereby creating complexity.'[22] ○ 'In some cases, if detail is required, it may be appropriate to include the detail in subordinate legislation made under an Act. This approach has the advantage of leaving the Act uncluttered to deal with the core policy, but it does result in shifting the detail to another document.'[23] ○ 'Sections that are frequently amended often contain lists of matters that change over time. If a section is likely to be amended in the future, and the section is not a core part of the Act, consideration should be given by drafters and instructors, at the time the section is being drafted, to dealing with the matters through subordinate legislation to avoid the section being tinkered with.'[24]

22 Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [72].
23 Ibid [77].
24 Ibid [82].

Appendix E
Draft Guidance

This Appendix contains the Draft Guidance referred to in **Question B13**. The ALRC welcomes feedback from stakeholders on the Draft Guidance.

Subject to stakeholder views in response to **Question B13**, the Draft Guidance could be adopted by the Attorney-General's Department (Cth) in implementing **Proposal B12**.[1]

Guidance for Delegating Legislative Power

1 In some places, the Draft Guidance adopts the same expression as existing guidance without quotation marks. Footnotes are used throughout the Draft Guidance to identify those sources of existing guidance, to indicate another relevant source, or to provide further information. Cross-references to existing guidance may enable stakeholders to more easily identify how the Draft Guidance corresponds to existing guidance. The ALRC does not envisage that retaining all of the cross-references to existing guidance would be necessary if the Draft Guidance were adopted by the Attorney-General's Department (Cth).

Introduction

E.1 Subject to the *Australian Constitution*, Parliament is able to delegate its power to make laws. Parliament typically delegates legislative power to the various persons and entities that comprise the Executive — such as ministers, departments, and statutory agencies. Parliament does this through an Act — an 'enabling' or 'empowering' Act — and the process of using that delegated power is commonly referred to as executive law-making. Regardless of any specific label that may be used in particular cases, the product of executive law-making is generally referred to as 'delegated legislation'. When designing legislation that delegates legislative power, fundamental questions are:

- **What** can (or should) be delegated?
- **Who** is to exercise the delegated power?
- **Which safeguards** will apply to the power?

E.2 The principles and guidance below help to answer those questions.

When and how to use this guidance

E.3 The purpose of this guidance is to help all of those involved in designing, drafting, and scrutinising enabling legislation. This guidance is therefore directed toward a wide readership, including policy-makers, legislative drafters (and their instructors), civil society, and Parliamentarians.

E.4 This guidance will be of most benefit if it is considered at the outset of the policy and legislative development process, or as soon as it becomes apparent that delegated legislation may form part of a particular legislative scheme. If difficult or contentious issues arise or are likely to arise, then policy-makers and others involved in legislative design are encouraged to engage with the Attorney-General's Department (Cth) ('AGD') as early as possible in the legislative development process. This guidance may also be useful when considering amendments to pre-existing legislation.

E.5 To the extent possible, the principles and questions in this guidance should be addressed in the explanatory memoranda for Bills that delegate legislative power (as well as the explanatory statements for delegated legislation made using that power). Adhering to this practice will assist Parliament, and in particular the Senate Standing Committees for the Scrutiny of Bills ('Bills Scrutiny Committee') and the Scrutiny of Delegated Legislation ('Delegated Legislation Scrutiny Committee'), to perform their oversight roles.[2]

2 The Delegated Legislation Scrutiny Committee was formerly known as the Senate Standing Committee on Regulations and Ordinances.

E.6 This guidance does not directly address how a power to make delegated legislation should be exercised, nor how delegated legislation should be drafted and made. The *Instruments Handbook* provides detailed guidance on these issues.[3]

Legislative power

E.7 This guidance focuses on the delegation of *legislative* power, as distinct from executive power or judicial power.[4] Whether a power is legislative in nature is itself a legislative design question that focuses upon the intended nature, scope, and effect of the power. Policy-makers should carefully consider which type of power best suits, or is most appropriate for, the particular policy and legislative context.

E.8 The distinction between legislative powers and other powers (most particularly executive power) has implications for the availability of judicial review and the framework established by the *Legislation Act 2003* (Cth) ('*Legislation Act*').[5] Both the common law (case law) and s 8(4) of the *Legislation Act* establish functional tests for determining, respectively, whether a power or an instrument made using a power is legislative in character.[6]

E.9 In addition to the functional test, s 8 of the *Legislation Act* sets out circumstances in which an instrument is deemed to be (or not to be) a legislative instrument, including when specified by an empowering provision. When a delegated power is intended to be legislative in nature, it is best practice to specify that the power is to be exercised by way of legislative instrument. This will clearly bring it within the *Legislation Act* definition. The *Instruments Handbook* contains more detailed discussion of the difference between legislative instruments and other types of instrument (such as notifiable instruments) for the purposes of the *Legislation Act*.

E.10 **Figure 1** illustrates the typical way that Parliament delegates, and oversees the exercise of, its legislative power.

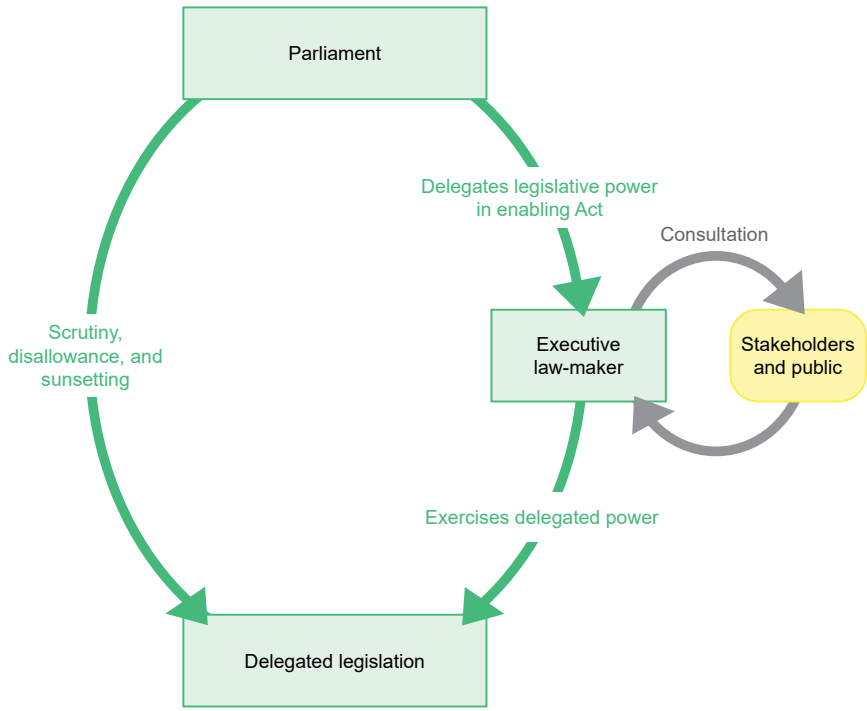
3 Office of Parliamentary Counsel (Cth), *Instruments Handbook* (Document release 3.7, September 2022).

4 For guidance regarding administrative law issues in draft legislation or proposals, see the Attorney-General's Department (Cth), *Australian Administrative Law Policy Guide* (2011).

5 Including judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or *Judiciary Act 1903* (Cth).

6 See, eg, *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185.

Figure 1: Delegating legislative power



Overarching principles

E.11 The following principles should guide decisions about when it is appropriate for Parliament to delegate its legislative power.[7] To some extent, these principles may compete and need to be balanced in each case.

