

FINANCIAL SERVICES LEGISLATION INQUIRY

WEBINAR: Legislation Renovation: What Interim Report B means for you

WEDNESDAY 16 NOVEMBER 2022

TRANSCRIPT

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Dr Andrew Godwin

Good afternoon and welcome to today's ALRC webinar. The title of which is Legislation Renovation: What Interim Report B means for you? My name is Andrew Godwin and I'm Special Counsel at the ALRC. I'll be moderating today's webinar and I'll be joined by three colleagues at the ALRC, Chris Ash, Will Isdale and Cindy Davies. I'd like to begin by acknowledging the traditional owners of country on the land on which we meet and wherever you might be joining us from around Australia.

And I'd like to pay my respects to their elders, past and present. The purpose of today's webinar is to discuss Interim Report B, the second interim report in the ALRC Inquiry into the Legislative Framework for Corporations and Financial Services Regulation. As many of you may be aware, Interim Report A focused on these definitions. This Interim Report B focuses on the coherence of the regulatory design and hierarchy of laws.

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Dr Andrew Godwin

Interim Report C, which my colleague Cindy Davies will outline in her comments, will focus on how Chapter 7 of the Corporations Act would be reframed or restructured to achieve a legislative framework for financial services that is clearer, more coherent and more effective. For access to the ALRC publications relating to this Inquiry, including the Interim Reports, Background Papers, recordings of previous webinars and podcasts, I'd encourage you to visit our website.

I would also encourage all of you to engage with us further on the issues, whether through formal submissions in response to Interim Report B or through consultations. And I'd like to thank everyone who has contributed to the work of the ALRC to date. Your contribution is greatly appreciated. So let me provide a brief outline of Interim Report B before inviting my colleagues to speak.

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Dr Andrew Godwin

Similar to Interim Report A, Interim Report B makes various recommendations and puts forward various proposals and questions. Dealing first with the proposals and questions, the key feature of Interim Report B is that it proposes a new legislative model in terms of where law is located within the legislative hierarchy and also who makes the rules. The legislative model would comprise three elements.

First, the Act containing provisions appropriately enacted only by Parliament. Secondly, the Scope Order which would operate as a single consolidated legislative instrument and contain exclusions, class exemptions and other details concerning the scope of the Act. And thirdly, thematic rulebooks, which would operate as consolidated legislative instruments and contain rules giving effect to the Act in different regulatory contexts, such as disclosure and licensing.



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Dr Andrew Godwin

My colleague Chris Ash will explain the legislative model in further detail and provide some examples. The ALRC has received broad support from stakeholders for such a model, and we believe that it would help to achieve a more adaptive, efficient and navigable legislative framework as contemplated by our terms of reference. Interestingly, one of the key takeaways from the ALRC's empirical research is the corporations and financial services legislation in Australia makes less use of delegated legislation, that's as a percentage of the primary legislation, than other regulatory regimes in which technical expertise, flexibility and adaptability are important.

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Dr Andrew Godwin

Examples include civil aviation and maritime regulation. Accordingly, the ALRC believes that there is scope to make more effective use of delegated legislation. Two important proposals underpin the legislative model proposed by the ALRC. First, rules made under Chapter 7 of the Corporations Act should not contain matters more appropriately enacted in primary legislation such as serious criminal offenses and significant civil penalties.

In this regard, Interim Report B provides draft consolidated guidance on the delegation of legislative power, which ALRC suggests should be maintained by the Attorney-General's Department in consultation with the Office of Parliamentary Counsel. Secondly, the Minister and ASIC would concurrently hold powers to exclude classes of products and services for exempt classes of person from provisions of Chapter 7

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Dr Andrew Godwin

to set out details that adjust the scope of the provisions in Chapter 7 and to make rules. Coordination in respect of the exercise of those powers, would be supported by a protocol between the Minister and ASIC. Sunsetting and review safeguards would apply to ensure that there was appropriate oversight of delegated legislation by Parliament. To support amendments to the Scoping Order and the rulemaking powers the Minister and ASIC would be required to consult the Rules Advisory Committee and the public. The ALRC has prepared prototype legislation to illustrate how the proposed legislative model could be applied in respect of disclosure. It shows how large parts of the current law relating to disclosure could be reframed and restructured within the existing policy settings. In addition to the proposals that I've just outlined, Interim Report B makes various recommendations to repeal redundant and outdated provisions and also to simplify unnecessarily complex provisions, including replacing generally applicable notional amendments with textual amendments to the primary legislation.

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Dr Andrew Godwin

My colleague Will Isdale will touch on related issues in his comments. On the subject of complexity, an area in which we at the ALRC have reflected and written quite a bit to date. I think everyone would agree that the law has become unnecessarily complex, particularly in the area of financial services. Empirical research by the ALRC suggests that complexity in the Corporations Act is being caused by various design choices to date. These design choices include the spread of prescriptive detail across the legislative hierarchy, the use of notional amendments in regulations and ASIC legislative instruments, and the creation of alternative regulatory regimes by way of exemptions contained in regulations and ASIC legislative instruments. Of course, complexity, particularly in Chapter 7 of the Corporations Act, is also due to two decades of regulatory modifications as new regimes have been added to the old. Often without full regard to how the regimes could operate alongside each other.

