9 December 2022

Australian Law Reform Commission
119 North Quay
Brisbane QLD 4000

Submitted by email: financial.services@alrc.gov.au

Insurance Australia Group Limited (**IAG**) welcomes the opportunity to make a submission in relation to the Australian Law Reform Commission's *Financial Services Legislation: Interim Report B (Report 139, 2022)* (**ALRC Report**).

About IAG

IAG is the parent company of a general insurance group with operations in Australia and New Zealand. IAG's main businesses underwrite over $13 billion of insurance premium per annum under many leading brands, including: NRMA Insurance, RACV (under a distribution agreement with RACV), CGU, WFI and ROLLiN' (Australia); and NZI, State, AMI and Lumley (New Zealand).

With more than 8.5 million customers in both countries, we use our leadership position to understand and provide world-leading customer experiences, making communities safer and more resilient for the future.

Our purpose is to "make your world a safer place". We recognise that our role extends beyond transferring risk and paying claims. Our purpose drives our business to work collaboratively with communities to understand, reduce and avoid risk, and to build resilience and preparedness. This results in better outcomes for the community and means fewer claims and lower costs for our business.

We work collaboratively with government, industry bodies and Australian and international organisations on a range of topics and issues that relate to our customers, our people and the community. These include climate change, disaster response and resilience, and diversity, inclusion and belonging.

The ALRC's Review and current issues with the existing regulatory regime

Throughout the course of the ALRC's Review of the Legislative Framework for Corporations and Financial Services Regulation (**ALRC Review**), the formidable complexity of the Australian general insurance regulatory regime has been well described. It was identified that in addition to Chapter 7 of the *Corporations Act*, the *ASIC Act*, accompanying regulations and ASIC legislative instruments and guidance, the general insurance industry is also bound by the Insurance Contracts Act, the Insurance Act, various state-based insurance regulation and the soon to be enforceable code provisions in the General Insurance Code of Practice.

Multiple and sometimes overlapping legislation

Striking examples of complexity in the Australian regulatory regime are the obligations and requirements which attach to the same subject matter. These obligations and restrictions can be seen within the same Act, across various Acts and within the subordinate legislation.

For example, insurers must comply with multiple ‘fairness’ obligations and duties. The following are examples of various locations of these duties:

- the Australian Financial Services Licence (AFSL) general obligation to ensure that financial services covered by the licence are provided efficiently, honestly and fairly – s 912A of the *Corporations Act*;
- the duty of utmost good faith – s 13 of the *Insurance Contracts Act* and at common law;
- the prohibitions on unfair contract terms – s 12BF of the *ASIC Act*; and
- the requirement to be honest, efficient, fair, transparent and timely in dealings with customers in the General Insurance Code of Practice.

These overlapping requirements create complexity for insurers, and, more importantly, can cause confusion for consumers in understanding the standard of conduct they should expect from insurers.

Various different definitions/terminology for the same concept

Another issued faced as a result of the current regulatory regime is the confusion caused by the same concept or idea being defined by different words in different pieces of legislation. An insurer and its customers are faced with having to deal with and understand what are:

- ‘retail clients’;
- ‘consumers’;
- ‘consumer contracts’; and
- ‘consumer insurance contracts’.

These terms are intended to cover the same type of person, being individuals and small businesses that require additional protection. In practice, they capture quite different types of consumers which therefore attract different obligations. Ultimately, this means that consumer protections are not applied in a consistent fashion.

<u>IAG’s submission to the ALRC</u>

In order to explore these (and other) issues in the general landscape of the insurance regulatory regime, IAG commissioned a report (Attachment A) by MinterEllison entitled, ‘Streamlining Insurance Regulation’ (**ME Report**). MinterEllison was engaged to draft and prepare a report that is informed by their own research and input from IAG’s experience as a regulated entity.

At the heart of the report is simplification – simplifying the existing legislative framework and ensuring that the intent and purpose of the regulation is clear. IAG supports this primary thesis of the ME Report because it helps stakeholders (including insurers and consumers) to identify and understand the policy intent of the regulation. Simplification provides clarity and better accessibility of the law-making compliance requirements to all stakeholders.

The ME Report

MinterEllison makes several recommendations to address specific issues of complexity, overlap and duplication of requirements in the current legislative regime for general insurance. It supports a redesign of the financial services regime premised on a clear set of principles and norms of conduct. These principles would be enshrined in the primary legislation and would be applied at all times and in all circumstances. Of course, these principles will be, where required, enhanced with specific rules and requirements required to ensure both:

- protection for consumers; and
- certainty for industry participants on how to apply and comply with the principles while operating in a competitive, commercial environment.

Further considerations arising from the ME report

One feature of the redesign envisaged by the ME Report is the empowering of a relevant 'conduct' regulator with the ability to develop and implement rules that are specific for each part of the financial services sector and with the power give effect to the principles in the primary legislation.

While IAG supports many of the redesign principles contained within the ME Report, we believe that further consideration and discussion is needed beyond the ME Report's recommendation of a regulator with rule-making power. In particular, further discussion is needed about when the rule-making power could be exercised and, when exercised, what regard will be given to its impact on customers, individual insurers, the industry and society as a whole. In our view, any consideration of this power must come with an appropriate consultation process with relevant stakeholders to ensure that the rule is fit for purpose. Appropriate transition periods to implement any new rule are also an important consideration.

Reviews of the effectiveness of new laws

As noted earlier, the ME Report makes recommendations having regard to the general landscape of the insurance regulatory regime – it goes beyond the recommendations and proposals set out in the ALRC Report. One recommendation relates to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**FSRC**). In its response to the FSRC Final Report, the Government said that "*Starting in three years, the Government will establish an independent inquiry to review and assess whether industry practices have changed following the Royal Commission and have led to better consumer outcomes.*" We support this view. Similarly, MinterEllison recommends that a post-implementation review of the FSRC reforms should be conducted as soon as practicable. Such reviews are important and enable assessment of whether the objectives of the regulation have been met.

IAG supports in principle the regulatory changes enacted in response to the recommendations of the FSRC. Given many of these reforms have now been in place for over year, we believe it is prudent to ensure processes are put in place to meet the FSRC's recommendation of a three-year review to test the effectiveness of the reforms and identify any improvements that can be made to further good consumer outcomes.

Harmonising State and Territory statutory scheme legislation

The ME Report considers the complexity and uncertainty in navigating through the different State and Territory regulatory requirements for compulsory insurances such as workers' compensation, motor accident injuries and home warranty insurance. While there are overlaps between the regimes, there are also conflicts which require insurers and service providers to duplicate processes, resources and systems and then customise them for a single jurisdiction which is both costly and time consuming. There is no compelling reason why the level and type of cover and the cost of cover should vary based on where a consumer lives, works or carries on business. On that basis, MinterEllison concludes there is a strong case for harmonising regulation of compulsory forms of insurance and ensuring coordination of reporting obligations and enforcement by the relevant State and Territory regulators. IAG supports this view – we believe there is a case to review and determine what opportunities exist for harmonisation across the different regimes.

Next Steps

IAG is thankful for the opportunity to contribute to the ALRC Review. We believe it is an important review and presents a real opportunity to reframe financial services regulation. We also acknowledge the challenges associated with the ALRC Review and the extent to which reform of the existing regulatory framework can be undertaken. We look forward to working with the ALRC, the industry, regulators and consumer groups to further the discussion on how financial services legislation can be simplified for the benefit of consumers, the financial services industry and society.

If you have any questions or require any further information with respect to our submission, please do not hesitate to contact Louise Kerkham, Principal, Public Policy & Industry Affairs ([redacted]) or Vincent Lee, Principal, Public Policy & Industry Affairs ([redacted]).

Yours sincerely

[redacted]

Peter Horton
Group General Counsel

Attachment A

ME Report

Streamlining Insurance Regulation

Streamlining Insurance Regulation

Prepared for
IAG

Contact

Richard Batten
Partner, Financial Services

T +61 2 9921 4712 M +61 402 098 068
richard.batten@minterellison.com

MinterEllison.

Streamlining Insurance Regulation

MinterEllison Report

Chapter 1 – Executive summary

This Report has been commissioned by IAG[1] to accompany its submission to the ALRC Review of the Legislative Framework for Corporations and Financial Services Regulation.

1.1 Overview

The Australian financial services regulatory regime is complex and difficult to navigate. This has been recognised by many over a long period of time, most recently and powerfully in the Final Report of the Financial Services Royal Commission.[2] The Federal Government has acknowledged the issue by referring the matter to the ALRC for inquiry which has led to the ALRC Review of the Legislative Framework for Corporations and Financial Services Regulation.

For the general insurance industry, complexity arises not only from the general financial services framework in the Corporations Act and the ASIC Act, but also from insurance-specific legislation and codes that impose an additional set of complex and sometimes inconsistent requirements.

Addressing complexity in financial services regulation requires careful consideration of the circumstances in which it arises to identify the drivers for complexity. In this Report, we identify regulatory issues experienced by the general insurance sector and make recommendations about how they can be addressed. We also develop some fundamental design principles for financial services regulation and demonstrate how they would improve regulatory outcomes in relation to specific issues within the regulatory system for general insurance.

(a) Complexity in the financial services and insurance legislative framework

There are a number of drivers of complexity within the legislative framework for general insurance.

Firstly, various pieces of legislation must be referred to for an insurer to understand its obligations. This includes Chapter 7 of the Corporations Act, the ASIC Act, the Insurance Contracts Act, the Insurance Act, enforceable code provisions (enforced by legislation) and state-based insurance regulation, particularly in relation to the statutory classes of insurance such as motor accident insurance and workers compensation. Insurers, like other financial service providers, must also have regard to economy-wide regulation, such as the Privacy Act.

Secondly, complexity is caused by and evident in the regulatory design and hierarchy of laws. The financial services legislative framework consists of many components, including primary legislation, regulations, instruments, standards, guidance and self-regulation. Identifying and understanding the regulatory regime therefore requires reference to various sources. For example, to identify the obligations of AFSL holders, readers must not only refer to the Corporations Act, which sets out the general obligations, they must also refer to the Corporations Regulations, ASIC Instruments, ASIC guidance and consider industry code requirements. Multiple layers of regulation make the law hard to access, understand and apply. This is particularly the case where subordinate forms of regulation modify higher levels of regulation which is commonly done in the financial services regime. For example, regulations frequently modify and replace, and insert new provisions in Chapter 7 of the Corporations Act. The same is also frequently done by ASIC when exercising its exemption and modification powers under Chapter 7 of the Corporations Act.

[1] Defined terms in this Report are listed in the Glossary in Appendix 9.
[2] Final FSRC Report, vol 1, p 16 – 19.