- **Democratic accountability and legitimacy**: democratic accountability, via Parliament and its processes, is crucial to the law's legitimacy.

  Parliament's role is to determine matters of important policy and political significance through an open, democratic process. That democratic process is crucial to the law's legitimacy. Delegating too much legislative power, or delegating overly broad and unconstrained powers, can undermine the law's legitimacy and the separation of powers between the legislature and the executive. However, parliamentary time is scarce and in a complex world not every law or necessary detail can be made by Parliament.

7 See, eg, Legislation Design and Advisory Committee (NZ), *Legislation Guidelines* (2021) 67.

- **Durability and flexibility**: laws should be durable, but also allow for flexibility and adaptability where necessary.

  Durability refers to the ability of legislation to maintain its currency and relevance over time. Delegation helps to create durable and flexible laws. In particular, delegation can provide a means for regulatory flexibility and adaptability in response to changing or unforeseen circumstances. It may also be used to 'close loopholes' or reduce opportunities for avoidance. Delegated legislation should not, however, be viewed as a substitute for periodic review and reform of primary legislation.

- **Clarity and predictability**: the law should be clear and predictable in relation to the delegation of legislative power.

  Clarity begins with the empowering provision. Provisions that do not clearly allocate responsibility for making delegated legislation can undermine the law's clarity, both in terms of how the law is expressed and in terms of understanding what the law requires. Unconstrained or open-ended delegations that effectively enable delegates to determine matters of significant policy risk undermining the law's predictability. Unconstrained delegations also increase the risk that a power may be exercised arbitrarily.

- **Coherence and navigability**: the law should be coherent and navigable.

  Coherence is important within an Act, within each layer of the legislative hierarchy, and between each layer of the legislative hierarchy. Multiple layers or sources of delegated legislation can lead to complexity, fragmentation and overlap in the law, making it difficult to find and comprehend. Equally, too much prescription in primary legislation can make it difficult to navigate. Coherence and navigability are mutually reinforcing, and help to produce legislation that is easier to read and understand.

Primary legislation or delegated legislation

Is the matter appropriate for delegated legislation?

Legislation should not contain a power to make delegated legislation in respect of matters that are more appropriate for an Act of Parliament.[8]

E.12 Parliament is the Commonwealth's democratically accountable law-maker. As a general rule, therefore, matters of significant policy and principle should be

8 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [1.10]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Guidelines* (2nd ed, 2022) Principle (iv); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (2nd ed, 2022) Principle (j); Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [77].

contained in an Act. Generally, delegated legislation should deal with minor or technical matters that relate to implementing the objectives and intent of the Act, and the Act's operation. However, there are difficult decisions as to where some matters belong on the continuum between significant policy and minor or technical matters.[9]

E.13 Some matters, such as those that substantially affect human rights, clearly should be contained in an Act. However, the decision will not always be clear-cut. Some matters may be appropriate for either primary or delegated legislation. Delegated legislation may (unavoidably) involve some matters of policy, but close attention must be paid to the nature of those matters to ensure appropriate safeguards apply to retain oversight and accountability.

Policy and its significance

E.14 'Policy' can be an elusive term, and its meaning differs depending on context. In the context of legislation, policy refers to decisions about the matters that should be the subject of legislation and how those matters should be dealt with. In other words, policy describes a particular problem and its legislative solution. Policy may also refer to the underlying goal of legislation, or its purpose and object. In this sense policy may be expressed at varying levels of generality or specificity.

E.15 Likewise, 'significance' is difficult to define objectively, and is necessarily a matter of degree. When choosing between primary legislation and delegated legislation, there may be several relevant aspects of significance:

- **Democratic or public interest significance**: the policy has the potential to give rise to widespread public interest or controversy.[10] This includes issues of major political disagreement, or of disagreement between key stakeholders. Moral questions or questions involving important human and civil rights fall into this category.
- **Substantive significance**: the policy answers the key problems addressed by the legislation.[11] The policy is central to the legislative scheme or solution and is likely to have universal or near-universal application.
- **Significance to legislative design**: a well-designed legislative scheme should itself identify matters of policy (understood broadly) that are more suitable for delegated legislation than primary legislation, for reasons such as adaptability and flexibility.

E.16 The more significant a matter is from the perspective of democratic accountability and the rule of law, including because of its substantive significance, the more likely it will be appropriate for inclusion in primary legislation.

E.17 Recognising significance in terms of legislative design helps to ensure that the principles of durability and flexibility, and coherence and navigability, are also

9 Legislation Design and Advisory Committee (NZ) (n 7) 68.
10 See, eg, ibid 69.
11 See, eg, ibid.

considered when allocating matters between primary and delegated legislation. In some cases, democratic significance (or public interest significance) may be at odds with the demands of legislative design. For example, certain prescriptive detail that is not substantively significant, which may be more suitable for delegated legislation, may nevertheless become the subject of strong political disagreement. As a result, legislators may consider it desirable to enact such detail in primary legislation — this may be for the purposes of being seen to take action or to make it more difficult for a future government to change. In other cases, it may be appealing (but contrary to principle and good legislative design) for legislators to leave significant policy questions (more appropriate for parliamentary enactment) for future delegated legislation, so as to avoid debate or to speed up the passage of legislation.

E.18 In cases such as these, coherence of the legislative scheme (in particular) should be considered and weighed against other aspects of significance. Ultimately, it is a matter for Parliament to determine whether political priorities (and the principle of democratic legitimacy) outweigh the potential incoherence introduced to a legislative scheme (relevant to the principles of clarity and predictability, and coherence and navigability).

E.19 As a general rule, the following matters — which exemplify applications of the general principle — should be addressed in primary legislation:

- matters that have a significant impact on fundamental human or civil rights and personal liberties;
- the creation of serious criminal offences and imposition of significant penalties;
- the creation of coercive powers, such as search and seizure or confiscation of property;
- provisions imposing burdensome obligations on individuals or organisations to undertake certain activities or prohibiting certain activities;
- variations to the common law, particularly if a common law right is to be taken away, or replaced, by legislation;
- the authorisation of a tax or levy, borrowing money, or an appropriation of money;
- provisions imposing fees and charges;
- procedural matters that go to the essence or integrity of a legislative scheme or set the scheme's fundamental policy, for example, rights of review; and
- retrospective changes to the law.[12]

12 See, eg, Department of the Prime Minister and Cabinet (Cth) (n 8) [1.10]; Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 16–17; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia (n 8) Principle (iv); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 8) Principles (h), (j); Legislation Design and Advisory Committee (NZ) (n 7) 69.

E.20 The following reasons do not justify leaving policy matters to be addressed in delegated legislation:

- to fill substantive gaps in an Act caused by a rushed or unfinished policy development process;
- to avoid full debate and scrutiny of politically contentious matters in Parliament;
- solely to accelerate a Bill's passage through Parliament; or
- simply to follow a past practice of using delegated legislation on that subject where no clear reason otherwise exists for doing so.[13]

E.21 The following are examples of matters that are generally appropriate for delegated legislation:

- the mechanics of implementing an Act, such as prescribing fees, the form and content of documents, or other administrative procedures not going to the essence of the legislative scheme;
- large lists and schedules of prescriptive details;
- technically complex matters;
- subject matters requiring flexibility or updating in light of rapid or unpredictable developments in an area;
- responses to emergencies or other matters requiring agile or speedy responses; and
- matters requiring input from experts or key stakeholders.[14]

E.22 These examples are not exhaustive or prescriptive. They are intended to aid decision-makers in applying the more general principle that matters of significant policy are appropriately determined by Parliament. They should be considered in light of all of the principles discussed in this guidance. In addition, there may be circumstances in which two or more considerations are relevant (for example, technically complex matters, and matters that require input from experts or key stakeholders).