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Dr Andrew Godwin

In large part, these design choices have been made to manage the over-inclusiveness that results from the traditional approach of regulating functionally equivalent products in the same way. Using functional definitions for this purpose and tailoring regulation through the use of notional amendments and conditional exemptions.

As Commissioner Hayne said during the Financial Services Royal Commission, it's been a process of piling exception upon exception.

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Dr Andrew Godwin

Of course, a further social context of the impact of innovation in the area of financial products and financial services, driven in part by technological developments. This is the subject of a recent Background Paper issued by the ALRC on new business models, technologies and practices. Two further Background Papers will be released shortly: one on rationalising the provisions on unconscionability and misleading or deceptive conduct and the other Background Paper on post-legislative scrutiny.

So enough from me. Let me now invite my colleague to provide comments on various topics relating to Interim Report B and to join me after that for a Q&A session. If anybody has questions or comments to make for the purposes of the Q&A, please email your questions to financial.services@alrc.gov.au.

Thanks to all of those who have submitted questions in advance. We'll try to cover as many questions as possible and apologies if we don't manage to cover a specific question or issue in which you might be interested. We'll certainly take all of these questions into account going forward. So let me commence the coverage of the other topic by asking the question of my colleague, Chris.

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Dr Andrew Godwin

Chris, as I mentioned during my introductory comments, the ALRC has proposed a new legislative model. It could be applied at least in the first instance to Chapter 7 of the Corporations Act. It's fairly easy to explain the model in the abstract, as I've just done, but can you tell us a bit more about what it might actually mean for people who use the legislation?

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Christopher Ash

Thanks, Andrew. Hi everyone. Andrew's right. It is much easier to say what the model is and what it does, but it's harder to imagine what it would be like to use. One way you could think of it is a bit like buying a car. You know what the old car feels like. It could be a bit rough. It could be noisy and it's not until you give a new car a test run that you realise how smooth and how quiet it can be.

It's not quite so straightforward with legislation, obviously, but as Andrew mentioned, we do have some prototype legislation which you can take for a spin if you would like. So what I'll try to do today is use some diagrams and some examples to hopefully explain how the model that we put together could make life easier for those of you who are stuck driving the current 'clunker' which is what we would say it's like at the moment, to think of a car again.

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Christopher Ash

But just before I do that, let me briefly outline what we think is the current problem. So at the moment, the law is disbursed across Chapter 7 of the Corporations Act, the Corporations Regulations and any number of other legislative instruments, and these are usually made by ASIC in the case of Chapter 7. These include complex conditional exemptions and notional amendments, which, although they can change the wording of the law, don't actually appear on the face of the legislation that's being changed and even experienced lawyers have told the ALRC that when they're advising on Chapter 7, given such wide dispersal of material, they worry about missing something. On top of that, each layer is jam packed with prescriptive detail. For example, since this Inquiry commenced just over two years ago, the Corporations Act has grown by about 600 pages and it shows little sign of stopping.

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Christopher Ash

Before this Inquiry started, the Financial Services Royal Commission observed that the amount of detail in the law often obscured fundamental norms of behaviour, and this often meant that there was a tick box approach taken to compliance and that the law's intent wasn't actually being met. Now some level of complexity might

be unavoidable. And that's especially the case given the breadth of subject matters, and the type of subject matters, that the corporations covers.

But we think that much of the current complexity could be avoided. So what these points really just highlight is the lack of any guiding plan or model for what the Corporations Act should look like, especially about what goes where in the hierarchy of legislation that is something that the proposed model seeks to correct, principally by introducing some sort of order to the current chaos.

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Christopher Ash

So what does that mean for you? The main aim of the model really is to make the law more user friendly. It should be easier to find and it should be easier to find your way around. The first way it does this is by reducing the number of places that you should need to look to find the law. Under the model those places would be: the Act made by Parliament, a Scoping Order which would be a single consolidated legislative instrument, and a small number of thematic rulebooks.

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Christopher Ash

Each one of those also being a consolidated legislative instrument. I'll come back to each of those in a moment. The second way the model would be more user friendly is by making it easier for you to find a way around and between each piece of legislation. For example, this diagram shows how the model could be applied to the law on disclosure for securities and other financial products. Cindy will speak a bit more about how this merger can be managed.

But for now, I'll just focus on the elements of the model, the second half of that diagram. What this part of the diagram shows is how the model is about finding the right home for each part of the law and then organising it in a way that makes sense. So the Act should contain everything that sets the core policy of the law and fundamental obligations and everything which should be made only by the Parliament. Using disclosure as the example, this would include key obligations to give disclosure, the standards that must be met, and prohibitions on defective disclosure including serious offenses and penalties.

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Christopher Ash

Next, the Scoping Order would contain almost all of the exclusions and class exemptions from the obligations of the Act as well as other detail to help determine the 'scope' of the Act. So if the Act applied to you, then the next step would be to look at the Scoping Order, to check whether there are any applicable exclusions or exemptions. Then the final layer are rulebooks with each one organised by theme. In the case of disclosure, the Disclosure Rules provide a home for prescriptive detail, such as what should go in a disclosure document, what it should be called, and detail that tailors the disclosure regime for particular financial products. Using function and theme to organise the layers in this way should make it easier to know where to go. So if you're looking for scoping details or exclusions and exceptions you know to go to the Scoping Order, if you're looking for details on what should go in a PDS, for example, then you know to go to the Disclosure Rules. This kind of order is just absent at the moment, instead regulations or legislative instruments can do any number of things and they can apply generally, or they can apply to only a small number of people in a relevant handful of situations.