As French CJ has said:

> *Complexity in statute law raises a number of issues, which include:*
>
> - *Their democratic legitimacy — the inaccessibility of the law to the ordinary reader, the ordinary run of non-specialist legal practitioner and even perhaps a significant number of the legislators who voted for it, may affect perceptions of its democratic legitimacy.*
> - *Public confidence in the law — the difficulty of discerning the public purposes served by such laws reflects a want of moral clarity and, coupled with that, an acceptance that the law is just and reasonable. Obedience to such laws flows from their status as laws because they are the product of a constitutional law-making process.*
> - *The certainty of the law — complex laws carry their own difficulties in interpretation and associated difficulties in predicting how the law will be interpreted and applied by those concerned with its enforcement and by the courts.*
> - *Transaction costs — the transaction costs of interpreting complex laws and advising upon those interpretations involves time and therefore cost on the part of non-specialist advisers and perhaps less time but more cost expended on specialist advisers. Complexity gives rise to contestable interpretations which may engender more disputes requiring dispute resolution mechanisms and, ultimately, a resolution by the courts.*
> - *The growth of less visible soft law — complex law administered by public authorities tends to require extensive written guidance to the officers of those authorities who have to administer the law. Those administrative guidelines may become, for all practical purposes, the real law so far as many people are concerned.*[3]

The Attorney-General's Department has made the same point somewhat more pithily:

> *Laws that are clear and easy to understand are an essential part of an accessible justice system. Clearly written laws can be better understood, complied with and administered.*[4]

Thirdly, complexity is found both within the statutes and across the various overlapping and potentially inconsistent regulatory regimes. Financial services legislation contains numerous and extensive obligations. These obligations and requirements which concern the same subject matter can be spread over various sections in a single Act, as well as across other Acts and subordinate legislation. For example, insurers have multiple obligations and duties that essentially all have the same objective of requiring insurers to act fairly. They are found in the AFSL general obligation to ensure that financial services covered by the licence are provided efficiently, honestly and fairly (the Corporations Act),[5] the duty of utmost good faith (the Insurance Contracts Act[6] and at common law), the prohibitions on unfair contract terms, misleading and deceptive conduct and unconscionable conduct (ASIC Act and Corporations Act)[7] and the requirement to act fairly in dealings with customers (the General Insurance Code).[8] There are also considerations of what AFCA considers fair when it deals with complaints. These overlapping requirements create complexity for consumers in understanding the standard of conduct they should expect from their insurers, complexity in establishing a common understanding across all participants in the insurance industry as to what the minimum standards or obligations under the law are and adds to the cost of compliance for insurers. We discuss this issue further in section 5.1 of this Report.

Other areas of inconsistency in financial services legislation can be easily found. Terminology in the legislation lacks consistency and uniformity, which results in inconsistent terms and definitions for the same or similar subject matter. An example is the inconsistent concepts of 'retail client',[9] 'consumer',[10]

---

[3] French R, 'Law - Complexity and Moral Clarity', Speech to the North West Law Association and Murray Mallee Community Legal Service, 19 May 2013, Mildura: https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj19may13.pdf.
[4] Attorney-General's Department, 'Reducing the complexity of legislation': https://www.ag.gov.au/legal-system/access-justice/reducing-complexity-legislation (accessed on 7 June 2022).
[5] Corporations Act, s 912A(1)(a).
[6] Insurance Contracts Act, s 13-14.
[7] ASIC Act, Part 2, Division 2 and Corporations Act, Part 7.10.
[8] GICOP, [21].
[9] Corporations Act, s 761G(5) and Corporations Regulations, regs 7.1.11 – 7.1.17A.
[10] ASIC Act, s 12BC.

'consumer contract'[11] and 'consumer insurance contract'.[12] These terms are all intended to encapsulate the same type of person, i.e. a person that requires additional protection, but in fact capture quite different types of consumers. Inconsistency extends beyond reducing navigability of the law; it also means that important consumer protections are not applied in a consistent fashion. We discuss this issue further in section 5.2 of this Report.

Fourthly, complexity is also created because of the level of prescription in financial services legislation. The Corporations Act contains not only principles-based regulation but also highly prescriptive, detailed and extensive requirements that frequently do not take into account the nuances of particular types of products resulting in the law becoming increasingly complex over time.[13] While prescriptive requirements provide certainty for stakeholders, the level of prescription in the Corporations Act and related regulations and instruments means that the regime lacks flexibility and adaptability for different circumstances and increases the cost and effort required to maintain compliance. It also has the potential to create a box-ticking culture of compliance[14] instead of one which focuses on the outcomes that regulation is intended to achieve.

Complexity also arises through an overlapping regulatory structure. Multiple regulators are responsible for the insurance sector at both Federal and State and Territory levels. Following the Financial Services Royal Commission, measures have been taken to clarify the role of ASIC and APRA and improve coordination and collaboration, particularly in the area of superannuation. These measures, including the updated MOU between ASIC and APRA and the statutory obligation to cooperate,[15] are welcome. However, complexity persists and we believe that there are more opportunities to streamline the regulation of the insurance sector.

The financial services sector is complex and it would be naïve to believe that complexity could be eliminated from the regulatory regime. However, a more coherent approach to regulation can benefit consumers, industry participants and regulators alike.

(b) Purpose of our recommendations for the existing regime

We make a number of recommendations in chapters Chapter 4 and Chapter 5 of this Report to address specific issues of complexity, overlap and duplication of requirements in the current regulatory regime for insurance discussed in those sections. A list of the recommendations can also be found in section 1.4 of this Executive Summary. These recommendations are intended to address issues caused by the current regulatory regime and to ensure that the purpose of the regime is achieved.

Our recommendations canvas a range of issues, from the use of consistent terms and definitions to introducing a single fairness obligation to replace existing overlapping obligations in regards to fairness. Central to all of our recommendations is the goal of removing complexity where possible and accordingly streamlining and consolidating the law where it is appropriate to do so.

Consistent with our design principles and the critical importance of effective consultation as discussed in section 4.3 of this Report, our recommendations should be the subject of a thorough consultation process before any decision is made to implement them.

As our recommendations are made in relation to the existing legislative framework, we expect that many would not be required if the regulatory framework is re-designed based on the design principles we have proposed in this Report. Our design principles contemplate the Conduct Regulator being given a broad rule-making power to prescribe specific requirements to implement the principles applying to financial service providers. We do not expect that all of the detailed requirements currently found in the financial services regime would be automatically transferred to the Rules. Rather, the Conduct Regulator should engage in appropriate consultation to identify any areas where the conduct principles in the Act require elaboration or more specific requirements to be imposed and only make Rules where absolutely necessary and following further consultation.

---

[11] ASIC Act, s 12BF(3).
[12] Insurance Contracts Act, s 11AB.
[13] ALRC Interim Report A, [3.88].
[14] Australian Government, *Restoring Trust in Australia's Financial System: Government Response to the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry,* 2019, p 38.
[15] ASIC, *The ASIC-APRA relationship,* 2021: https://asic.gov.au/about-asic/what-we-do/our-role/other-regulators-and-organisations/the-asic-apra-relationship/ (accessed on 15 May 2022).

There would of course need to be an appropriate transition period between the existing regime and the new principles-based regime to give the Conduct Regulator enough time to properly consult on any Rules it proposes to make. We do not expect that such a transition period would be short. Effective consultation takes time and there would need to be sufficient time to properly consult with and engage with stakeholders about the need for Rules and the nature of those Rules before they are made and implemented.

(c) Legislative reform and re-design

Addressing the complexity of the financial services regulatory regime requires a reform of the legislative framework.

A key factor in producing effective regulation is ensuring that the intent and purpose of the regulation is clear. This helps stakeholders to identify and understand the policy intent so that the expected compliance requirement is also clear.[16]

Consultation is also a critical process in developing and re-designing the legislative framework and is an important control in the law-making process. Stakeholder input is essential in developing legislative policy and identifying the form in which regulation will be most effective. In particular, the consultation process provides insights about how regulation will be applied in practice and how it will impact stakeholders. It is therefore essential that consultation is conducted before the introduction of any legislative regime and occurs in a timely and structured manner to ensure feedback can be meaningfully considered.

A redesign of the financial services regime should therefore start with a clear identification of the principles and objects of the legislative regime. Parliament should establish the principles or norms of conduct expected of financial sector participants. Ideally, this would be done in a separate Act of Parliament and the requirements should be framed as principles and outline clear outcomes and/or objectives that must be complied with across the regulated financial services industry. As with Commissioner Hayne's six 'norms of conduct',[17] these principles should be fundamental norms of behaviour that are expected of financial services providers. Identifying principles will facilitate regulated entities to focus on the behaviours and standards of conduct expected of them rather than simply meeting prescriptive compliance requirements.

Where sector-specific principles are appropriate, this could be done in a separate part of the same legislation. For example, principles and requirements that apply specifically for general insurance could be consolidated and set out in a separate part of the legislation. This will improve the navigability of the law and help ensure that it is developed in a consistent manner.

The principles in the legislation should be standards that are self-evidently appropriate and not controversial. They should be principles that every well-run company would agree should be the standard to which they are held. They should also of course set the standard of conduct expected of financial services providers at an appropriate level to ensure and promote consumer confidence in the sector. For this reason, we believe that breach of the principles should be give rise to penalties and/or liability to affected consumers.

It is important that the principles are general enough to apply at all times and in all circumstances, meaning that modifications, amendments and exemptions to the primary legislation would not be needed. This will address one element of complexity found in the current financial services framework as notional amendments will not need to be made to the legislation and will not be permitted. The Act will therefore be the single source of truth for the principles applying to the financial services sector.

We acknowledge however that there will be a need in certain circumstances to prescribe specific rules and requirements to apply in specific situations either to ensure consumers are provided with an appropriate minimum level of protection or to give industry participants certainty on how to apply and comply with the principles in practice. Providing the regulator with a rule-making power and an authority and expectation that it will set the rules where required is an important feature of our proposal to redesign the financial services regime. This model has the advantage of offering flexibility, as principles can be

[16] Australian Government, Department of the Prime Minister and Cabinet, *Principles of best practice regulation*: https://www.pmc.gov.au/ria-mooc/coag/principles-best-practice-regulation (accessed on 18 May 2022).
[17] Final FSRC Report, vol 1, p 9.

applied and adapted for different circumstances, allowing industry to understand the intention behind the legislation and model frameworks around the principles, while also allowing for specific requirements to be outlined in the laws as regulations or rules. It therefore has the potential to reduce the duplication and confusion currently caused by the lack of a clear legislative hierarchy.