Scope of power and purpose

For what purpose may the power to make delegated legislation be exercised?

The empowering Act should define the content, purpose, and scope of a delegated law-making power as clearly and precisely as possible.[15]

13 Legislation Design and Advisory Committee (NZ) (n 7) 69–70.
14 Department of the Prime Minister and Cabinet (Cth) (n 8) [5.65]–[5.66]; Legislation Design and Advisory Committee (NZ) (n 7) 69.
15 See, eg, Legislation Design and Advisory Committee (NZ) (n 7) 73.

E.23 Empowering provisions are important because they establish the nature and scope of the power delegated by Parliament. Clearly defining the range of subject matters and purposes for which delegated legislation can be made is important because it helps to ensure that the resulting delegated legislation is within the limits intended by Parliament. A clearly scoped empowering provision also helps to maintain the appropriate distribution of matters between primary and delegated legislation.

E.24 An alternative way to approach this question is to ask, from the perspective of citizens who may be subjected to the power, whether the empowering provision would enable them to understand the factors that will guide the exercise of the delegated power and to predict how the power may be exercised.

E.25 When considering the scope of a delegated law-making power, it may assist to consult those responsible for implementing or administering the Act, and those who will be responsible for making delegated legislation.[16] Doing so would help identify the extent of the powers that are necessary and the circumstances in which they may be exercised.[17] So far as possible, those responsible for implementing or administering the Act should have a clear idea of the scope and content of potential delegated legislation when an empowering provision is being developed.[18]

E.26 A power to create delegated legislation should be wide enough to enable the Act and its objectives to be effectively implemented.[19] Some flexibility or discretion in an empowering provision is justified as it can be difficult to predict how an Act's requirements will be given full effect, or the full range of circumstances that may require delegated legislation. However, flexibility should be balanced against the need to place clear limits on the scope of power so that it is not unfettered.[20]

E.27 Clarity of scope and purpose may be aided by:

- clearly describing the matters in relation to which the power may (and may not) be exercised;
- describing matters that should be taken into consideration when exercising the power; and
- setting out the purposes for which the power is intended to be used.

16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 Ibid.

How is the power intended to affect primary legislation?

Delegated legislation should only be permitted to override or modify the operation of an Act (including by way of notional amendments) in circumstances where:

- there is a strong need or benefit in doing so;
- the empowering provision is as circumscribed as possible; and
- the applicable safeguards reflect the significance of the power.

E.28 Delegated powers that affect the operation of an Act can be placed along a spectrum. Towards one end of the spectrum are powers to effect a change in such a narrowly circumscribed way that the policy is fully or largely set by Parliament, and the subject matter would in any case be appropriate for delegated legislation. Examples include adding to a list of matters using a test or criteria set out in an Act, or expanding on concepts that do not set the scope of the Act (meaning that they are not central to the policy or principle of the Act). These types of provisions can be used to supplement an Act. That is to say, if the power is appropriately circumscribed, subject to appropriate safeguards, and the matter is generally appropriate for delegated legislation, then its exercise should supplement the Act consistently with the Act's objectives and Parliament's intention. These types of powers do not pose a significant risk of undermining the separation of powers and the law's legitimacy.

E.29 At the other end of the spectrum are unconstrained powers that allow delegated legislation to modify an Act in ways that may affect its underlying policy. Examples include several of the modification powers contained in the *Corporations Act 2001* (Cth).[21] These powers are typically exercised through notional amendments (or 'modifications') which, although they do not appear on the face of the Act, take effect *as though* the Act were amended as described by the delegated legislation.[22] These powers are sometimes referred to as 'Henry VIII clauses'. Strictly speaking, however, a 'Henry VIII clause' is one that permits an Act to be textually amended by delegated legislation, not just notionally amended.[23] Regardless of the label given to a power, notional amendments and textual amendments have the same legal effect.

E.30 Notional amendment (or 'modification') powers pose a greater risk to the separation of powers and democratic legitimacy than many other powers. In particular, delegated legislation should not be permitted to notionally amend the text

21 For example, s 926B(1)(c): 'The regulations may … provide that this Part [7.6] applies as if specified provisions were omitted, modified or varied as specified in the regulations'. Provisions such as this confer a 'wide discretionary power': see *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 [47].

22 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 135.

23 See, eg, Legislation Act Review Committee, Attorney-General's Department (Cth), *2021–2022 Review of the Legislation Act 2003* (2022) 46.

of offence provisions, especially when offences carry significant penalties or terms of imprisonment. Offence provisions are discussed in detail further below.

E.31 Exclusions or exemptions are another specific example of delegated legislation that may adjust the scope or change the operation of an Act in potentially significant ways. These are discussed in further detail below.

E.32 Powers to notionally amend the text of primary legislation should only be enacted in exceptional circumstances. Such powers require strong justification, careful design, and appropriate safeguards. When a modification power is contemplated, the following questions should be asked:

- Why delegate this power, and in this way? What is the need or benefit that justifies delegating a power to override or notionally amend the Act? Possible justifications may include:
    - to provide for genuine emergencies that require a much swifter response than can be provided by Parliament; or
    - to facilitate a complicated transition between statutory regimes, or between a new and old regime.[24]
- If a modification power is necessary, what is the extent of delegation that is being permitted? What is the significance of the matters being delegated? Would the subject matter generally be appropriate for delegated legislation?[25]
    - As discussed above, there is a continuum between significant policy and technical detail. The closer a subject of delegation is to affecting significant policy, the greater the risks to the separation of powers and democratic legitimacy. In these cases, the need or justification for the power should be stronger and clearly explained. If a modification power is needed, then the empowering provision should be drafted in the most limited terms possible to address the need, and its exercise should be consistent with the provisions of the empowering Act.[26]
- If the power is justified, are additional safeguards needed to ensure that the power is appropriately exercised and subject to appropriate scrutiny?[27]
    - Safeguards, including those that apply to all delegated legislation under the *Legislation Act*, are discussed in more detail further below. In the case of modification powers that potentially affect policy, additional safeguards should also be considered. These may include:
        - specific consultation requirements with stakeholders likely to be affected;

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24 See, eg, Legislation Design and Advisory Committee (NZ) (n 7) 79–80.

25 Ibid 80.

26 See, for example, s 370-5 of the *Taxation Administration Act 1953* (Cth) which illustrates a more circumscribed modification (notional amendment) power.

27 Legislation Design and Advisory Committee (NZ) (n 7) 80. See also Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia (n 8) Principle (iv).