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Christopher Ash

Finding a way between these layers could also be improved with the use of notes. For example, we suggested that the power to amend the scoping order could also included the ability to add notes to the Act, such as this example on the slide. What this shows is how a note could act as a signpost to show, firstly, that exclusions have been made, and secondly where they can be found in the Scoping Order. Taking it a step further and in the future, it could even be possible to hyperlink a note such as this so as to take you to those exclusions. A third way that the model could simplify the law is by 'decluttering' the fundamental norms and key obligations in the Act, as well as doing away with notional amendments. Under the model a lot of detail that's currently in the Act could be moved out of the Act allowing the key norms and obligations left there to be much more visible. What this diagram shows is how in applying the model to parts of the law in disclosure a lot of prescription

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Christopher Ash

can be moved out of the Act and instead appears in the Scoping Order or rules. This means that the key obligations, that the obligation to give disclosure, serious offences and penalties, are left 'uncluttered' in the Act. I should say that the model isn't only about taking things out of the Act. For example there are some things currently in delegated legislation which more properly belong in the Act. What the model is about is finding the best 'home' for necessary detail, whatever that may be, and doing so in a principled and consistent way.

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Christopher Ash

This slide give an example of detail that could be moved from the Act to rules. In this case, it's the fairly unsurprising requirement that a 'Product Disclosure Statement' must have the words 'Product Disclosure Statement' on it. But perhaps more importantly, what this example also shows is how notional amendments can be avoided. On this slide is the current notional amendment, made by an ASIC instrument, which notionally inserts the words 'or beginning' within s 1013B as well as about a dozen other provisions as you can see. It does this so as to make the law technology neutral. Instead of notionally amending the Act under the proposed model, a change such as this could be made by amending the text of the rule itself, so as to achieve the same effect, as highlighted here. This also helps to illustrate how more generally flexibility and adaptability can be maintained in the law using rules and without the need for notional amendments.

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Christopher Ash

This slide shows another example of a detail currently in the Act which we think could be more appropriately moved to the rules. Not all cases are as straightforward as these examples may seem but the guiding principles that we've set out help to make good decisions about what goes where in the legislative hierarchy. And as Andrew has mentioned these principles are supported by guidance which we prepared and appears in Interim Report B. So that's the model and overview, now I'll fairly briefly discuss what it offers in relation to offences and penalties. As at the 1st of January this year the ALRC counted that there were over 978 offence provisions and 168 civil penalty provisions for the Corporations Act.

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Christopher Ash

A large number of these, especially offences are prescriptive and often overlap by targeting the same type of conduct, misleading conduct for example. As part of implementing the model, we suggested that many of these offences and civil penalty provisions could be consolidated into a smaller number of provisions that cover the same conduct. In the prototype legislation, we've given a small example of this, showing how 7 existing provisions — 5 offences and 2 civil penalty provisions — could to be consolidated into four provisions covering the same ground. The prototype also shows how a lot of prescriptive offences which carry low penalties — so that's around about 50 penalty units in the case of individual and up to around 500 penalty units for a corporation — could also appear in the rules.

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Christopher Ash

And they could appear there without infringing the fundamental principle that serious offences and civil penalties should appear in the Act, and be made only by the Parliament. Rationalising offences and penalties, and finding the right home for prescriptive, low-level offences are further ways that the model could simplify the current legislation. The final point I'll mention before finishing is about the lawmaking process. As Andrew mentioned, under the proposed model we've suggested that the powers to make scoping orders and rules be granted concurrently to the Minister and ASIC.

In most cases, this is already the case in Chapter 7 of the Corporations Act, both the Minister through Regulations which are formally made by the Governor-General and ASIC, can typically modify certain parts of the Act. There are some cases in Chapter 7 where only ASIC has the power to make rules, the market integrity rules for example. But in most other parts it's an established feature that both the Minister and ASIC make delegated law.

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Christopher Ash

This is one current policy feature which separates the proposed model from the United Kingdom approach, for example, where the Financial Conduct Authority or FCA as the regulator for financial services is the sole authority responsible for making rules governing financial services in the FCA Handbook. So while it isn't novel for both the Minister and ASIC to have concurrent law-making power, what is novel about the model is that both would exercise these powers by amending the same legislative instruments. For example, rules made by both the Minister and ASIC would be consolidated into the same authoritative version of the law as it appears on the Federal Register of Legislation. So the Disclosure Rulebook for example. This is an important feature of the model and something that we think would make the law much more user friendly by limiting the number of places that a person needs to look to find the authoritative law.