Ensuring the regulator has the capacity and expertise to develop rules that are appropriate for each part of the financial services sector and give effect to the principles in the legislation is critical to the success of such a significant redesign of the financial services regulatory framework. Furthermore, the power to make rules will need to be matched with strict protocols as to how the regulator can exercise such a power. These include:

- giving the regulator a clear mandate and authority to make rules in the legislation;
- requiring the regulator to engage in effective consultation before making any rule in order to examine the impact and appropriateness of the proposed rule and evaluate it against the principle it is intended to give effect to;
- ensuring there is appropriate oversight of the regulator's use of its rule-making powers; and
- giving stakeholders the ability to challenge rules through an effective review mechanism.

There should be a specialist regulator for financial services to administer and enforce this regime which we refer to in this Report as the Conduct Regulator. This could be ASIC (although we are concerned that ASIC's current mandate is too wide) or a new regulator. Giving a specialist regulator the responsibility for developing rules should enable a more coherent and considered approach to be taken to the development of prescriptive requirements. It will also facilitate appropriate consultation which should be a mandated requirement for the development of the rules.

We do not however envisage that the Conduct Regulator will have an unfettered role. Appropriate oversight and checks and balances are essential for a system based on the rule of law. We therefore propose there would be review and oversight over this process by giving an expanded mandate to the FRAA. The FRAA should be required to oversee regulators in the financial services industry and assess how effectively they are performing their functions as well as coordinating and collaborating with each other. In addition, the FRAA should be empowered to review and reconsider rules made by the Conduct Regulator. Stakeholders should also have the ability to apply to the FRAA for it to review any rule made by a regulator. The FRAA should have an injunctive power to pause the application of a rule until it determines whether to replace the rule, send it back to the regulator for reconsideration or retain the rule without change.

1.2 Design principles

The considerations for redesigning the financial services regulatory regime which we have discussed above are encapsulated in the following design principles. These design principles underpin our recommendations for reform of the financial services and insurance regulatory regime. They are discussed in more detail in section 6.2 of this Report which describes the basis for a fundamental rethink of the financial services regulatory regime.

Principles-based legislation

Design principle 1:	General insurance (and financial services more generally) should be regulated by principles-based legislation with the main statute setting out the norms of conduct or principles that apply to the provision of financial services and the parameters of what is regulated.

General insurance principles

For the purposes of this design principle, we have proposed the following general insurance principles.

1.	Skill and competence	A financial service provider (**provider**) must provide services and conduct its business competently and with due skill and care and ensure that its representatives are appropriately trained and competent.
2.	Fit and proper	A provider must ensure that its officers and representatives are fit and proper persons to undertake the roles they perform.
3.	Act fairly	A provider must act fairly in its dealings with consumers, having regard to the interests of both consumers and the provider. Special care must be taken for vulnerable consumers.
4.	Information needs of customers	A provider must ensure that consumers have the information they can reasonably be expected to need to make decisions relating to the services or products provided by the provider and must communicate information to them in a way which is clear, fair and not misleading.
5.	Conflicts of interest	A provider must manage conflicts of interest fairly, including conflicts between itself and its consumers and wholesale clients (**clients**), between its officers, representatives and service providers and its clients and between a client and another client.
6.	Suitable services	A provider must take reasonable care to ensure the suitability of the information, advice and services it provides to consumers.
7.	Prioritise consumer interests	When acting for a consumer or advising a consumer based on their individual circumstances, a provider must give priority to the consumer's interests.
8.	Recommendations	A provider must have a reasonable basis for any express or implied recommendation they make to a consumer about a financial product or service.
9.	Client assets	A provider must take reasonable care to ensure adequate protection for the assets of clients it is responsible for.
10.	Complaints	A provider must manage complaints received from consumers fairly and expeditiously.
11.	Compliance and risk management	A provider must take reasonable steps to ensure compliance with its obligations and to manage risks relating to its business and the services it provides appropriately, including cyber security risks.
12.	Resources	A provider must have adequate resources to provide the services it provides to clients, including financial, technological and human resources.

Separate Act

Design principle 2: Financial services regulation should be taken out of the Corporations Act and all financial services regulation (including the consumer protection provisions of the ASIC Act) should be contained in separate legislation, e.g. a Financial Services Act (**FSA**).

Regulations

Design principle 3: Regulations should only be used for limited and specific purposes, e.g. to adjust the boundaries of financial services regulation.

Rules

Design principle 4:	The regulator should be empowered to make rules to impose specific requirements, where appropriate, that must be complied with in relation to particular activities to implement the principles articulated in the legislation.
Design principle 5:	Rules should only be made to further the objectives of the financial services regime and the principles and only after appropriate consultation.

Regulators

Design principle 6:	ASIC's financial services regulatory functions should be separated from its corporate regulatory functions so that there is a regulator specifically tasked to oversee financial services conduct (i.e. the Conduct Regulator).
Design principle 7:	The twin peaks model remains appropriate as one regulator cannot effectively regulate both prudential and conduct matters. An essential element of the twin peaks model is both an appropriate allocation of responsibilities between the regulators and effective consultation and cooperation where responsibilities overlap.

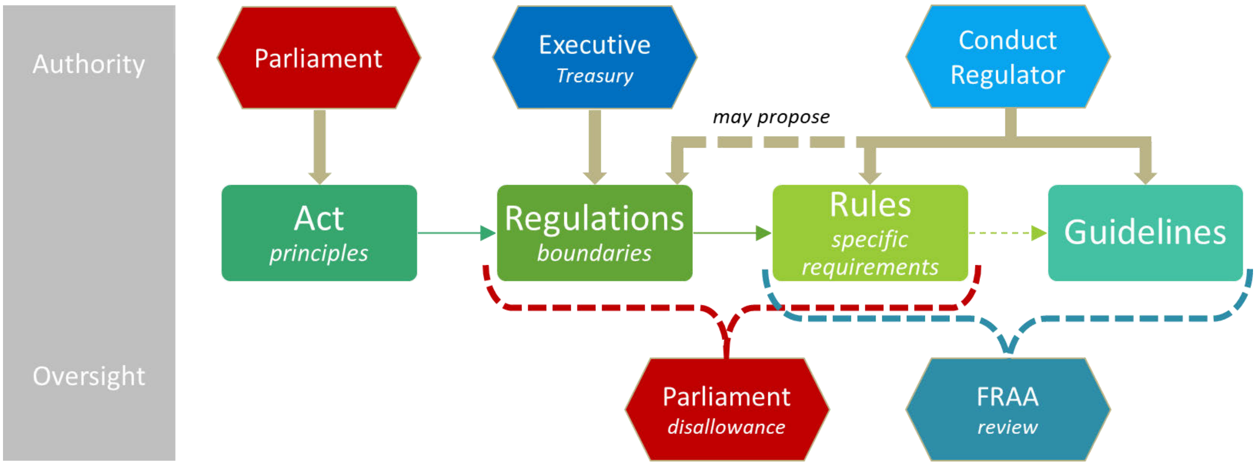
Review and oversight

Design principle 8:	The Conduct Regulator and the Rules it makes should be subject to proper review and oversight.

Self-regulation

Design principle 9:	Industry bodies should continue to identify opportunities to improve industry practice and develop effective means of self-regulation.

The following diagram illustrates the operation of our design principles. It demonstrates how principles-based legislation enacted by Parliament would sit at the top of the legislative hierarchy. Regulations, rules and guidance would support the application of the principles. Regulations would be made by either the Government or the Conduct Regulator, while the Rules and guidance would be developed by the Conduct Regulator and overseen by the FRAA.



As noted in section 1.1(b) above, the Rules should not simply recreate the detailed requirements currently found in the financial services regime. The Conduct Regulator should undertake appropriate consultation to identify what, if any, Rules should be made to implement the principles legislated in the FSA.

1.3 ALRC's proposed legislative model

Since we began work on this Report, the ALRC has released its Interim Report B which proposes a very similar approach to key elements of our design principles, particularly design principles 1, 3 and 4. The

ALRC proposes amending the legislative hierarchy of Chapter 7 of the Corporations Act so that it comprises:

- *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;*
- *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; and*
- *thematically consolidated rules, which for convenience may be labelled 'rulebooks', containing prescriptive detail (also currently spread across the legislative hierarchy).*[18]

While there are differences between our design principles and the ALRC's proposals, we welcome the approach adopted by the ALRC which we believe is supported by the findings of this Report. We discuss the differences between our proposed design principles and the ALRC's proposals in section 6.3 of this Report.

1.4 Recommendations for reform of the existing regime

We have identified a number of areas of reform of the existing regime in the course of preparing this Report. These recommendations seek to solve specific issues in the current regime if and until the more fundamental recommendations in the design principles or the ALRC's proposals for a new legislative hierarchy are able to be implemented. The recommendations are intended to be complementary. We do not believe that the full benefit of the recommendations would be realised if they are adopted on a piecemeal basis.

Some of the recommendations relate to recent legislative changes (e.g. reforms following the Financial Services Royal Commission). Our intention is not to weaken the consumer protections introduced by the reforms. Rather, we believe that the application of these measures in the context of insurance requires further consideration to ensure that they have their intended effect for the benefit of consumers. As Dr Austin has noted:

> *Comparing legislative reform recommendations by the Royal Commission with enacted legislation purporting to adopt those reforms leads to some uncomfortable reflections. Was the Royal Commission acceptable as a process for identifying legal deficiencies and developing ideas for reform? Can we be confident that the dramatic increase in penalties and other changes to the statutory remedies, brought about by the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth), was justified having regard to the unusual evidentiary procedures that such a Royal Commission deploys?*[19]

We have extracted the recommendations we have made in the body of this Report below. Further detail about the basis for these recommendations can be found in the relevant section noted next to each recommendation.

Table 1

Recommendation		Section
Difficulty of navigating through the legislative framework		
Recommendation 1	The principle sought to be implemented by prescriptive requirements or prohibitions should be clearly stated at the outset in the relevant legislation.	4.2(a)
Recommendation 2	The mandates for the Senate Standing Committees for the Scrutiny of Bills and Delegated Legislation should be expanded as follows:	4.2(c)

[18] ALRC Interim Report B, [2.4].
[19] Dr Austin RP, 'Corporate law reform: Some reflections on the reform experience of the last 30 years' (2021) 36 *Australian Journal of Corporate Law* 197, p 211.