  - preconditions on the exercise of the power, such as satisfaction that a particular state of affairs exists or that exercise of the power would not cause detriment;
  - providing that the power is exercised by the Governor-General in Council (so at the highest level of delegation) by way of regulations;[28]
  - providing a shorter timeframe for sunsetting than the default position provided by the *Legislation Act* (10 years);[29]
  - establishing or allocating responsibility to a review panel to consider and report to Parliament or the responsible Minister on the exercise of the power;
  - for emergency powers, making any exercise of the power conditional upon a prior declaration of emergency which is itself subject to disallowance; or
  - making delegated legislation created using the power subject to parliamentary approval (rather than only disallowance).
- If notional amendments are to be used, can they be made easier to find?
  - Notional amendments unavoidably make the law more difficult to find and navigate. If they are to be used, consideration should be given to how their existence may be brought to the attention of the people most affected by them.
  - Technology may also assist in this regard. For example, a non-authoritative but annotated version of the Act containing hyperlinks may aid navigation.

Exclusions and exemptions

Should legislation delegate a power to exclude or exempt?

There must be good reasons to delegate a power of exclusion or exemption.[30]

E.33 The scope (or perimeter) of a statutory regime is an important policy decision that should be made by Parliament and generally contained in an Act. Factors that may favour delegating a power of exclusion or exemption include:

- the Act relates to a complex, developing, or rapidly changing field, which means that its boundaries may be difficult to foresee;
- the Act relates to fields in which an urgent decision on an exclusion or exemption may be required;

28 See, however, further discussion about the use of regulations at [E.40]–[E.41] below.
29 See, eg, Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 8) Principle (l).
30 Legislation Design and Advisory Committee (NZ) (n 7) 84.

- the Act relates to fields that require frequent adaptation to changing factual or policy circumstances;
- technical issues or minor unforeseen developments may arise in the law, and are sufficiently technical or minor in nature that they do not immediately justify amending the Act; or
- where compliance with a regulatory scheme may be impractical, inefficient, or unduly expensive, but the scheme's policy objective can be achieved by other means (which may include imposing conditions on an exemption).[31]

E.34 In cases such as these, delegated legislation that is subject to appropriate safeguards may be a suitable way to manage regulatory boundaries.

E.35 These factors may also be relevant where a power is delegated to exclude or exempt by way of non-legislative instrument (such as an individual exemption).

E.36 A delegated power to exclude or exempt should rarely be unconstrained. The following limitations, in particular, should be considered when designing and drafting an exclusion or exemption power:

- **Consistency with the purposes of the Act:** the power must be exercised consistently with, or at least taking into account, the objects of the Act.
- **Criteria or principles for the exercise of power:** when a wide or discretionary power is granted, the Act may set out criteria or guiding principles to limit the discretion.
- **Review process:** there should be a process to review exclusions and exemptions at regular intervals to identify any need to amend the Act. A person that exercises delegated power may also be required to provide an annual report to Parliament detailing the number of times and circumstances in which the power was exercised to ensure appropriate accountability.[32]

Appropriate delegates

Who will hold or exercise the power to make delegated legislation?

The person or body delegated a power to make delegated legislation must be appropriate, having regard to the subject matter and the importance of the relevant issues.[33]

31 Ibid 84–5.
32 Ibid 85. See also Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 8) Principle (j).
33 See, eg, Legislation Design and Advisory Committee (NZ) (n 7) 74.

E.37 The power to make delegated legislation should be granted to the most appropriate person or body (the 'delegate'). In deciding who would be best to exercise delegated legislative power, the following factors should be taken into account:

- the extent of policy or value judgements required;
- the degree of democratic accountability required, or alternatively, the extent to which the decision-maker should be insulated from political influence; and
- the technical expertise required of the person making the delegated legislation.[34]

E.38 Technical expertise has two relevant aspects: subject-matter expertise and law-making expertise. The chosen delegate should possess subject-matter expertise to make delegated legislation in the particular subject area, especially in complex or technical fields. The delegate should also have sufficient capacity and capability to carry out the law-making function. This would include drafting expertise. When the delegate may lack drafting expertise, or in cases of particularly complex delegated legislation, the delegate should consult the Office of Parliamentary Counsel (Cth) ('OPC') and obtain its support as appropriate.[35]

E.39 The identity of the delegate should be clear and unambiguous. If a power is capable of being 'sub-delegated' then the intent to permit sub-delegation should be clearly set out in the Act.[36] Providing that a power may only be sub-delegated by legislative instrument, so as to subject it to disallowance by Parliament, would reinforce oversight and accountability.

E.40 Some subject matters may be more appropriately enacted by the Governor-General in Council (in the form of regulations) than other legislative instruments because of the additional scrutiny that may be applied by the Federal Executive Council and the involvement of OPC in the drafting of regulations.[37] Examples include the following matters, which in any event are matters that should be addressed in primary legislation and appear in delegated legislation in only limited circumstances:

- offence provisions, powers of arrest or detention, entry provisions, search and seizure provisions, and civil penalties (discussed in further detail below);
- impositions of taxes; and
- setting the amount of an appropriation authorised by the Act.[38]

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34 Ibid.

35 Section 16 of the *Legislation Act* provides that to 'encourage high standards in the drafting of legislative and notifiable instruments, the First Parliamentary Counsel must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments and notifiable instruments'.

36 Legislation Design and Advisory Committee (NZ) (n 7) 77–8; Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [26]–[27].

37 The drafting of regulations is 'tied work' within the meaning of the *Legal Services Directions 2017* (Cth), and must only be performed by OPC.

38 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [3]. See also Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 26.

E.41 The involvement of the Federal Executive Council and OPC should not, however, be given undue weight or serve as the default position in deciding who should exercise delegated power if the Minister (as the effective rule-maker for regulations) would not be the most appropriate delegate. To the extent that additional scrutiny is needed, other safeguards (as discussed further below) may be considered. If drafting capability or quality causes concern, this may indicate a need for the delegate to consult with OPC about improving the delegate's drafting capability or to engage the drafting services of OPC.

Appropriate safeguards

Is the delegated legislation subject to appropriate safeguards?

All delegated legislation should be subject to an appropriate level of scrutiny, a sound process, and review.[39]

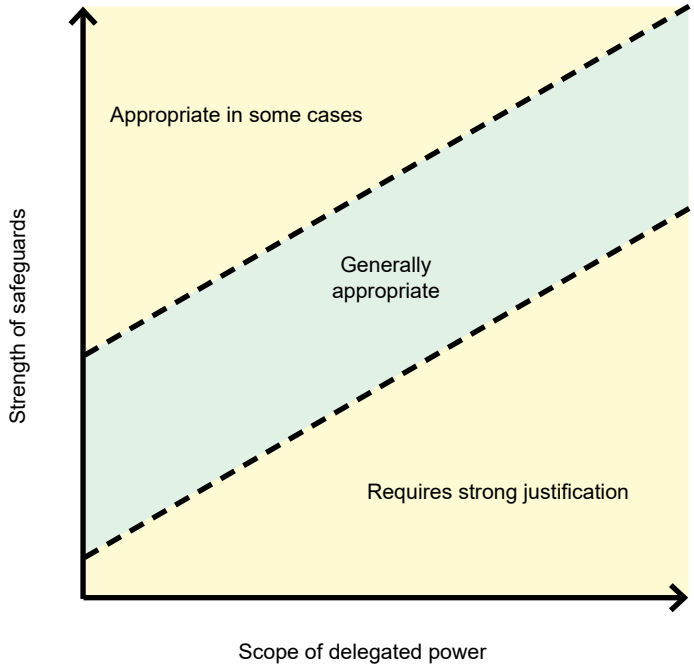
E.42 Safeguards are important because of the potentially significant effects that delegated legislation can have. The more significant those effects, and the closer the subject of delegated power is to the significant policy end of the spectrum, the more important the safeguards become. This is illustrated by **Figure 2** below. However, safeguards also aim to strike an appropriate balance between the expediency of executive law-making (compared to parliamentary law-making) and the important principles at stake.