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Christopher Ash

This approach also helps to avoid notional amendments - at the moment, for example, ASIC legislative instruments can notionally amend regulations in both regulations and ASIC legislative instruments can notionally amend the same provisions in the Act. Under the proposed model, actual textual changes could instead be made to the scoping order or rules by different lawmakers as necessary. Now there are some other aspects of the model that we don't have time to cover today, but hopefully I've left you with an impression of how we think the model could reduce complexity and make life that little bit easier for those of you who are stuck using the current legislation. Back to you, thanks, Andrew.

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Dr Andrew Godwin

Thanks very much, Chris. I'd like now to address a question to my colleague Will Isdale. As well as focusing on Chapter 7 of the Corporations Act, much of what we've been doing at the ALRC today has been discussing how we could use Interim Report B to make improvements to the Corporations Act and even other legislation more generally, we've used this analogy of a house of law and the need to renovate the house of law to explain that our work is really all about putting and keeping things in order. What difference would this make for readers and uses of legislation?

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Dr William Isdale

Thank you Andrew. So the analogy of our law as a house of law is one that we've found helpful to provide a striking visual image, if you like. So your imagination may already be at work based on what Chris has said. But here's a little description that Chris and I wrote for a summary article on our website. If Australia's corporations and financial services statutes were likened to a house, it would be a large and disordered one, a house in which new annexes have been added with little thought to overall design, and in which objects are scattered and hidden with little regard to how they may be found in the future.

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Dr William Isdale

In short, a house that is thoroughly disordered, a house that needs redesign and substantial tidying. The legislative model that Chris has just spoken about is really about the overall architecture of our house of law. The model that the ALRC has proposed would seek to give users of legislation a clearer idea as to what goes where and why. It would help to put some of the contents of our house of law in drawers. It would be clearly labeled and organised by theme or function. To continue this housing analogy though, Interim Report B isn't only concerned with overall legislative architecture or hierarchy. It also suggests a number of ways in which we might substantially tidy up our house of law, to lift the carpets, open the cupboards, and throw out some of the broken toys and scattered pizza boxes that currently litter this house. So to give you a bit of summary of some of the ideas in Interim Report B, I'll talk under two headings. First, is how we can put our house of law in order.

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Dr William Isdale

And the second, is how do we keep our house of law in order. So first putting things in order. An important starting observation is just a recognition of the fact that our house of law wasn't built in a day. It has evolved and filled with detritus over many decades. Legislative amendments have often been spurred by crises. Now, lest I remind listeners and viewers today that the substantial heft of our Commonwealth Corporations Legislation, here's another visual of what that looks like. And as that shows, there's been no shortage of production of legislation. However, there has been comparatively little attention paid to maintaining the law to make sure that it remains accessible and comprehensible. Over time countless errors and infelicities have crept into our legislation. For example, the ALRC has identified over 100 spent legislative provisions and cross references to repealed provisions. My colleagues and I have taken to calling this the dead law that currently sits in our statute books: the transitional or time limited provisions, which, despite no longer having any operative effect, remain in the legislation. This is a form of legislative detritus that urgently needs to be swept up and disposed of.

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Dr William Isdale

There is a cost involved in retaining inoperative provisions in the law because to work out that a particular provision is inoperative, at least requires reading it, and that takes some time. Accordingly in Interim Report B the ALRC proposes a substantive program of tidying up that includes the identification and repeal of spent transitional provisions and instruments, redundant definitions, references to repealed provisions and redundant regulation-making powers. Now to identify these provisions the ALRC has written and run computer software and in Interim Report B and accompanying materials there are some further details about how this could be done by Government to identify such provisions and other information on how the ALRC perceives a program of tidying up being conducted. Such a program would help ensure that everything that remains in our statute books is at least still serving some purpose, which is not currently the case.

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Dr William Isdale

Another aspect of putting our law in order, our house of law, is to ensure that we fix the countless errors that have slipped in over time. So for example, there are currently two sections that are both numbered 5C.2 in Part 5C in schedule 10A. There are also multiple references in the Act to disclosure for managed investment schemes in Chapter 6D. Despite the removal of those schemes from that Chapter in 2004. Errors like these waste the time of practitioners, courts and regulators. And it makes it harder for us all to make sense of the law and to comply with it. Finally, putting things in order, putting our house of law in order requires simplification of the law to the extent possible.

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Dr William Isdale

The expression of our statutory law should be no more complex than it absolutely needs to be. Perhaps the biggest offender in this regard is the current use of notional amendments, which, despite making changes to the law, are not visible on the face of the legislation. As a temporary measure the ALRC suggests that generally applicable notional amendments should be replaced with textual amendments where possible. This would improve the findability and readability of the legislation. On your screen, you'll see an example of a provision that has been amended by multiple notional amendments. So the notional amendments that have been added to the provision appear in colour text. The black text is what you would actually find if you opened up the Act to that provision.

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Dr William Isdale

So as you can see, notional amendments place an enormous burden on users of legislation to piece together the law for themselves. So the ALRC proposed model would fix that and as a temporary measure we should, where the notional amendments are generally applicable, just incorporate them into the text of the Act. So now I've spoken about putting our house of law in order but how do we keep our house of law in order?

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Dr William Isdale

It won't be sufficient to simply do a one stop tidy up of our legislation. Instead, we need to embed some processes and procedures that will ensure our legislation remains in good shape going forward. In this respect, Interim Report B contains a number of ideas, particularly relating to the creation of delegated legislation. One idea is that we should assist law-makers through the development and circulation of legislative drafting guidance.