Recommendation		Section
	2.1 The Committees should require the Government to report on the complexity of legislation and to confirm that alternatives to complex drafting have been considered and determined not to be appropriate. 2.2 The Committees should be required to consider whether aspects of the explanatory material for legislation would be more appropriately addressed in the legislation itself. 2.3 The Committees should also be required to certify that it is satisfied that legislation meets their standards for complexity and clarity and that the explanatory material does not contain elements that would be more appropriately addressed in the legislation itself. Failure to do so would have the following consequences: • for a bill, it would not be able to proceed a second or third reading in the Senate; (b) for delegated legislation, the Committee would move a motion of disallowance.	
Recommendation 3	Consistent with Recommendation 9, a post-implementation review of the Royal Commission reforms should consider whether the anti-hawking regime is having the intended effect in relation to general insurance or whether it would be more appropriate to apply the DSM regime where a general insurance product is being sold in an inappropriate way or for ASIC to make a product intervention order.	4.2(d)
Recommendation 4	Limit the DSM regime to problematic products specified by the Conduct Regulator after appropriate consultation. This would include the products which ASIC and the Financial Services Royal Commission have identified as junk insurance or having serious issues, such as tyre and rim insurance, gap insurance, loan termination insurance and consumer credit insurance.	4.2(d)
Consultation		
Recommendation 5	Minimum consultation periods for legislation (including regulations, rules and statutory instruments) affecting the financial services sector should be legislated. 90 days would be appropriate for standard consultations. Failure to consult should give rise to the ability to seek a court order invalidating the instrument. The instrument should remain in force until the order is made. However, it should be possible to seek an interlocutory order to suspend the operation of the instrument until the matter is decided.	4.3(b)
Recommendation 6	Where a measure is urgent, the relevant regulator should be able to seek a shorter consultation period or an exemption from consultation from an appropriate oversight body, such as the FRAA, having regard to the criteria for urgency set out in the relevant legislation. The FRAA should also review periodically the consultation undertaken by financial services regulators to confirm appropriate consultation has taken place and that it has been appropriately coordinated. If the FRAA is not satisfied that the regulator has consulted appropriately, it should be able	4.3(b)

Recommendation		Section
	to suspend the reform until appropriate consultation has taken place.	
Recommendation 7	Regulators should be required to implement appropriate transition periods and measures to ensure regulated entities have sufficient time to implement the new requirements properly. Consultation on appropriate transition periods and measures should be part of the consultation process they are required to undertake. The implementation period should have explicit regard to: 7.1 the reasonable time required to implement the new requirements across affected parties; 7.2 the other regulatory changes affecting regulated entities, whether past, present or future; and 7.3 the time required for the regulator to provide guidance on, and to be in a position to enforce, the new requirements. The FRAA should also review periodically the transition periods and measures implemented by regulators and have the authority to override regulators either on its own motion or at the request of one or more regulated entities.	4.3(d)
Recommendation 8	Post-implementation reviews should be conducted of all significant changes to the financial services regime, whether those changes are made by Parliament, in the regulations or in rules, standards or other delegated legislation and whether or not a risk impact statement has been prepared or approved. The review should: 8.1 occur within five years of the reform being made; 8.2 involve issuing an issues paper and provide for a consultation period of at least three months; 8.3 issue a final paper which should be made public within six months after it is issued or before the next Federal election, whichever is sooner; and 8.4 be conducted by: • the Government in the case of changes to an Act of Parliament or regulations (unless proposed by the Conduct Regulator – see section 6.2(c) of this Report). Of course, a relevant Parliamentary committee may wish to conduct its own review of reforms; • the relevant regulator in the case of reforms they make or propose. Such reviews should be considered by the FRAA as part of its role to oversee financial services regulators.	4.3(d)
Recommendation 9	Given the issues we have raised in relation to many of the Financial Services Royal Commission reforms in this Report, a post-implementation review of those reforms should be conducted as soon as practicable.	4.3(d)

Recommendation		Section
Multiple duties addressing the same concern – consumer protection and fairness		
Recommendation 10	Impose a fairness obligation (i.e. duty to act fairly) on financial service providers, including insurers and insurance intermediaries, that would apply to all dealings with consumers and small businesses (as defined – see sections 5.2(a) and 5.2(b) below) – i.e. it should not be limited to the financial services covered by an AFSL. This duty would only apply to dealings which relate to the provision of financial services and products – e.g. it would not apply to dealings with employees or shareholders which would continue to be subject to the specific duties that apply in those contexts.	5.1(a)(ii)
Recommendation 11	As a consequence of the above recommendation: 11.1 remove the licensing obligation to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly in s 912A(1)(a) of the Corporations Act; 11.2 replace the duty of utmost good faith with the duty to act fairly for retail and small business insurance (the duty of utmost good faith would continue to apply to other commercial insurance and to the conduct of consumers when making a claim); 11.3 exclude insurance contracts from the operation of the UCT provisions in Subdivision BA of Division 2 of Part 2 of the ASIC Act.	5.1(a)(ii)
Recommendation 12	Financial service providers including insurers and insurance intermediaries should be required to provide services to consumers and small businesses with skill and competence.	5.1(a)(iv)
Recommendation 13	All general consumer protection measures should be in one place. One approach could be to repeal Part 2 of the ASIC Act and making all financial service providers subject to the ACL (subject to the exclusion of insurance contracts from Part 2-3 of the ACL consistently with Recommendation 11). The Conduct Regulator could then be responsible for enforcing the ACL in relation to financial services and products, including general insurance. State and Territory consumer protection laws should not apply to financial services.	5.1(g) & 5.1(h)
Inconsistent terms and definitions		
Recommendation 14	Replace concepts of 'retail client', 'consumer', 'consumer contract' and 'consumer insurance contract' in the Corporations Act, ASIC Act and Insurance Contracts Act with one concept and require this term be used in the FSA, regulations, Rules and statutory instruments where consumer protection measures are imposed.	5.2(a)(iv)
Recommendation 15	Ensure consistent use of terminology to capture the same concepts to reduce complexity and confusion when identifying the application of regulatory obligations. All financial services legislation and legislative instruments	5.2(a)(iv)

Recommendation		Section
	should use the same terms and definitions for the same or similar concepts. This requirement should have overriding effect. In particular, one definition of 'consumer' should be used across all financial services legislation and legislative instruments.	
Recommendation 16	Apply one definition of 'small business' in financial services legislation and legislative instruments and require it to be used consistently.	5.2(b)
Product disclosure		
Recommendation 17	Replace the requirement to provide consumers with a PDS for a general insurance product with the requirement to provide a policy document. Given the extensive modification of the PDS regime for general insurance, there is no benefit in maintaining a separate concept which is more suitable for investment products.	5.3(b)
Recommendation 18	Require the policy document to meet the residual PDS requirements that apply to general insurance products. It must be dated, worded and presented in a clear, concise and effective manner and identify the insurer. It must include information about the dispute resolution process, the cooling-off regime and the requirements for unauthorised foreign insurers where applicable. There is no need to require the policy document to include information about significant benefits, characteristics, features, rights, terms, conditions or obligations as they will in any case be set out in the policy document and schedule.	5.3(b)
Recommendation 19	Replace the Key Facts Sheet with a more effective summary (**Product Summary**) for assisting consumers to compare general insurance products. The Product Summary should extend to the same classes of general insurance products that are subject to the standard cover regime (i.e. not be limited to home building and contents insurance) and identify key elements and features of a particular insurance product. The key elements as well as the content and format requirements of the Product Summary and how it is to be made available to consumers should be developed by the Conduct Regulator in consultation with industry and consumer groups. Also, similar to the current Key Facts Sheet, there should be a limit on the length of the Product Summary (e.g. one or two A4 pages long) to ensure it is maintained as a simple form of disclosure which can be used to compare general insurance products.	5.3(c)
Recommendation 20	Repeal the standard cover regime in s 35 of the Insurance Contracts Act.	5.3(d)
Other disclosure obligations		
Recommendation 21	Consistent with Recommendation 9, a post-implementation review of the Royal Commission reforms should consider whether CSFSs are useful for consumers or whether any concerns relating to cash settlement offers could be	5.4(a)

Recommendation		**Section**
	addressed by the introduction of a duty to act fairly (see Recommendation 10).	
Recommendation 22	Introduce new, consistent measures to permit, facilitate and encourage electronic disclosure. All documents should be able to be delivered electronically without requiring consumer consent provided the provider is reasonably satisfied that the consumer has the means of receiving the electronic disclosure, e.g. through the consumer providing their email address or mobile telephone number.	5.4(b)
Advice obligations		
Recommendation 23	To improve the ability of consumers to receive assistance with their insurance needs, remove general insurance from the financial product advice regime applying to other financial products and instead impose a 'product recommendation' regime for general insurance products. The product recommendation regime should simply require a recommendation provider to have a reasonable basis to recommend a particular insurance product or a particular choice within a product. The Conduct Regulator could be given the power to impose additional requirements to have a reasonable basis for the recommendation, but we do not advocate for any particular requirements at this point in time. It should simply be incumbent on the provider to establish that they had a reasonable basis for the recommendation and it should be open to a consumer to challenge that recommendation on the basis that there was no reasonable basis for the recommendation.	5.5
Recommendation 24	Remove the requirement to provide a FSG in relation to a product recommendation (or other financial services) provided by the insurer or a person identifiably acting on behalf of the insurer for a general insurance product (where that occurs). However, the information contained in an FSG should be required to be provided if the product recommendation is provided by a broker or a person acting on behalf of more than one insurer (for example, multi-line insurance agents and comparator websites). Insurers and people identifiably acting only on their behalf (for example, where a person is using the name or brand of the insurer or the relevant product) should be exempt as it will be clear who they are acting for and their interest in making the product recommendation.	5.5
Recommendation 25	Codify in the statute all duties and obligations (including common law duties) applying to the provision of financial product advice so that the legislation becomes a complete statement of the law on this topic.	5.5
Overlapping regulatory responsibilities		
Recommendation 26	Cooperation and coordination between all regulators should be mandated, particularly in relation to requests for data and other regulatory requests.	5.6
Recommendation 27	MOUs between regulators with responsibility for financial service activities should not only require regulators to coordinate their activities in relation to regulated entities	5.6

Recommendation		Section
	but the effectiveness of those arrangements should also be subject to review and oversight by the FRAA.	
Recommendation 28	Review allocation of responsibilities for related conduct obligations between different regulators to determine whether they could be streamlined, e.g. by adopting a lead regulator model where enforcement and surveillance activities are centralised under one regulator.	5.6
Responsible managers and persons		
Recommendation 29	Establish a single 'fit and proper' regime with a single set of requirements to govern responsible persons and appoint one lead regulator (either APRA or the Conduct Regulator) to oversee the regime and enforce the relevant requirements. Where additional requirements need to be imposed given the nature of the responsible person's responsibility (e.g. the specific knowledge requirements for responsible managers), the regulators should co-ordinate and consult among themselves. In our view, it would be appropriate for APRA to be the lead regulator given prudential regulation is significantly about governance arrangements and this forms a large part of what APRA currently does.	5.7
Recommendation 30	Introduce a consolidated, overarching definition for responsible persons and anyone who should be subject to character requirements.	5.7
Recommendation 31	Establish a single online portal administered jointly by APRA and the Conduct Regulator for entities to provide responsible person information (as opposed to having separate fit and proper person policies, accountability maps, statements of personal information and organisational competence tables).	5.7
Recommendation 32	Replace existing responsible manager and key person requirements with a requirement to nominate a 'back-up responsible person' for each responsible person.	5.7
Federal, State and Territory regulation		
Recommendation 33	A cooperative scheme should be implemented by Federal, State and Territory governments to harmonise requirements of compulsory classes of insurance and as far as possible bring all of the schemes up to the same standard.	5.8
Recommendation 34	The cooperative scheme should include the following elements: 34.1 States and Territories should be required to: (a) use consistent terminology and to take into account existing Federal requirements when imposing additional obligations on insurance companies; and (b) consult with APRA before imposing any additional obligations on insurance companies;	5.8