E.43 Safeguards provide an important check on the exercise of delegated legislative power so as to promote:

- a good law-making process (through, for example, requiring consideration of certain matters or consultation before exercising a power);
- transparency (through processes open to the public and the publication of explanatory materials);
- participation (through consultation, oversight or approval); and
- accountability (through parliamentary oversight and other review procedures).[40]

39 Legislation Design and Advisory Committee (NZ) (n 7) 74.
40 Ibid 74–5.

Figure 2: Appropriate safeguards



Legislation Act safeguards

E.44 The *Legislation Act* establishes a set of safeguards that are generally applicable to all delegated legislation. These safeguards provide for minimum standards in relation to:

- consultation before delegated legislation is made;
- publication requirements;
- parliamentary scrutiny, including that delegated legislation be tabled in Parliament and be disallowable by either House of Parliament; and
- sunsetting, which provides for automatic repeal after a set period of time.

E.45 Exemptions or deviations from the minimum standards of the *Legislation Act* should be adequately justified in explanatory materials. This includes exemptions from disallowance by Parliament and sunsetting. Disallowance is the most important mechanism allowing Parliament to control the exercise of delegated legislative power.

E.46 The Delegated Legislation Scrutiny Committee has expressed the view that exemptions from disallowance:

- should be created in exceptional circumstances only;

- should be made only if there is an alternative parliamentary role equivalent to disallowance, providing an alternative form of democratic accountability;[41] and
- should not be made when instruments would adversely affect rights, liberties, duties, or obligations.[42]

E.47 Alternative mechanisms for preserving Parliament's control while balancing other considerations may include, for example, providing that instruments commence only after the disallowance period has expired, or providing for a shorter disallowance period where good reasons exist for doing so.

E.48 Sunsetting is another safeguard that helps ensure delegated legislation is kept up to date and fit-for-purpose. Sunsetting also provides Parliament with an opportunity to reconsider the appropriateness of a legislative instrument.[43] Delegated legislation, particularly instruments that modify primary legislation, should not be allowed to continue in force for such a long period as to operate as a de facto amendment to primary legislation.[44]

E.49 Unless a different review mechanism applies — such as periodic review mandated by the enabling Act — exemption from sunsetting makes it more likely that outdated or irrelevant laws will be allowed to remain in force. Exemption from sunsetting also reduces Parliament's ability to remain informed about the operation of delegated legislation and to perform its oversight function. Instruments should not be exempt from sunsetting without strong justification. The *Guide to Managing the Sunsetting of Legislative Instruments* provides further guidance, including policy criteria, for exemptions from sunsetting.[45]

E.50 The Delegated Legislation Scrutiny Committee has expressed the following views in relation to exemptions from disallowance and sunsetting:

- Subject to the circumstances of the particular case, instruments that do any of the following should not be exempt from disallowance or sunsetting:
    - override or modify primary legislation;
    - trigger, or are a precondition to, the imposition of custodial sentences or significant pecuniary penalties;
    - restrict personal rights and liberties; or
    - facilitate expenditure of public money, including 'Advance to the Finance Minister' determinations.[46]

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41 For further discussion of alternative accountability mechanisms, see Chapters 4 and 5 of Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (2021).

42 Ibid [7.91].

43 Ibid [7.74].

44 Ibid [7.114].

45 Attorney-General's Department (Cth), *Guide to Managing the Sunsetting of Legislative Instruments* (2020).

46 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 41) [7.93].

- The following reasons are highly unlikely to be acceptable, in any circumstances, for exempting delegated legislation from disallowance and sunsetting:
  - the rule-making process needs to be separated from the political process; or
  - the instrument is intended to remain within executive control.[47]
- The following reasons are unlikely to be acceptable for exempting delegated legislation from disallowance and sunsetting unless exceptional circumstances exist:
  - the instrument is based on technical or scientific evidence;
  - the instrument relates to internal departmental administration;
  - the instrument is central to machinery of government arrangements or electoral matters;
  - commercial certainty will be affected;
  - the exemption is in response to a parliamentary committee recommendation;
  - the instrument is part of an intergovernmental scheme, or required under an international treaty or convention;
  - the instrument is critical to ensuring urgent and decisive actions; or
  - the exemption will provide certainty in meeting specific security needs.[48]

Other safeguards

E.51 Safeguards other than the default rules provided by the *Legislation Act* may also be considered in each case. Some examples are discussed below. The more significant a delegated legislative power, and the more likely its exercise involves considerations of policy or value judgements, the more likely it will warrant additional safeguards. Different safeguards may also be considered based on the identity of the delegate, the delegate's role in the executive arm of government (for example, the extent of any independence from the elected government), and the delegate's relationship to Parliament (for example, the extent of parliamentary oversight).

E.52 When considering additional or tailored safeguards, their potential benefits should be considered against any potential to create complexity or to disproportionately inhibit the exercise of the delegated power, thereby potentially frustrating Parliament's intention.

Specific consultation requirements

E.53 Section 17 of the *Legislation Act* requires a rule-maker to be satisfied that any reasonably practicable and appropriate consultation has taken place before making a legislative instrument. Non-compliance does not, however, affect the validity or enforceability of a legislative instrument.[49]

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47 Ibid [7.94].
48 Ibid [7.95].
49 *Legislation Act 2003* (Cth) s 19.

E.54 An empowering provision may modify the standard consultation requirements by, for example, providing that:

- rule-makers must have regard to particular matters when determining whether consultation has been appropriate (in addition to the non-mandatory matters suggested by s 17(2) of the *Legislation Act*);
- rule-makers must consult particular individuals, entities or groups; or
- non-compliance with a mandatory consultation requirement will enable a court to invalidate the relevant legislative instrument or declare it invalid against certain persons.

E.55 Creating a judicially enforceable requirement to consult would be a significant departure from the default position provided by the *Legislation Act*, but may be warranted when consultation is particularly important.

E.56 The following circumstances would tend to support a delegated legislative power being subject to enhanced consultation requirements:

- the exercise of the power involves important policy considerations or value judgements;
- specific groups may be significantly affected by the exercise of the power (particularly when those groups are not otherwise likely to participate in an ordinary consultation process);
- the delegated power relates to a significant regulatory scheme; or
- the exercise of the power involves scientific or technical considerations that are the subject of controversy in a specialist field.[50]

Affirmative resolution or delayed commencement

E.57 Typically, a legislative instrument commences the day it is registered on the Federal Register of Legislation or at a time specified by the instrument itself.[51] As an alternative, commencement may be delayed until:

- both Houses of Parliament expressly approve the legislative instrument (referred to as the 'affirmative resolution procedure');[52] or
- the time for parliamentary disallowance under the *Legislation Act* has expired.

E.58 Both processes increase the opportunity for scrutiny by Parliament before commencement and promote a degree of certainty as the laws commence only after an opportunity for disallowance. However, the processes also introduce practical constraints, particularly during parliamentary recesses. In the case of the affirmative resolution procedure, for example, there may be no clear timeline or process to

50 See, eg, Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (2019) [3.40]–[3.41].
51 *Legislation Act 2003* (Cth) s 12.
52 See, eg, Legislation Act Review Committee, Attorney-General's Department (Cth) (n 23) 82.

facilitate commencement, potentially delaying commencement indefinitely.[53] Delaying commencement also reduces the ability to respond to an issue quickly and potentially provides an opportunity for avoidance.