And there's an annexure to Interim Report B that contains some draft guidance, this would help law-makers determine what goes where and how powers to create delegated legislation should be expressed. An important point to recognise is that delegated legislation isn't only made by the Office of Parliamentary Counsel. It's made by agencies like us and potentially other government departments. So having this consolidated guidance would provide help to numerous law-makers.

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Dr William Isdale

Another idea from Interim Report B to help ensure the future quality of our legislation is to have some compulsory consultation requirements, in particular with an expert advisory committee, that is before the making of delegated legislation. So at the moment, the making of delegated legislation is not subject to the same level of scrutiny as the making of primary legislation is, but compulsory consultation with an expert advisory committee would at least provide a level of scrutiny and help to reduce the likelihood of errors or infelicities making their way into the law in the first place. The ALRC also suggests that we introduce sunseting for delegated legislation, which is not currently the case for the Corporations Regulations, for example. The benefit of sunseting is that it provides an opportunity for periodic review to ensure that our delegated law remains fit for purpose. And finally, in terms of keeping our house of law in order, the ALRC has suggested some other small procedural means of achieving this.

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Dr William Isdale

So for example, I spoke before about current proliferation of dead law, the time-limited provisions that are no longer relevant or operative. Well, one idea is that when we introduce time-limited provisions into legislation in the first place, we should clearly identify those provisions so that we facilitate their easy identification and repeal in the future. To conclude, let me return to this analogy about legislation as a house of law, or perhaps, as you may be, coming to think a house of horrors. As my colleague Nicholas Simoes de Silva and I have written: "This is a house in which lawyers are understandably scared of opening the cupboards.

Things will fall out or be near impossible to find. We have stuffed things in every nook and cranny for years, only rarely bothering to clean our house out." A key theme of Interim Report B is the importance of legislative stewardship, on the ongoing care and maintenance of our statutory law. If implemented, the ideas that I've discussed and other ideas in Interim Report B, would help make our house of law much more inviting for all those who are required to visit it. Back to you Andrew.

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Dr Andrew Godwin

Thanks very much Will. I've been keeping count in terms of the number of analogies we've been raising today, so we've got the clunky car thanks to Chris, the disorderly house thanks to Will. And my colleague, Cindy Davis will be introducing another analogy in a few moments. Interim Report B's focus is very much on the legislative hierarchy, looking at things in a vertical sense, if you like.

But it also foreshadows some of the work we'll be doing in Interim Report C. Cindy, the focus of the next interim report will be how Chapter 7 of the Corporations Act may be restructured or reframed. Could you tell us a bit more please about what that could mean for users of Chapter 7?

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Cindy Davies

Thanks Andrew. You're right. It's been helpful to think about things in a vertical and horizontal sense. Our focus so far has been on the vertical 'layers' of the legislative hierarchy. But we also need to make sure that each

layer makes sense, especially the top layer, the Act, because that sets the overarching structure for everything underneath.

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Cindy Davies

So here's my analogy, another way to think about it is like the laughing clown game at the carnival where you put the ball in the clown's mouth and hope that it ends up in the right funnel at the bottom, with the main difference being that instead of luck, we want good design to help get the ball into the right place. Hopefully, this is what restructuring Chapter 7 of the Corporations Act would mean for you as the reader of the legislation it should be easy for you to find what you need to know to navigate your way to an answer. As Chris and Andrew have already mentioned, we made a start on Interim Report B by trying to show how the ALRC's 'vertical' model could also make sense 'horizontally'. We've done this by showing how the similar but currently distinct disclosure regime in Chapter 6D of the Corporations Act, which is about security, and Part 7.9, which covers other financial products, could be integrated.

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Cindy Davies

So this diagram tries to show what we've done, how done that in some prototype legislation on the ALRC website. There's a fair bit of text in here, but what it shows is how the fundamentally common of those disclosure regimes could be integrated at the level of the Act. The top green box and the detail can be organized to accommodate differences as necessary in the rules, which is the bottom green box. Some stakeholders have expressed reservations about the risks of unintended consequences and 'losing what is good' about Chapter 6D in this process, but we think that much of what is good can be retained.

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Cindy Davies

The idea isn't to change the fundamentals of the law, but to structure it in a way that reduces overlap and finds the right 'home' for each piece of the law. And that said, we would be very grateful for further feedback from stakeholders on the pros and cons of integrating the two disclosure regimes. So in the prototype legislation that we've prepared, we've been able to show how restructuring the disclosure regimes and applying the model can the law shorter and simpler. Having tackled about 20% of Chapter 6D and Part 7.9 of the Act, at the Act level, we've been able to reduce the word count by about two thirds, largely by moving prescriptive details to the rules and reducing the duplication. And even after moving that detail to rules, the total length of the Act and the delegated legislation is reduced by about a third.

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Cindy Davies

So those books over there will shrink a bit hopefully. So as the audience would be aware, working through the legislation in this manner involves a great deal of detailed work and will not occur overnight, particularly in light of further reframing and restructuring that we anticipate introducing in Interim Report C. So on a final note on the prototype legislation, we would appreciate any feedback, and if you currently spent any of your time in Chapter 7 or Chapter 6D of the Corporations Act, then we strongly encourage you to have a look.