Recommendation		Section
	34.2 APRA should have the power to reject or modify any such proposed requirement; 34.3 the Federal Treasurer should have the ability to override any such decision by APRA on application by the relevant State or Territory; 34.4 State and Territory regulators and APRA should be required to cooperate with each other and comply with reasonable information requests.	
'One size fits all' regulation		
Recommendation 35	Consistent with Recommendation 9, a post-implementation review of the Royal Commission reforms should consider whether the DDO regime is performing a useful role in relation to general insurance or whether it should only apply to particular general insurance products after appropriate consultation.	5.9(a)
Product suitability		
Recommendation 36	The Conduct Regulator and APRA should be expressly required to coordinate and cooperate with each other when developing policies and regulatory requirements that have both conduct and prudential implications.	5.10
Distribution		
Recommendation 37	Consistent with Recommendation 15, identify one term to describe brokers and ensure this is used consistently throughout the financial services legislation and instruments.	5.11(a)
Recommendation 38	Obligations applying to insurance brokers should be reviewed and a single regime should be developed which imposes regulatory requirements where needed to address risks relating to their activities and ensuring that brokers are not subject to overlapping requirements.	5.11(b)
Commissions		
Recommendation 39	Streamline the regulation of commissions so that it is set out in a single regime and not regulated in a fragmented manner.	5.12
Insurance Contracts Act and UCT		
Recommendation 40	If Recommendation 11.3 is not adopted and the UCT regime continues to apply to insurance contracts: 40.1 Amend the application of the UCT regime so that it does not apply to terms or matters that are 'expressly permitted or addressed' by the Insurance Contracts Act 40.2 Remove the right of subrogation from review under the UCT regime as it is already regulated under the Insurance Contracts Act.	5.13

Recommendation		**Section**
Data		
Recommendation 41	Data and privacy requirements should be aligned across the state-based compulsory MAI and workers compensation regimes and with the Federal privacy regime to reduce complexity and duplication.	5.14
Claims		
Recommendation 42	The requirements for claims handling should be set out in one place and any guidance should be clearly identified so that participants understand what is expected of them. This will also ensure that any requirements are subject to the proper rule-making process and scrutiny.	5.15
Dual licensing		
Recommendation 43	Remove the requirement for general insurers that are authorised by APRA to obtain an AFSL. General insurers should only require authorisation by APRA to carry on an insurance business in Australia. This would require the following changes: 48.1 apply the conduct requirements in the financial services regime (whether in Chapter 7 of the Corporations Act or the FSA if our design principles are implemented) to general insurers that are authorised by APRA where appropriate; 48.2 enable the Conduct Regulator to request APRA to suspend or cancel an insurer's authorisation where the insurer has persistently breached relevant conduct obligations; 48.3 give APRA the power to suspend or cancel an authorisation where requested by ASIC.	5.16
Remuneration		
Recommendation 44	The language and terminology used in FAR and CPS 511 should be aligned as far as possible. Consideration should be given to establishing a single regime to regulate executive and Board-level remuneration for insurance companies.	5.17
Level playing field		
Recommendation 45	Conduct a review of the current and potential future role and risks for consumers of discretionary mutual funds (**DMFs**) to determine whether they should be subject to additional regulation, in particular in relation to the discretionary nature of the 'cover' provided by DMFs.	5.18

Chapter 2 – Introduction

2.1 Purpose and scope of Report

This Report has been commissioned by IAG to accompany its submission to the ALRC Review of the Legislative Framework for Corporations and Financial Services Regulation.

The Report seeks to identify issues with the financial services regulatory requirements that affect the general insurance industry, including issues of legislative complexity, duplication, overlap and inconsistency, and set out how the general insurance regulatory landscape can be improved and simplified. This Report also makes recommendations for improving financial services regulation by investigating the impacts of financial services regulation on consumers, insurers and other participants in the general insurance through various case studies.

This Report primarily focuses on statutory conduct obligations imposed on the general insurance industry and only briefly considers prudential regulation. We also note that while industry codes are an important source of regulation, they are not the focus of this Report.

This Report does not consider the regulation of life insurance or health insurance.

2.2 Context for Report

As part of the Government's response to the Financial Services Royal Commission, the ALRC has been asked to inquire into the potential simplification of laws that regulate financial services in Australia. The terms of reference for the ALRC's inquiry refer specifically to the Corporations Act and the Corporations Regulations and what changes can be made to simplify and rationalise the law, in particular having regard to the following:

- the use of definitions in corporations and financial services legislation;
- the coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders and standards; and
- how the legislative framework for financial services licensing and regulation contained in Chapter 7 of the Corporations Act and the Corporations Regulations could be reframed and restructured.[20]

At the date of publication of this Report, the ALRC has released two Interim Reports. Interim Report A sets out the ALRC's initial recommendations, proposals and questions for the reform of financial services law with a primary focus on the re-design of definitions. In response, the Government has introduced a bill to implement formal recommendations and informal suggestions made by the ALRC as part of its Treasury Law Improvement Program.[21]

Interim Report B builds on Interim Report A and sets out the ALRC's proposals for reform relating to a legislative hierarchy model and improvements to the design of legislation.

The purpose of this Report is not limited to the scope of the ALRC which is tasked with undertaking its inquiry within existing policy settings. MinterEllison has been asked to identify issues with financial services regulation more broadly with particular reference to the general insurance industry.

[20] ALRC, *Review of the Legislative Framework for Corporations and Financial Services Regulation: Terms of Reference,* 11 September 2020: https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/terms-of-reference/ (accessed on 1 June 2021).

[21] *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022*. The Government is of the view that these recommendations can be implemented prior to the conclusion of the ALRC's review. Given the nature of these changes is minor, it is questionable whether there is sufficient benefit in making them before the ALRC releases its Final Report.

2.3 Methodology

This Report has been prepared in accordance with the following three phases:

1. *Phase 1: legislation and regulation review.* This phase involved identifying regulatory requirements in the general insurance industry, identifying issues with their application (if any) and determining areas of complexity, duplication, overlap and inconsistency.
2. *Phase 2: pain points of the insurance landscape.* This phase involved confirming and clarifying issues with the regulatory requirements, including legislative complexity, duplication, overlap and inconsistency, with IAG and understanding their practical impacts on consumers and the insurance sector.
3. *Phase 3: recommendations for simplification.* This phase involved developing recommendations to address the issues identified in phases 1 and 2. These recommendations were tested and developed with IAG and other regulatory experts to ensure they could be implemented in a practical manner and result in better outcomes for consumers and participants in the general insurance industry.

The findings from these phases are presented and analysed in this Report.

2.4 MinterEllison team

MinterEllison is a leading Australian Law firm. We advise major financial institutions, including banks, insurance companies and superannuation funds, as well as specialist fund managers, platform operators, financial advice firms, stockbrokers, and other financial intermediaries in Australia and overseas.

This Report has been prepared by a team of insurance regulatory experts led by Richard Batten and Eugina Kwon with insights from Martin Wright, Ian Lockhart and other MinterEllison regulatory specialists.

Chapter 3 – General insurance legislative framework

The general insurance sector is regulated by a complex web of Commonwealth, State and Territory legislation, with some legislation being specific to the general insurance sector, while other legislation has more general application across financial services or the economy more generally.

Key sources of regulation in general insurance include the Corporations Act, the ASIC Act, the Insurance Act and the Insurance Contracts Act, and these Acts are supplemented by regulations, legislative instruments, regulatory guidance and self-regulation.

General insurance legislation is administered and enforced by a number of Federal and State regulators, with ASIC and APRA being the key regulators in the general insurance sector.

The legislative and regulatory framework for the general insurance sector is set out in Appendix 1 of this Report.

3.1 Affordability of general insurance and causes

Affordability of general insurance in Australia has become a core issue facing insurers and policymakers over the past few decades. In 2018, the Centre for Social Impact found that one in ten adults in Australia reported not holding any form of insurance and 12% had an unmet need for insurance.[22]

Extensive research has concluded that the primary groups affected by insurance affordability are:

- low socio-economic individuals; and
- individuals living in high risk geographical areas.[23]

There has been an awareness that groups of low income earners are unable to afford general insurance for some time. However, affordability issues for individuals living in high risk geographical areas has only arisen in the past decade, with many who fall into this category previously being able to afford general insurance.[24]

Research compiled by Finity Consulting in 2018 into the affordability of insurance determined that affordability of insurance was challenging for around 4% of the Australian adult population that are insured.[25] It did so by comparing the disposable incomes of Australian households to the price of insurance premiums. The research showed that affordability mostly affected lower socio-economic groups determining that the highest premiums for individual homes (flood and cyclone) are biased towards lower socio-economic groups, which ultimately exacerbates unaffordability.[26] However, this research did not account for those that forgo insurance.

It is well understood by insurers, government and stakeholders in the insurance industry that the increasing price of insurance is the main contributing factor to affordability. As such, identifiers of the cause of increase pricing of general insurance must guide the focus of an analysis into affordability.

IAG has identified the causes of general insurance pricing to include the following:

- Risk rating – each risk is assigned a relativity, depending on how it impacts claims;
- Claims inflation – post event inflation and global supply chain pressures are contributing to rising costs across all claim types, including buildings, contents and motor vehicles;
- Reinsurance costs – buying cover from other insurance companies to spread the risk from large major event claims; and

---

[22] Centre for Social Impact, *Financial Resilience in Australia 2018*, December 2018, p 7.
[23] Actuaries institute, *Property Insurance Affordability: Challenges and Potential solutions*, November 2020, [2.1].
[24] IAG, *Submission To The Financial System Inquiry*, March 2014, p 39.
[25] Lau S, Finity Consulting, *Personal Lines Pricing & Analytics Seminar 2018: Affordability of insurance for natural perils*, 22 May 2018: https://www.finity.com.au/publication/personal-lines-pricing-analytics-seminar-2018-affordability-insurance-natural-perils (accessed on 18 January 2022).
[26] As above.