E.59 When delegated legislation is to be made by a department or statutory agency, it may be possible to require consent, or to permit veto, by the responsible Minister (provided such a measure would align with the parliamentary disallowance procedure and timeframes). This may be appropriate, for example, when a regulator with technical expertise is responsible for significant elements of a regulatory scheme.[54] In cases where an agency or regulator functions independently of government (in respect of both law-making and non-law-making functions), veto may be a more appropriate mechanism than prior approval, in order to promote independence.

Publicity and publication

E.60 An empowering provision may require that delegated legislation be published in a particular way in addition to the general requirement that it be lodged and registered on the Federal Register of Legislation.[55] Although publication on the Federal Register of Legislation has supplanted many older forms of notification, such as gazettal, consideration may be given to additional publication or notice requirements if particular delegated legislation may not otherwise come to the attention of an affected group.

Adjusted sunsetting

E.61 While the standard sunsetting regime in the *Legislation Act* applies a period of 10 years, a shorter period of time may be appropriate in some cases. These may include, for example, modifications to primary legislation and exemptions from major regulatory schemes. A shorter sunsetting timeframe in these cases gives Parliament an opportunity to review and scrutinise changes to primary legislation. The Delegated Legislation Scrutiny Committee has suggested that in these cases, a three year timeframe would be appropriate as it would allow sufficient time for the modifications or exemptions to be in force so as to consider whether they are required for a longer period.[56]

Reporting to Parliament

E.62 An empowering provision may require the delegate of legislative power to periodically report to Parliament on the use of that power. Such reporting may assist Parliament to gain a 'macro level' understanding that it would otherwise lack through the usual scrutiny process, which is focused on particular legislative instruments as

53 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia (n 50) [8.45].

54 See, eg, *Corporations Act 2001* (Cth) s 798G (market integrity rules).

55 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [109].

56 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 41) [7.115]. See also Legislation Act Review Committee, Attorney-General's Department (Cth) (n 23) 49–50.

they are made. As noted above, this may also be considered in the case of a power to grant exemptions from primary legislation.

Specific issues

Fundamental rights and liberties

Could exercise of the power significantly impact personal rights and liberties?

Matters that have a significant impact on civil rights and liberties should generally be addressed in primary legislation, regardless of whether the impact is positive or negative.[57]

E.63 Matters that have a significant impact on civil rights and liberties are examples of significant policy matters that should be addressed in primary legislation. The Parliamentary Joint Committee on Human Rights has prepared a *Guide to Human Rights* which outlines 25 of the key human rights against which the Committee considers questions of human rights compatibility. This resource provides a useful starting point for assessing whether a particular legislative measure impacts on civil rights and liberties.

E.64 The Delegated Legislation Scrutiny Committee has also identified provisions that impact personal rights and liberties and which therefore appropriately belong in primary legislation or require special justification if they are to be contained in delegated legislation.[58] These include provisions relating to law enforcement (discussed under the next heading) and provisions that:

- apply retrospectively or have a retrospective effect;
- confer immunity from liability;
- exclude or limit procedural fairness; and
- provide for the collection, use and disclosure of personal information.

57 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 8) Principle (j).

58 Ibid Principle (h).

Offences, penalties, and coercive powers

Does the delegation allow for the creation of criminal offences?

Criminal offences subject to serious criminal sanctions, including imprisonment, should be contained in primary legislation.[59]

E.65 Laws creating offences should ordinarily be contained in primary legislation.[60] This is because:

- a criminal conviction carries a range of consequences beyond the immediate penalty;[61]
- there are public policy and political dimensions to the choice of what contraventions are regarded as 'criminal';[62] and
- those who read legislation have a legitimate expectation that 'fundamental aspects of a legislative scheme (such as serious criminal penalties) will be in the principal Act'.[63]

E.66 Any term of imprisonment is considered to be a serious criminal sanction and should not be included as a penalty in delegated legislation.[64] Serious criminal sanctions are also generally considered to include fines above 50 penalty units for an individual or 250 penalty units for a corporation.[65] However, in certain regulatory contexts, higher penalties have been set for corporations in delegated legislation, and this may be appropriate depending on the nature of the regulated community.[66]

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59 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia (n 8) Principle (iv); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 8) Principle (j); Department of the Prime Minister and Cabinet (Cth) (n 8) [1.10].

60 Department of the Prime Minister and Cabinet (Cth) (n 8) [1.10]; Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 44. See also Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2016) [17.3], [17.39]; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) [3.43] ('*Principled Regulation*').

61 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 13.

62 Australian Law Reform Commission, *Principled Regulation* (n 60) [3.43].

63 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 44.

64 Department of the Prime Minister and Cabinet (Cth) (n 8) [1.10]; Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 44.

65 Department of the Prime Minister and Cabinet (Cth) (n 8) [1.10].

66 See, eg, *Corporations Regulations 2001* (Cth), reg 5D.2.01(2A) (50 penalty units for an individual and 500 penalty units for a corporation).

Does the delegation allow for the imposition of civil penalties?

Obligations that attract significant civil penalties for their breach, and provisions setting significant civil penalties, should be contained in primary legislation.[67]

E.67 Civil penalties are non-criminal monetary penalties imposed by a court in civil proceedings that apply the civil standard of proof ('the balance of probabilities'). They are one of a range of enforcement tools available to those designing legislation and have become common in Australian regulatory laws. Such penalties exist to deter contraventions and promote compliance with regulatory standards.[68]

E.68 Although civil penalties are not criminal sanctions, they can have serious reputational and financial impacts on a person or entity. There are also some differences between the protections in the criminal law, and the procedural and evidential rules applicable in civil penalty proceedings. Given this, it is not generally appropriate to delegate the power to create significant civil penalties.[69] The monetary threshold for a 'significant' pecuniary penalty under a civil penalty provision is the same as for a criminal offence: 50 penalty units for an individual and 250 penalty units for a corporation (see above). However, as with criminal fines, the level of civil penalty is set higher in some regulatory contexts for corporations.[70]

Is the power subject to appropriate safeguards?

Any power to create criminal offences or civil penalty provisions in delegated legislation should be clearly defined and subject to appropriate safeguards.

E.69 If it is intended that an offence and/or civil penalty provision is to be included in delegated legislation, the empowering Act must include express power for a legislative instrument to create offences and/or civil penalties, and should also specify the maximum penalty.[71]

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67 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 8) Principle (j).

68 See, eg, *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599.

69 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 8) Principle (j). See also Australian Law Reform Commission, *Principled Regulation* (n 60) [6.50].

70 See, eg, *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019* (Cth) regs 10(2) and (4) (300 penalty units).

71 See generally Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 14.

E.70 Because of their impact on fundamental rights and liberties, the following types of criminal law provisions are of particular concern to the Delegated Legislation Scrutiny Committee and require particular safeguards:

- abrogation of the privilege against self-incrimination;
- strict or absolute liability offences; and
- reversals of the legal or evidential burden of proof.[72]

Does the Act delegate the content of an offence or civil penalty provision?

The content of an offence or civil penalty provision should not be provided in another instrument unless there is a demonstrated need to do so and appropriate safeguards apply.