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Cindy Davies

Okay, so now looking forward to Interim Report C, in line with the Terms of Reference, we aim to make it quite targeted. We'll focus on Chapter 7 of the Corporations Act, but at the same time and like we've done in earlier reports, we will outline some of the principles that could be applied to the Corporations Act and other legislation more generally. As a first step, we'll outline some of the issues and challenges that are embedded in the current design of Chapter 7.

Largely draw from stakeholder feedback to date. These include the complexity of the law on disclosure, the blurring of lines between different categories, such as consumers of financial products and services and investors, as well as the general lack of coherence in Chapter 7 in terms of the way various regimes are framed and structured. So looking at the substance of Chapter 7, there are two overarching themes that we think will provide helpful focus points for reframing and restructuring.

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Cindy Davies

The first, which I've already touched on, is rationalising and simplifying the provisions governing disclosure and other consumer products. This would cover what those who sell financial products and services must do before selling or providing a service, including DDO obligations and disclosure obligations, as well as consumer rights and redress such as dispute resolution. It's important to note that when we talk about simplification, we're not talking about deregulation or substantial changes in the underlying policy settings. The second theme is financial services providers and the law covering conduct norms, licensing and advice. Any discussion of advice, of course, will consider any change in the policy settings arising out of the current Quality of Advice Review. So in terms of output, we hope to put together an outline of what a proposed restructure of Chapter 7 covering those themes would look like.

00:38:34:05 - 00:39:57:11

Cindy Davies

This, combined with what we've said in Interim Report B about the ALRC's proposed model, will hopefully give readers a fairly good idea of how a restructured and reframed Chapter 7 could be clearer, more coherent and easier for readers to navigate. Interim Report C will also help to show how implementing the proposed model as well as restructuring and reframing, could be done in stages. So far, for example, we've suggested that financial product disclosure would be a good place to start, and with the prototype legislation, we've shown how that can be restructured and how it could actually be its own Chapter of the Corporations Act. Other things could be, for example, financial services disclosure, financial services licensing and advice. So in this diagram from Interim Report B. It's a bit abstract, but it shows how we took some of the current law on disclosure and applied it to the proposed model. This same approach of 'top down' for deductive reasoning and 'bottom up' analysis could be used for each stage, and combined with Interim Report C could be used to help develop a 'roadmap' for staged implementation. A bit like that clown game analogy, there would be a few moving parts, but unlike the clown game, we think that some guiding principles would help everything line up.

So thank you. And I will now turn back to Andrew for questions and hopefully some answers.

00:40:04:15 - 00:40:48:15

Dr Andrew Godwin

Thanks very much Cindy. We've received a number of questions and thanks again to all those who submitted questions in advance and those who are submitting questions as we speak. A number of questions, I think, deal with this issue about how all of this might be implemented. And indeed, I think implementation is a key issue that we need to bear in mind in any reforms.

One question that came through quite, I guess, a direct question, how do we propose to deal with all of the Corporations Regulations, various class orders and other supporting instruments which can apply to various provisions within Chapter 7 of the Act? So perhaps, Chris, I might ask you to respond to that one.

00:40:49:07 - 00:41:31:09

Christopher Ash

Sure, it's a good question that highlights some of the challenges that there would be in applying the model and it also highlights some of the challenges in legislative design more generally. So there are currently quite a few examples of delegated legislation which apply to or modify several provisions of the Corporations Act or the regulations and these include notional amendments. I think one of the examples that I gave earlier under national amendments applied to more than a dozen provisions including both the Act and the regulations which clearly creates a serious level of complexity. But many guiding principles I think in these sorts of cases should be navigability.

00:41:31:14 - 00:42:00:10

Christopher Ash

So what helps to makes the law easier to find and then easier to find your way around. So what that probably means is that in most cases there's a choice between taking something that currently applies across several provisions and either keeping that structure or essentially duplicating that in each of the individual provisions to which it relates. Now doing that could result in slightly longer legislation but it might also make it easier to understand.

00:42:00:13 - 00:42:57:13

Christopher Ash

So when reading the provision you don't need to go looking somewhere else to supplement or fill out the detail. The same could apply to rulebooks, something might apply across several rulebooks, say a disclosure rulebook, for example, and if that's the case it might suggest that type of detail might be better included in the Act. But equally, it could also be that it would simply be better off repeating it as necessary. So I think that the key point is really that there's no one size fits all approach in these cases. The direct answer to the questions is probably, well it depends, and that's because drafting is difficult and there are judgement calls to make but we think that having a clear model in mind, like we've set out, as well as some guiding principles, will help us to make good, informed and consistent decision on what goes where and to deal with these issues.

00:42:57:13 - 00:43:39:13

Dr Andrew Godwin

Thanks Chris. As you mentioned, this notion of navigability is such an important concept and a lot of our thinking has progressed around how we can make the law easier to find, easier to access, and ultimately, hopefully easier to understand and apply once it's been found. So we've got a question that's come through in relation to the rules. And perhaps I can direct this question to you Cindy. Is it intended that rules would include matters currently captured in ASIC regulatory guides or are talking about here only legislative requirements?