- Expenses – includes cost of estimating, collecting and managing each insurance policy, government taxes and charges and relevantly to this Report the cost of legislative/regulatory changes.[27]

APRA has also indicated that it is continuing to focus on insurance accessibility and affordability for Australians, including promoting the sustainability of insurance products for the long-term benefit of consumers.[28]

3.2 Implications of legislative and regulatory changes

There are two factors arising from the regulation of general insurance which contribute to an increase in overall pricing, reducing affordability. The first is regulatory overlap contributing to confusion, and increasing the resources that need to be invested into the implementation of obligations. This in turn increases costs of insurers which is ultimately passed onto consumers through increased premiums or a reduction in the availability of insurance. The second factor is higher overall cost of compliance as a result of the large number of obligations imposed on insurers.

In relation to regulatory overlap, IAG in its submission to the Financial System Inquiry noted that the costs of the implementation of Financial Services Reform over a period of approximately two years were between $17 million to $20 million for IAG alone.[29] The factors contributing to higher implementation costs include:

- *Increase in compliance officers required to ensure companies meet regulatory requirements – monitoring is a key component of the work;*
- *Development and implementation of training resources and materials – may include online training modules, purchase of software licences;*
- *Training of staff and authorised representatives – conduct of training sessions;*
- *Development of incident reporting tools and the monitoring, reporting and rectification of incidents;*
- *Preparation of manuals particularly for authorised representatives;*
- *Preparation of documentation specific to regulatory requirements and printing- excluding existing requirements such as the Insurance Contracts Act 1984;*
- *Marketing materials – inclusion of disclaimers, consideration of the nature of the proposed marketing campaign and relevant regulatory requirements;*
- *Preparation of scripts for telephone sales and enquiries; and*
- *Audit reporting including retention of auditors, development of processes to support audits, staff and management time.*[30]

In relation to the overall cost of compliance, general insurers are subject to corporate regulatory regimes that apply to Australian incorporated businesses generally. This includes the legislative regimes of the Corporations Act, the ASIC Act, the Competition and Consumer Act and, for public listed companies, the requirements of the Listing Rules of the ASX.

General insurers are also subject to a range of industry specific regulations at Federal and State level, including the Insurance Act, the Insurance Contracts Act and State and Territory statutes and legislative instruments. These regulations subject insurers to prudential supervision. They also deal with aspects of market conduct and consumer protection and the various statutory insurance schemes, which operate in each State and Territory.

The main rationale for the regulation of general insurance is one of consumer protection, however, the consumer protection regulatory regime has grown substantially since the introduction of the Financial Services Reform Act in 2001, and in an ad hoc manner that has added substantially to the cost of the general insurance products without a commensurate increase in protection for customers.[31] The principle for whether to make regulation should be that where regulation has the potential of increasing the regulatory or administrative burden on business, it should only be implemented if material or prudential

---

[27] IAG, *Submission To The Financial System Inquiry*, March 2014, p 28.
[28] APRA, *Corporate Plan 2022-23*, 8 August 2022, p 8.
[29] IAG, *Submission To The Financial System Inquiry*, March 2014, p 21.
[30] As above, p 20.
[31] As above, p 19.

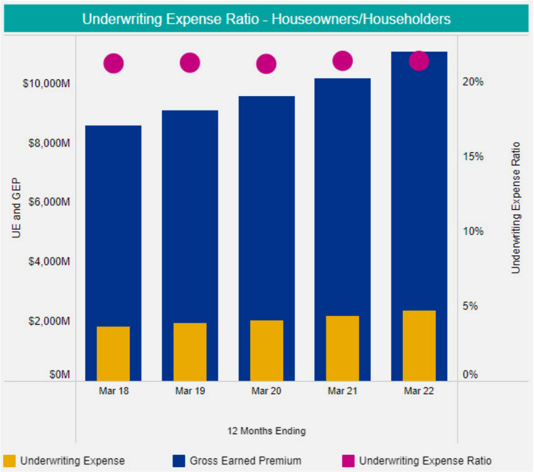
benefits are expected to outweigh the costs.[32] The ever increasing burden of regulation affecting the insurance sector means that this ideal is not being met.

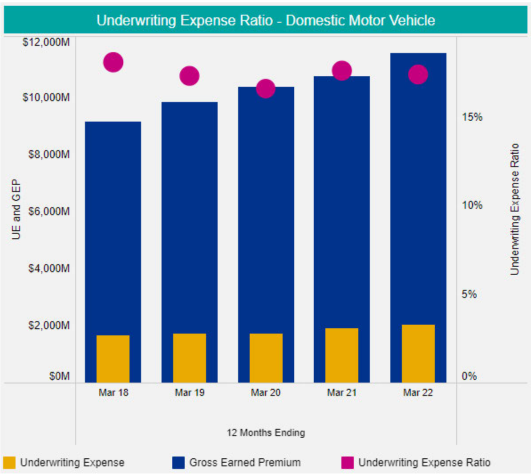
The sheer volume and overlap of regulation and legislation at a State and Federal level is and will continue to increase the cost base of insurers, which in turn increases the overall pricing of insurance and reduces affordability.

These issues are discussed further in chapters Chapter 4 and Chapter 5 of this Report.

3.3 Impact of regulatory costs

The following charts show that underwriting expense ratio, which includes among other things, costs incurred as a result of regulation (but excluding commission), represented 21.38% of the gross premium earned by general insurance companies in 2022 for home insurance and 17.42% for domestic motor vehicle insurance.





(KPMG General Insurance Insights Dashboard 2022 based on APRA Quarterly General Insurance Performance Statistics March 2022)

Of course, underwriting expenses include not only the cost of regulation but also the cost of expenses such as stamp duty. Every inquiry and review of insurance costs and affordability over the last decade has recommended the abolition of these State government charges and some have also recommended the abolition of GST.[33]

---

[32] As above, p 20.

[33] See NSW Government, NSW Review of Federal Financial Relations Draft Report July 2020, p 64; Insurance Council of Australia, *Role of the Private Insurance Market – Independent Strategic Review: Commercial Insurance – Final Report* September 2021 (**Trowbridge Report**). State governments charge stamp duty of between 9% and 11% on insurance premiums (except in the ACT where it is nil). The NSW government also charges via insurers an emergency services levy of 20% or more (it fluctuates according to Government funding needs) on business insurance policies (the levy is also collected on most retail policies). GST of 10% is also charged on all policies: Trowbridge Report, p 57.

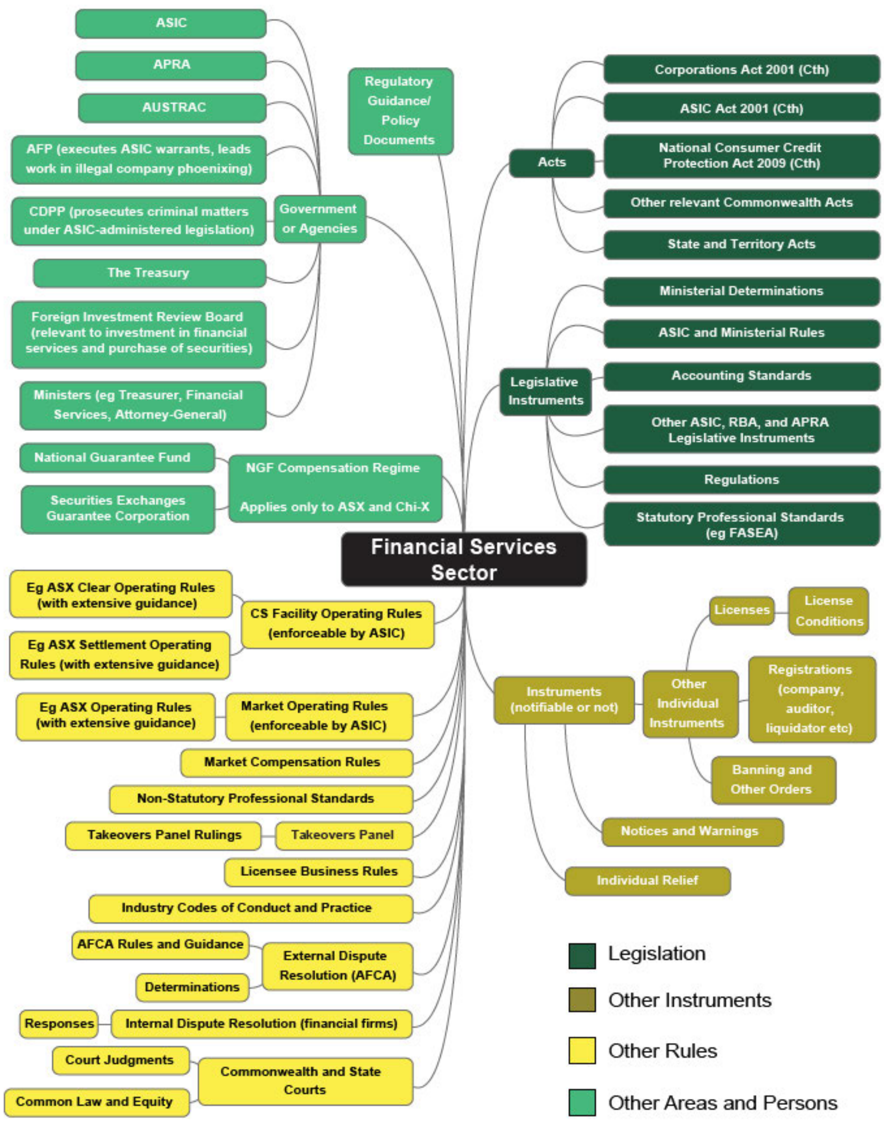
Chapter 4 – Regulatory design and the hierarchy of laws

This section of the Report discusses the current design of the regulatory structure for general insurance and the challenges it poses. We provide examples of the issues in practice and recommendations for addressing them.

4.1 Legislative hierarchy

The legislative hierarchy in the financial services regulatory framework is a significant driver of legislative complexity. The (somewhat simplified) financial services regulatory ecosystem map published by the ALRC and extracted below illustrates this with the financial services legislative framework spread over primary legislation, regulations, instruments, standards, guidance and self-regulation.[34]

Figure 3.1: Financial services regulatory ecosystem map



34 ALRC Interim Report A, p 94.

The Background Paper on Complexity and Legislative Design published by the ALRC identifies this as an issue and attributes the complexity to three legislative features being:

- the consistent use of legislative hierarchy;
- notional amendments; and
- the proliferation of legislative instruments.[35]

This is equally applicable to the regulation of insurance products. As briefly described in Appendix 1 of this Report, there are multiple statutes that regulate insurance and each statute is supplemented by regulations and in some cases instruments, standards and guidance.

(a) Regulations

A key driver of legislative complexity is the use of regulations. Regulations were once used primarily to prescribe detailed requirements that may need to change frequently and that would not be suitable for or require detailed Parliamentary scrutiny. However, the use of regulations has changed significantly in recent years, particularly and perhaps uniquely in the case of the financial services regime in Chapter 7 of the Corporations Act.