E.71 The content of an offence or civil penalty provision set out in an Act or regulation should be clear from the provision itself, although it may rely on the Act or regulations, or another instrument, to define terms or give context.[73] For example, the following would normally be considered undesirable:

> A person commits an offence if the person fails to comply with obligations set out in the regulations.

E.72 Clarity of content on the face of the provision is important:

- so the scope and effect of the provision is clear to Parliament and those subject to the provision;
- to enable Parliament to scrutinise the entire content of an offence or civil penalty provision; and
- in the case of offences, to avoid imposing a general offence with a single maximum penalty to a wide range of potential conduct of undifferentiated seriousness.[74]

E.73 It will generally be easier to justify delegating the content of civil penalty provisions than offences, because of the different consequences attached to each, and the existence of case law and specific statutory provisions addressing the threshold for imposing, and calculation of, civil pecuniary penalties.

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72 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 8) Principle (h).

73 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 26. See also Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [8].

74 See Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 27.

E.74 Circumstances in which it may be appropriate to delegate offence or civil penalty content to another instrument include:

- the relevant content involves a level of detail inappropriate for an Act;[75]
- prescription by legislative instrument is necessary because of the changing nature of the subject matter;[76]
- the relevant content involves material of such a technical nature that it is not appropriate to deal with it in the Act;[77]
- elements of the offence or civil penalty provision are to be determined by reference to treaties or conventions, in order to comply with Australia's obligations under international law or other international agreements, or for consistency with international practice;[78]
- the offence or civil penalty provision relates to breach of conditions of a licence, authorisation, permit, or exemption (because the holder applies for it and agrees to its terms);[79] or
- a civil penalty provision relates to contravention of a specific set of highly visible and easily identifiable regulatory rules or a code of conduct.[80]

E.75 Offence and civil penalty content should not be enacted by delegated legislation if it would be more appropriate for that content to receive the full consideration and scrutiny of Parliament (for example, if the content to be delegated is likely to be significant or contentious).

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75 For example, s 20AB of the *Civil Aviation Act 1988* (Cth) allows for regulations to specify the process for determining the types of people who are authorised to carry out a variety of duties in relation to different categories of aircraft.

76 For example, s 18HE of the *National Measurement Act 1960* (Cth) allows for the prescription of scales of measurement on measuring instruments appropriate for particular classes of goods for sale.

77 For example, Part VI Div 4 of the *National Measurement Act 1960* (Cth) allows for the prescription of the procedures by which the average quantity of a statistically significant sample of goods is calculated.

78 For example, the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) and the *Corporations (Passport) Rules 2018* (Cth).

79 See Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 29. However, where legislation permits the relevant authority to vary the terms of the licence, authorisation, or permit, the legislation should generally provide for the holder to be notified of the change. Consideration should also be given to allowing a minimum period for compliance with the new conditions, especially when a person may be criminally liable for non-compliance.

80 See, for example, the following provisions of the *Corporations Act 2001* (Cth): s 798H, by which contravention of obligations in the market integrity rules attract a civil penalty (not applicable to overseas market operators under s 798H(2)); s 908CF, by which contraventions of the financial benchmark rules made by the Australian Securities and Investments Commission via legislative instrument attract civil penalties; and s 921E, by which contravention of the Financial Planners and Advisers Code of Ethics (made by legislative instrument) attracts a 'restricted' civil penalty. Note that the other bullet points in this list are covered in the Attorney-General Department (Cth) *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at 27–30), but this final bullet point is a new addition by the ALRC.

E.76 It is generally easier to justify the delegation of offence and civil penalty content to regulations than to other kinds of legislative instrument.[81] However, where an Act delegates content directly to a different type of instrument (such as 'rules' or 'orders')[82] it may be appropriate to delegate offence and civil penalty content to such an instrument, subject to parliamentary scrutiny and any other appropriate safeguards.[83]

E.77 The Scrutiny of Bills Committee has noted that, at a minimum, delegated legislation containing the content of offences should be subject to parliamentary review and disallowance.[84] The Committee has expressed concern about provisions that allow for obligations to be changed without Parliament's knowledge, or without any opportunity for Parliament to scrutinise the variation.[85] There should also be strong justification when delegated legislation is to be exempt from scrutiny.[86]

E.78 The above principles also apply to the delegation of offence or civil penalty content from regulations to another legislative instrument. Offence and civil penalty content should generally only be sub-delegated where it is likely to be lengthy, technical in nature, or changed regularly.

E.79 When the content of an offence or civil penalty provision is delegated to a legislative instrument, safeguards should be put in place to ensure that the types of matters that can be delegated are clear and that those who are subject to the offence or civil penalty provision can readily ascertain their obligations.

E.80 Appropriate safeguards include:

- clearly defining and circumscribing what may be contained in delegated legislation;
- mechanisms to ensure delegated legislation is readily publicised and obtainable, in addition to publication on the Federal Register of Legislation (such as on the relevant Department's website);
- mechanisms for distinguishing parts of an instrument to which the offence or civil penalty provision applies. For example, if an offence applies to contravention

81 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 26. See also Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [28]–[34].

82 See, eg, *Navigation Act 2012* (Cth) ss 14, 342. The effect of these provisions is to include Marine Orders, a form of delegated legislation made by the Australian Maritime Safety Authority, within the definition of 'regulations' and to provide that Marine Orders may be made with respect to the same matters as regulations (subject to exceptions).

83 This may include, for example, ensuring that instruments relating to offences and civil penalties are drafted by OPC.

84 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 28.

85 See, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Sixth Report of 2010* (16 June 2010) 217–21.

86 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2007* (February 2007) 7.

of a regulation made for the purposes of the offence, the relevant regulation should refer to the offence provision;

- when an offence or civil penalty provision affects an identifiable class of people, it may be appropriate for relevant stakeholders to be consulted when changes are made to the delegated content. For example, the Civil Aviation Safety Authority has informal and formal processes for consulting stakeholders in the aviation industry whenever legislative changes are made affecting business or restricting competition; and
- explanatory material clearly explaining why it is necessary to delegate offence or civil penalty provision content and any safeguards that have been included in the legislation.[87]

Does the delegation allow for the creation of an infringement notice scheme?

When primary legislation allows for the creation of an infringement notice scheme in delegated legislation, regulations are preferable to other legislative instruments.

E.81 Infringement notices are an administrative device to dispose of criminal and non-criminal contraventions without going to court. An infringement notice sets out particulars of an alleged offence or contravention, and gives the person to whom the notice is issued the option of either paying the penalty set out in the notice or electing to have the matter dealt with by a court.

E.82 Infringement notices are traditionally used for low-level offences when a high volume of uncontested contraventions is likely.[88] The amount payable under an infringement notice scheme at any level of the legislative hierarchy should not exceed 12 penalty units for a natural person or 60 penalty units for a body corporate.[89]

E.83 Regulations are generally considered an appropriate form of instrument for detailed matters such as how an infringement notice scheme operates or the content of notices.[90] If an infringement notice scheme is intended to be included in regulations, the primary legislation should include an express regulation-making power providing for this.[91] It should also be noted that the *Regulatory Powers (Standard Provisions)*

87 See generally Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 28–30.
88 See Australian Law Reform Commission, *Principled Regulation* (n 60) 59.
89 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 60.
90 Australian Law Reform Commission, *Principled Regulation* (n 60) [6.100].
91 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 57.

Act 2014 (Cth) sets out a general scheme for infringement notices that may be relied on to reduce the length of an Act.[92]

Does the delegation allow for the imposition of administrative penalties or other administrative action?