00:43:39:13 - 00:43:51:01

Cindy Davies

Thanks Andrew. I also think that's a good question. Because one of the things that we've heard back from a lot of stakeholders, is that because the law is so complex, they end up relying on the regulatory guides rather than actually looking at the law itself. And clearly that's a bit problematic.

00:43:53:15 - 00:44:40:07

Cindy Davies

We think that there is still going to be a role for regulatory guidance alongside the model, but it wouldn't be the same or the demand for it wouldn't be so extensive because hopefully a lot of the detail that is currently in regulatory guides could be moved to the rules themselves making it easier to navigate. But to return to the question, the default position is the rules are law and they would be enforceable as law, unlike the regulatory guidelines but it possible that some of the matters currently in guidance could be incorporated into rules and in particular something called 'evidential provisions'. Now those may not be familiar to all of our listeners today. They're fairly novel in Australia, but they're sometimes used in the UK, in the financial services regulation.

00:44:40:08 - 00:45:35:02

Cindy Davies

and as part of the FCA handbook ... But under that scheme, the 'evidential provisions' are rules that are unenforceable, but a breach of (or compliance with) these rules, may evidence a breach of (or compliance with) an enforceable obligation. So if you think of their being an effect, being on a spectrum, between enforceable law on one end and unenforceable guidance at the other, these would fall somewhere in between, they are more than guidance because they can be used to help prove a case in court, but they are not a safe harbour or defence. That said, even in the FCA Handbook, these types of rules aren't used very frequently. So we've asked Question B16 in Interim Report B to get views from our stakeholders about whether or not it could be a role for them and we'd certainly welcome everyone's input.

00:45:35:02 - 00:46:01:07

Dr Andrew Godwin

Thanks Cindy. A question in relation to implementation, a key issue, as we move forward with Interim Report C, and ultimately, of course, the final report without our final recommendations. And there's a comment and a question. The comment to the effect that some of the proposed changes could be implemented quickly with government agreements. The question is, will you have a road map of what changes could occur and when?

00:46:02:02 - 00:47:05:14

Dr Andrew Godwin

I think we all appreciate that any reform needs to take implementation into account. I've always thought that if you can make a convincing case in relation to how the reform should be implemented, you're well on your way to making a decent case in relation to the reforms themselves. So as part of the final report, we will be formulating a roadmap for reform, including the order in which regulations might be amended and the order in which reforms might be implemented. Encouragingly, as many of you would be aware, Treasury has already taken the recommendations that we made in Interim Report A into account. And has produced draft legislation for consultation, but I think it's absolutely right. Implementation is a key aspect. We have very much a focus on ensuring that what we do end up recommending is able to be implemented and as I think Chris you mentioned before, this will be over a period of time.

00:47:07:07 - 00:47:25:08

Dr Andrew Godwin

So Will, perhaps a question for you. Interim Report B talks about the current proliferation of offences and penalty provisions, which Chris touched upon in his comments earlier. Could you speak a bit about what the ALRC suggests in this area.

00:47:26:05 - 00:48:13:06

Dr William Isdale

Sure. Thank you Andrew. The proliferation of offence provisions and other conduct obligations is something that the ALRC's been concerned about and it's written about from our very first Interim Report A, it's something that we've identified. In broad terms, the ALRC is interested in trying to consolidate and reduce those provisions where possible. We think that the unnecessary proliferation of such provisions can obscure the underlying norms that inform law and ultimately guide regulated entities to comply with that. Perhaps a good example of this in practice is related to a background paper that the ALRC will be producing and publishing very shortly, which Andrew mentioned earlier concerns misleading and deceptive conduct and unconscionable conduct provisions.

00:48:13:15 - 00:48:51:13

Dr William Isdale

So this is an area where there is a proliferation of provisions that prescribe essentially very similar or related conduct, even just within corporations and financial services legislation, there are multiple provisions that deal with the same sort of conduct. And in this background paper, the ALRC has charted a map forward as to which provisions we might remove and which ones might remain, with the aim being not to change the overall substance or intent of the law so that protections remain the same. But just so that the law itself can be simplified and be clearer for regulated entities to comply with. So that's a brief outline Andrew.

00:48:52:02 - 00:50:03:10

Dr Andrew Godwin

This process of rationalising and consolidating provisions that might give rise to some concerns that it might equate to deregulation. And as you mentioned Cindy, we're not about deregulation or reducing protections. We're all about making the law more coherent and giving it much more rigor in terms of how it's found and ultimately how it's understood and applied. So that'll be a key issue.

I think that we're looking at it in that background paper. It will be exciting to see that come out, hopefully in a week or so. So we've had a question raised in relation to what other ideas we might have for how the expression or presentation of legislation could be improved. But I think this does go to this question of how we can make the framework more navigable.

Chris, I know you've had thoughts about how we can make the framework easier to navigate and how we can improve the expression and presentation of legislation. Some thoughts along those lines please.