The Corporations Regulations made under the Corporations Act contain significant amendments to the provisions in the Act, including modifying and exempting provisions for particular activities, businesses, financial products and/or financial services. Many sections in the Corporations Regulations are examples of notional law as they modify the Act itself by removing or replacing sections within the Act. It is therefore impossible to refer to the statute without checking whether there are any regulations modifying the content of the statute. It requires experience and knowledge to identify relevant regulations which are not incorporated in the Corporations Act itself.

Regulations in financial services law are lengthy and prescriptive pieces of legislation. For example, the ALRC has identified that the word length in the Corporations Regulations has increased by 321% compared to the Corporations Act increase of 78% since their enactment.[36]

(b) ASIC instruments

Legislative instruments are '*pieces of laws that are made by the executive, including ministers and agencies such as ASIC and APRA. They must be authorised by an Act but have the same force of law as an Act of Parliament*'.[37] Legislative instruments include regulations, ASIC instruments (previously referred to as class orders) and APRA prudential standards and determinations. Administrative instruments such as individual relief also form part of the financial services legislative scheme.

The ALRC explains that the proliferation of legislative instruments in the financial services legislation is a consequence of the design of the Corporations Act which regulates a broad range of matters through standardised regimes. It was intended for Parts of the Act to apply to particular products or services and for legislative instruments to also remove or include certain products and services (for example, s 1020F and s 1020G of the Corporations Act permit ASIC and the regulations, respectively, to exempt or modify the financial product disclosure obligations). The ALRC notes that this may have worked if the Act was more principled as fewer carve-outs or modifications would have had to be made to the Act. Instead, numerous legislative instruments have been made, often in response to views that the Act is too expansive and prescriptive by stakeholders.[38]

Legislative instruments are used for three purposes under the Corporations Act:

- *Prescribing detail required for an obligation, prohibition or other rule to function.*
- *Determining scope of the Act by exempting or specifically including products, services, circumstances or persons.*

---

[35] ALRC, *Background Paper FSL2 Legislative Framework for Corporations and Financial Services Regulation Complexity and Legislative Design*, October 2021, [95].
[36] Simoes da Silva N, ALRC, 'The Regulatory Ecosystem for Financial Services', webinar presented on 17 May 2021, https://www.alrc.gov.au/wp-content/uploads/2021/05/The-Financial-Services-Regulatory-Ecosystem-1.pdf (**ALRC Webinar**).
[37] ALRC, *Background Paper FSL2 Legislative Framework for Corporations and Financial Services Regulation: Complexity and Legislative Design*, October 2021, [8].
[38] ALRC Webinar.

- *Notionally modifying the Act to insert or omit sections, subsections etc.*[39]

ASIC instruments themselves therefore make a significant contribution to legislative complexity. While the power to make modifications and exemptions is essential for the current regime to ensure that it can be adjusted to meet particular circumstances, ASIC instruments are essentially ad hoc and more the point are not easily found. Reference to ASIC instruments is not found in the statute or the regulations themselves. ASIC of course lists its instruments on its website and refers to them in regulatory guides and other guidance provided by ASIC. It is not otherwise easy to identify them as they referred to primarily by reference to the year they are made and the order in which they are made in that year. It is therefore necessary to refer to ASIC guidance and more to the point know that it is necessary to refer to such guidance or commentary to identify relevant ASIC instruments and even then there is a risk that a particularly instrument is not or is not yet referred to in guidance or commentary.

(c) Regulatory guidance

Regulatory guidance is produced by all the major financial sector regulators and takes various forms, including:

- Regulatory Guides and Information Sheets issued by ASIC;
- Prudential Practice Guides issued by APRA;
- Guides and manuals issued by the ACCC; and
- Guidance and advice issued by the OAIC.

Regulatory guidance is designed to:

- explain how and when a regulator will exercise its powers;
- explain how the regulator interprets the law;
- describe the principles underlying the regulator's approach; and
- give practical guidance about complying with the law or making an application to the regulator.[40]

According to ASIC, regulatory guidance is designed to:

- explain how and when a regulator will exercise its powers;
- explain how the regulator interprets the law;
- describe the principles underlying the regulator's approach; and
- give practical guidance about complying with the law or making an application to the regulator.[41]

APRA states that

> *Prudential Practice Guides provide guidance on the Australian Prudential Regulation Authority's (APRA) view of sound practice in particular areas. Prudential Practice Guides frequently discuss legal requirements from legislation, regulations or APRA's prudential standards, but do not themselves create enforceable requirements.*[42]

This last observation by APRA is no doubt correct. However, one of the contributors to regulatory complexity can be regulatory guidance where the guidance sets out de facto requirements that the regulator expects industry participants to meet. While the regulatory guidance provided by APRA in Prudential Practice Guides is relatively easy to find because they are listed with the relevant Prudential Standard and grouped by topic, it can be very challenging to find expectations which APRA sets out in letters or other material sent to industry participants, particularly where they are not made public or only provided to an industry association or a limited number of participants. Such practices challenge the transparency of legal obligations and enforcement practice.

The challenge is greater for ASIC material. This is partly because it is so voluminous. However, it can also be found in different forms. Regulatory Guides are only the primary form of guidance. As noted, Information Sheets are also used as is guidance contained on particular webpages or media releases and may also arise from Consultation Papers and Reports. This material is not organised in a form that is

---

[39] As above.
[40] ASIC, *Regulatory guides*, https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/ (accessed on 14 December 2021).
[41] As above.
[42] This statement is included in each of APRA's Prudential Practice Guides, for example *Prudential Practice Guide CPG 320 – Actuarial and Related Matters* (July 2019), p 4.

easy to find. Regulatory Guides are not grouped by topic and do not use any obvious numbering system. ASIC has sought to address this by providing topic based groupings of material on its website, but it still requires great familiarity with the material that is available to know where particular guidance can be found.

(d) Case study – deferred sales model regime[43]

The deferred sales model (**DSM**) for add-on insurance products is a good example of the regulatory structure as it relates to conduct regulation.[44] The main requirements and prohibitions for the regime are set out in the ASIC Act. However, the ASIC Regulations both expand upon and modify the requirements of the DSM regime in the ASIC Act. This includes specifying exemptions from the DSM regime. The ASIC Act also gives ASIC the power to make exemptions and specifies the factors that ASIC is required to take into account when making exemptions. The factors include any matter that ASIC considers relevant and ASIC has specified these matters in *ASIC Regulatory Guide 275: The deferred sales model for add-on insurance*.[45] If ASIC does decide to grant an exemption from the DSM regime, this is issued by ASIC through a notifiable instrument.[46] Furthermore, ASIC is empowered to set out the information that must be given to a consumer to start the add-on insurance deferral period in the DSM.[47] This is set out in *ASIC (Information under the Deferred Sales Model for Add-On Insurance) Instrument 2021/632*.

The requirements for the DSM regime are therefore spread across the ASIC Act, ASIC Regulations, ASIC instruments and a regulatory guide. Further, the Explanatory Memorandum to the Hayne Response Bill introducing this regime, as well as ASIC reports in relation to the regime,[48] often need to be referred to understand the genesis of the regime and its intended purpose.[49] Other regulatory regimes may also require reference to ASIC information sheets.[50] This all contributes to the complexity of the regime as it becomes difficult to navigate the material and identify where the relevant requirements, interpretive material or guidance can be found.

Further, the amendments made by the supporting regulations result in several versions of the law, as noted by Van Geelen,[51] meaning that different requirements apply to different classes of insurance products. This also contributes to unnecessary complexity when applying the law as various pieces of instruments must be '*pieced*' together.[52] For example, as noted above, the ASIC Regulations make exemptions for certain classes of add-on insurance products from the DSM regime,[53] and therefore, it becomes critical to refer to all legislative provisions as each source may make amendments to the primary Act.

This is ultimately to the detriment of the consumer as it obfuscates the underlying principles and purposes of a regulatory regime. Instead, the focus is redirected on identifying the exemptions that may apply and '*wading through [the] legislative porridge*'.[54] ASIC Instruments are a particular example of this.

---

[43] We discuss the DSM regime further in section 4.2(d) of this Report and make recommendations for its reform (Recommendation 3 and Recommendation 4).
[44] Hayne Response Act, schedule 3.
[45] ASIC Act, s 12DY(2)(e); ASIC RG 275.185-206.
[46] ASIC Act, s 12DY(1).
[47] ASIC Act, s 12DP(4).
[48] For example, *ASIC Report 492: A market that is failing consumers: The sale of add-on insurance through car dealers* (12 September 2016) presented ASIC's findings on the sale of add-on insurance through car dealers which contributed to the introduction of the deferred sales model regime. This report is useful in understanding the barriers to consumer understanding of add-on insurance products and the type of conduct that is the intended target of regulation.
[49] O'Neill P, ''Was there an EM?': History of Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament', *Parliamentary Library Research Brief No. 15 2004–05*, 12 September 2006.
[50] For example, *ASIC Information Sheet 253: Claims handling and settling: How to comply with your AFS licence obligations* (May 2021) outlines important information about the financial service of claims handling and settling for insurance products and how to comply with the associated obligations.
[51] Van Geelen T, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, p 307.
[52] ALRC, *Background Paper FSL2 Legislative Framework for Corporations and Financial Services Regulation Complexity and Legislative Design*, October 2021, [101].
[53] ASIC Regulations, reg 12B.
[54] *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028, [948].

(e) Case study – ASIC instruments

ASIC is delegated significant rule-making powers under the laws it administers. While this may be necessary as a matter of practicality, expediency and flexibility in certain circumstances, there should be effective governance, limits and oversights over this to ensure that ASIC does not overstep its mandate by developing policy. That is, there needs to be processes to ensure that ASIC exercises its power '*in a way that is consistent with the responsibilities and objectives of Parliament – not just in a way that is consistent with ASIC's own objectives*'.[55]

However, issues arise when the empowering provisions in the primary statue enable ASIC to develop instruments that can be characterised as 'Henry VIII' provisions. These are provisions that '*amend or modify the operation of primary legislation, or exempt person or entities from the operation of primary legislation*'.[56] Van Geelen points to s 741 of the Corporations Act as an example of such an enabling provision, as ASIC may exempt or declare that a provision in Chapter 6D of the Corporations Act applies as if were '*omitted, modified or varied*'. ASIC has equivalent powers in relation to Chapter 7 of the Corporations Act.[57] Accordingly, ASIC has the power to amend and override the primary legislation itself. While ASIC is required to exercise this power for appropriate purposes consistent with the objects of Chapter 7 and its own objects in the ASIC Act, these powers have the following consequences:

- When exercising these powers, ASIC is in effect repealing or modifying the statute and to that extent overriding the will and therefore primacy of Parliament.
- This in turn means that ASIC is appropriately only willing to exercise these powers in limited and specific circumstances.
- When it does exercise these powers, it creates another tier of regulation, adding complexity to the regulatory framework and making it harder to identify the rules that apply in specific circumstances. This in turn adds cost by making knowledge of the financial services regime a highly specialised field not accessible to ordinary consumers and requiring industry to engage experts to identify the obligations that apply in specific circumstances.