Provisions establishing schemes for the imposition of administrative penalties, or other administrative action related to regulatory offences or contraventions, should be contained in primary legislation.

E.84 Regulatory schemes may also include a range of administrative penalties (automatic, non-discretionary monetary administrative penalties that can be imposed without going to court) or other consequences such as enforceable undertakings, licensing restrictions, or banning orders that may be imposed or negotiated following the alleged commission of regulatory offences or contraventions.

E.85 The Delegated Legislation Scrutiny Committee considers that provisions establishing significant elements of a regulatory scheme should be contained in primary legislation. Such elements may include:

- licensing regimes;
- principles underpinning the scope and exercise of significant discretionary powers;
- the availability of independent review of administrative decisions made under the scheme;
- safeguards to protect against undue trespass on personal rights and liberties in the administration of the scheme; and
- significant penalties for regulatory breaches.[93]

Does the delegation allow for the creation of coercive powers?

Coercive powers should generally be contained in primary legislation.

E.86 Including coercive powers (such as powers of arrest or detention, entry provisions, search provisions, and seizure provisions) in primary legislation ensures that the scope and effect of these powers is clear to Parliament and those subject to the powers. Consideration should be given to adopting the standard suite of

92 For further guidance and information, see Attorney-General's Department (Cth), 'Regulatory Powers' <www.ag.gov.au/legal-system/administrative-law/regulatory-powers>.

93 See, eg, Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 8) Principle (j).

provisions for monitoring and investigation powers contained in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).[94]

E.87 However, providing for such powers in delegated legislation may be appropriate in certain circumstances, including when the primary legislation makes express provision for the creation of the power under delegated legislation,[95] or when the objectives of the primary legislation may be frustrated unless the powers are created under regulation (for example, because of rapidly changing circumstances).[96]

Incorporation by reference

Does the empowering provision contemplate 'incorporation by reference'?

Incorporation by reference should only be used if there are clear benefits to doing so.

E.88 Section 14 of the *Legislation Act* provides general authority for delegated legislation to apply, adopt, or incorporate material contained in an Act, an instrument, rules of court, or another written document. OPC Drafting Direction 3.8 discusses the requirements for particular circumstances and issues to consider when drafting delegated legislation.[97] In summary, a legislative instrument can apply, adopt, or incorporate:

- the provisions of a Commonwealth Act, disallowable legislative instrument (as defined in the *Legislation Act*), or rules of court as in force at a particular time, or as in force *from time to time*;
- material contained in something *other than* a Commonwealth Act, disallowable legislative instrument (as defined in the *Legislation Act*), or rules of court as in force or existing *at or before* the time the legislative instrument commences; and
- if expressly permitted by the enabling Act, material contained in something *other than* a Commonwealth Act, disallowable legislative instrument (as defined in the *Legislation Act*), or rules of court as in force or existing *from time to time*.

94 For further guidance and information, see Attorney-General's Department (Cth) (n 92).
95 See, eg, *Great Barrier Reef Marine Park Act 1975* (Cth) s 66(2)(c).
96 See Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (n 12) 73.
97 Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) [164]–[180].

E.89 The prospect of incorporating material by reference should be kept in mind when designing an empowering provision. This is particularly the case if potentially incorporated material is not in legislation as existing from time to time. There are four main issues to consider in this regard:

- **Quality**: incorporated material may not be sufficiently certain or understandable to be appropriate for legislation. This is particularly important if the material forms the basis for offences.
- **Accessibility**: legislation should be easy to find, use, and comprehend. Incorporated material should generally be accessible to the same extent as legislation.
- **Legitimacy**: if the incorporated material can be changed, then those changes may automatically flow through to the legislation, and Parliament or the delegated law-maker may have no control over that process. Sub-delegation of this kind must be carefully considered.
- **Good process**: it is problematic if incorporation by reference would bypass or subvert important law-making procedures.[98]

E.90 These potential problems must be weighed against the benefits of incorporation by reference, which include:

- making the law shorter and simpler by removing significant detail that otherwise clutters core requirements;
- allowing certain aspects of rules to be developed by people with specialist knowledge and expertise; and
- facilitating convergence and consistency of standards, including by keeping laws up to date with national and international standards.

E.91 Incorporation by reference may be appropriate when, for example:

- the incorporated document is long or complex, covers only technical matters, and few people are likely to be affected;
- the document has been agreed with one or more foreign governments, cannot easily be recast into legislation, and deals with only technical details of a policy already approved by Parliament;
- it is appropriate for the document to be formulated by a specialist government agency or private sector organisation, rather than by Parliament or ministers; or
- the document has been developed by an organisation for use in respect of a product manufactured by it or its members.

Naming delegated legislation

E.92 When formulating the terms of an empowering provision, consideration should be given to how the delegated power is described in operative terms. This

98 Legislation Design and Advisory Committee (NZ) (n 7) 81.

is important because the nature of the power will generally be reflected in the name of instruments made under that power, which in turn affects their findability and useability. For example, if the exercise of power is intended to 'certify' something, then the instrument giving effect to it will typically be a 'Certification'. OPC Drafting Directions give further guidance regarding the appropriate language to use in an empowering provision.[99]

Other resources

E.93 This guidance aims to consolidate and synthesise pre-existing resources relating to the legislative process so far as they touch on questions concerning the design of provisions that delegate legislative power. Those resources include the following.

- The *Legislation Handbook* maintained by the Department of the Prime Minister and Cabinet, as it relates to the distinction between primary and delegated legislation.[100] The *Legislation Handbook* contains detailed information regarding the procedures for making Commonwealth Acts.
- OPC guidance materials, in particular Drafting Direction 3.8 regarding delegated legislation. OPC is an important source of knowledge and expertise regarding delegated legislation, and should be consulted early and regularly regarding the delegation of legislative power.
- AGD's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, in relation to delegated legislation creating, providing the content of, or modifying offences.

E.94 This guidance also draws on comparable guidance published by the New Zealand Legislation Design and Advisory Committee.[101]

E.95 The Bills Scrutiny Committee and Delegated Legislation Scrutiny Committee are important sources of guidance. The guidance in this document draws on the scrutiny guidelines of both committees and recent reports of the Delegated Legislation Scrutiny Committee.[102] The committees also create an important resource by applying many of the principles discussed above on a case-by-case basis. So far as possible, policy-makers and law-makers should remain up to date with both committees' views by:

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99 See especially Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021) 8; Office of Parliamentary Counsel (Cth), Drafting Direction 1.1A, 'Names of instruments and provision units of instruments' (Document release 3.2, July 2022).

100 In particular, the guidance addresses the matters discussed at [1.10]–[1.12] and [5.65]–[5.76] of the *Legislation Handbook*.

101 Legislation Design and Advisory Committee (NZ) (n 7).

102 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia (n 50); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia (n 41).

- subscribing to the Scrutiny News, an email newsletter service highlighting key aspects of the work of both the Bills Scrutiny Committee and Delegated Legislation Scrutiny Committee;
- consulting the Bills Scrutiny Committee's *Scrutiny Digest*, which is published during parliamentary sitting weeks and contains the Committee's comments on recently introduced Bills; and
- consulting the Delegated Legislation Scrutiny Committee's *Delegated Legislation Monitor*, which is published during parliamentary sitting weeks and provides a periodic overview of the Committee's scrutiny work.