00:50:03:10 - 00:50:56:04

Christopher Ash

I think there are plenty of ways, that presentation of the law, especially in electronic form can be improved and many of these really centre on better technology. So one I touched upon earlier is the use of hyperlinking. Now one difficulty with that, especially at the moment, is that people need to, usually need to, be manually done and then kept up to date manually as well, so could become quite labour intensive. And that's especially the case if it

was the reviewing authority that does the law because it would have to be correct. A more fundamental change that we think itself, although there are other possibilities for improvement, would be a change to the drafting legislation XML, which is extensive mark-up language, basically a form of computer code. Lots of jurisdictions around the world, including State jurisdictions in Australia already do this, but not at the Commonwealth level.

00:50:57:14 - 00:52:14:09

Christopher Ash

And picking up on some earlier work of the ALRC, if I can, the committee that recently reviewed the legislation and recommended that Parliamentary Counsel should have a scoping study to look at how we could be adopted at the Commonwealth level. So XML basically makes legislation machine readable which means that other computer programs can read the law and do things with it. So that could include entering into compliance systems or making a bespoke version of the legislation for particular uses for particular industries, basically slicing and dicing in a number of different ways and could do so much more easily than a human could do it.

One last example I'll mention is the Financial Conduct Authority Handbook in the UK, which we've mentioned a few times. So this is an online version of the rules regulated for financial services in the UK and it's a really good example of what can be done with technology because it's modular. So you can choose how you wish to view the law, whether you want to choose principles, guidance, evidential provisions all at the same time or any one of a number of those simply by ticking a box on the side.

00:52:15:12 - 00:52:51:08

Christopher Ash

Also in that version of the law, definitions are hyperlinked. So if you click on a defined term, which is indicated to you, and a popup box with a definition appears. And actually you get the definition itself which contains interconnected definitions so too are those that are hyperlinked. So in that ways it just helps you navigate your way around instead of having to click between, say different pdf documents or different pages of the hard copy law. So those are just a few examples of what is possible. And I'm sure because of interest that it's even more is likely because of it.

00:52:52:07 - 00:54:06:12

Dr Andrew Godwin

Thanks, Chris. We've received a question in terms of look in to simplification or the possibility that we'll looking to simplification to Chapter 5 which is the external administration Chapter in the Corporations Act. And how, if at all, we might be linked to the PJC's current insolvency inquiry? Well, certainly that's an important inquiry that's underway. And the key issue I think that we all need to bear in mind is that our focus is very much on the technical aspects as distinct from the policy that underpins these regimes.

But we are hopeful that the recommendations that we come up with will have broader relevance to other chapters of the Corporations Act and might provide insights for simplification for them. But there's a lot taking place at the moment: there's the Quality of Advice Review, which we've mentioned before, there's the recent review into managed investment schemes. So there's a lot happening on the policy front and of course we'll be tapping into all of that and trying to take it all into account as we move forward with this inquiry.

00:54:07:02 - 00:54:29:14

Christopher Ash

And I would like to think that along the way we've tried to not to just express things in terms of inclusions but in the form of principles that can be taken and applied to other areas and I think the draft legislation that implements some of the recommendations from Interim Report A demonstrates that. How these principles that we're working through can be picked up by other areas.

00:54:31:07 - 00:54:50:12

Dr Andrew Godwin

That's probably a good lead in Chris to the next question that we've received, and perhaps we'll make this the final question. It's a very general question. How will the success of the legislative changes be measured, or how should success in relation to any reform be measured? Do you have any ideas about that?

00:54:52:05 - 00:55:24:11

Christopher Ash

Well, the short answer is probably the proof is in the pudding, if everything that I outlined earlier is true then life would be easier for those of you who on a frequent or infrequent basis have recourse to the law, which at the moment, can be inaccessible and impenetrable in places. I think that's the real litmus test. But another useful way to think about this is in terms of post-legislative scrutiny which is something at least in terms of primary law isn't frequently done in Australia.

00:55:25:05 - 00:55:56:09

Christopher Ash

So I mentioned the legislation review earlier, so that the operation of that Act is reviewed periodically. This sort of review even if it is limited simply to review the model when it's first implemented would better help to pause and reflect upon the reform which at the moment in the case of the Corporations Act is fairly infrequently, more often than not, we'd simply pile amendment on amendment without much chance to take a breath.

00:55:57:02 - 00:56:20:15

Dr Andrew Godwin

Very good. Well, I think that's probably all the questions we have time for today. Apologies again if we didn't get to all of the questions that you were hoping we'd answer or the issues you were hoping we'd cover. Our Inquiry has one more year to run during which we will produce the Interim Report C by 30th of August.

00:56:21:15 - 00:56:52:01

Dr Andrew Godwin

And then finally, the Final Report, which is due by 30 November 2023. So as I mentioned at the start, please do continue to engage with us as we move forward with the Inquiry. And please do consider making a submission, if you haven't already done so, in response to Interim Report B. There is a submission form on the ALRC website that we encourage stakeholders to use for the purpose of making a submission.

00:56:52:14 - 00:57:27:11

Dr Andrew Godwin

But we would also be very happy to receive submissions by email, ideally in a PDF format, and just again to mention the email for this purpose, financial.services@alrc.gov.au. So let me conclude by thanking my colleagues, first of all, for their contribution to today's webinar and also last but certainly not least to all of you for joining us today.

Thank you and have a good afternoon.

Recording of webinar on ALRC website:

<https://www.alrc.gov.au/news/recording-interim-report-b/>