The ALRC has also concluded that complexity is caused by ALRC instruments notionally amending the primary law and regulations.[58] In response, the Government has released *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022* which proposes to move '*longstanding and accepted matters currently contained in ASIC-made legislation*' into the Corporations Act and the Corporations Regulations, including *ASIC Corporations (PDS Requirements for General Insurance Quotes) Instrument 2022/66*.[59] While welcome, this does not resolve the ongoing issue.

It is important to note that we do not oppose the existence and use of ASIC's modification and exemption powers in the context in which they currently exist in the Corporations Act. Given the often prescriptive nature of Chapter 7, it is essential that ASIC has and uses the power to make appropriate modifications and exemptions. Significant difficulties arise when this power has not been granted.[60]

(f) Design solution

Our design principles address the complexity of the existing legislative framework as follows:

- Identifying the principles or norms of conduct that financial service providers should be required to meet and incorporating them into the primary statute (or the Financial Service Act or FSA as we refer to it in our design principles). These would not require modification and therefore there

[55] Van Geelen T, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, p 297.
[56] Senate Standing Committee for the Scrutiny of Delegated Legislation, *Final Report – Inquiry into the exemption of delegated legislation from parliamentary oversight*, March 2021, [7.110].
[57] For example Corporations Act, s 926A, 951B, 992B and 1020F.
[58] ALRC Interim Report A, [2.145].
[59] *Explanatory Memorandum to Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022*, [6.3].
[60] An example of this which is not particularly relevant to the general insurance industry is the personal advice regime in Part 7.7A of the Corporations Act. A different kind of example is the fact that there is no power to directly modify Parts 1.2 or 7.1 of the Corporations Act which define essential concepts of the regime. This has the potential to lead to somewhat tortured modifications in both the Corporations Regulations and ASIC Instruments: for example Corporations Regulations, reg 7.6.02AB – 7.7.02AE and *ASIC Corporations (Qualified Accountant) Instrument 2016/786*.

would not be any need to grant the power to make modifications either in the regulations or by the Conduct Regulator.

- The regulations would be limited to setting the boundaries of the financial services regime by defining the services and products which are subject to regulation and defining consumers and small business which are subject to additional levels of protection.
- The FSA would empower the Conduct Regulator to make Rules to set out the specific requirements that financial service providers are required to comply with in specific circumstances. The Rules would not modify the FSA but may specify what a provider is required to do to comply with a principle of the Act and thereby provide a safe harbour where that is appropriate and after appropriate consultation.

By giving the Conduct Regulator an express power to make Rules, there will be no need for the regulator to make a proliferation of instruments making modifications or exemptions to the Act. Instead, the Conduct Regulator will be able and required to make the Rules in a consolidated and logically organised instrument. This in turn will reduce the need for guidance but will also enable the Conduct Regulator to incorporate guidance in the Rules where appropriate.

The approach we have proposed will make it simple to identify where to find the relevant level of regulation:

- The Act for the requirement to be licensed and the principles which all financial service providers are required to comply with.
- The regulations for the boundary concepts – financial services, financial products and consumers.
- The Rules for the detailed requirements that apply to specific services, products and providers.

4.2 Difficulty of navigating through the legislative framework

The ALRC refers to navigability as '*the ability of a person who uses legislation to find, and find their way around, the law*'.[61]

Legislation for financial services is particularly difficult to navigate as it is spread across a range of legislative sources and, even within a specific piece of legislation, there is often no clear logic for the location of particular legislative requirements. The following case study on the hawking prohibition provides an example of the complexity of navigating statutory requirements.

As the ALRC has observed, improving the navigability of the financial services framework is important in making the law accessible and able to be understood which in turn promotes the rule of law.[62]

(a) Case study – the hawking prohibition

The hawking prohibition first applied to securities and was extended to other financial products in stages over time. The prohibition first applied to insurance products under Federal law with the enactment of s 992A of the Corporations Act in 2002.

Ford, Austin & Ramsay's Principles of Corporations Law provides an explanation of the history of prohibition:

> *Section 736 [the securities hawking prohibition] is successor to a provision first introduced in United Kingdom legislation — namely, s 92 of the Companies Act 1928, passed in adoption of a recommendation of the Greene Committee (Report Cmd 2657 para 93). The provision was aimed at the mischief caused by the activity of canvassers, many of whom were paid by commission, who personally hawked securities from house to house, offering them in many instances to people who had no business experience. Fraud was thought to exist in many cases. Although the law provided a remedy for fraudulent misrepresentation, it was often impracticable to commence proceedings because of the difficulty of proving the facts, and also because in many cases the victims lacked the means to bring proceedings. Accordingly, it was thought best to prevent the*

---

[61] ALRC, *Background Paper FSL3 Legislative Framework for Corporations and Financial Services Regulation Improving the Navigability of Legislation*, October 2021, [6].
[62] As above, [10].

> *hawking of securities and to provide that the court trying the offence could declare contracts void and order the repayment of money paid.*[63]

There was no explanation for the extension of the prohibition to insurance (and other financial products) in the Explanatory Memorandum for the Financial Services Reform Bill.

The section introduced by the Financial Services Reform Act applied a general prohibition on the hawking of most financial products but allowed products to be offered in the course of unsolicited telephone calls if certain requirements were met. However, Commissioner Hayne found during the Financial Services Royal Commission that these provisions did not effectively protect consumers from harm and the exceptions allowed for the '*fraudulent or unscrupulous to prey upon the unsuspecting*'.[64]

Therefore, Commissioner Hayne recommended prohibiting the hawking of insurance products, except to:

- those who are not retail clients; or
- offers made under an eligible employee share scheme.[65]

The Hayne Response Act enacted these recommendations by strengthening the prohibitions on the offer of financial products, including insurance products, as a result of unsolicited contact, extending the prohibition to any real-time interaction in the nature of a discussion or conversation (such as an online chat service) and defining 'unsolicited contact' in the Corporations Act. Removing the exemption for telephone sales of life insurance products reflected the issues identified by the Financial Services Royal Commission in relation to cold calling, the mis-selling of complex products and the use of unfair sales tactics in relation to life insurance products. However, the reforms enacted go beyond the core issues identified by the Royal Commission hearings and apply to general insurance products even though no similar issues were identified in relation to general insurance.

The anti-hawking regime has therefore evolved from its original policy roots of protecting consumers from the door-to-door selling of securities to a blanket prohibition on the offer of financial products in the course of '*unsolicited contact*' with a retail client. Ford, Austin & Ramsay comment that the evolution of the regime from its origins to its changes in the 1990s, which include the extension of the prohibition to cover other forms of communication in addition to personal visits, was '*not founded upon any coherent principle*',[66] and in our view this comment equally applies to the changes that have been made since that time.

The anti-hawking regime therefore demonstrates one of the factors contributing to the complexity of financial services law – imposing an inflexible and prescriptive regime to address a principle which is not in fact articulated in the legislation.

Principles-based regulation would start with articulation of the principle. Presumably in the case of the anti-hawking regime, the principle is that providers should not engage in unfair sales practices or practices designed or likely to have the effect of pressuring the consumer to purchase a product or service which they may not in fact need or want.[67] While door-to-door sales of a financial product or service may never be appropriate, the Conduct Regulator should be tasked with identifying circumstances in which specific prohibitions or requirements should be imposed to give effect to the principle because for example, there may be uncertainty regarding how to apply the principle in certain circumstances or there may be evidence that particular providers are engaging in certain practices which the regulator believes are or could be unfair and which therefore need to be either prohibited or subject to prescriptive regulation. As proposed in our design principles, this can be done by giving the Conduct Regulator the power to make rules after appropriate consultation has taken place.

Recommendation 1	The principle sought to be implemented by prescriptive requirements or prohibitions should be clearly stated at the outset in the relevant legislation.

[63] Austin RP and Ramsay IM, *Ford, Austin & Ramsay's Principles of Corporations Law* (online last reviewed January 2019), [22.190].
[64] Final FSRC Report, vol 1, p 13.
[65] As above, p 279.
[66] Austin RP and Ramsay IM, *Ford, Austin & Ramsay's Principles of Corporations Law* (online last reviewed January 2019), [22.190].
[67] This is consistent with our proposed general insurance principle 3 which would require providers to act fairly in dealings with consumers.

Implementation of Recommendation 1 will ensure that the prescriptive requirements can be tested against and interpreted having regard to the objective they purport to achieve. Otherwise, there is a much greater risk that compliance becomes a box-ticking exercise and it is more difficult for participants to identify and '*comply with the fundamental norms of behaviour that should guide their conduct*'.[68]

This recommendation is also consistent with proposals made by the ALRC that legislative instruments and rules should be accompanied by statements explaining how they are consistent with or further the relevant objects of Chapter 7 of the Corporations Act.[69]

(b) Complex drafting

As a complex prescriptive prohibition, the anti-hawking regime is an example of the issue identified by the ALRC that excessive use of conditional statements or their use in particularly complex ways leads to unnecessary complexity.[70] Under the anti-hawing regime, the defined term '*unsolicited contact*' comprises multiple conditional statements (i.e. contact is unsolicited contact 'if' and 'either').

> 'Unsolicited contact' is defined in s 992A(4) and (5) of the Corporations Act and contact is unsolicited *if* the contact is in one or more of the prescribed forms (i.e. a telephone call, face-to-face meeting or any other real-time interaction in the nature of a discussion or conversation),[71] and *either*:
>
> - the consumer did not consent to the contact; or
> - *if* the consumer consented to the contact – the requirements of s 992A(5) are not met.[72]
>
> Further, s 992A(7) provides that for the avoidance of doubt, certain advertisements or publications of offers are not unsolicited contact *if* certain requirements are met.

The ALRC suggests a number of ways to address complexity in drafting:

- an independent review body could be established to serve a legislative stewardship role, similar to the role performed by the Corporations and Markets Advisory Committee (CAMAC) from 1989 to 2014;
- the Federal Office of the Parliamentary Counsel could adopt more of a ‘stewardship’ role to focus on reviewing and managing legislation, noting this would require improved resourcing and potentially changes to its mandate and powers;
- a legislative blueprint could be adopted for complex legislation such as the financial services regime which explains the manner in which a piece of legislation should be amended in future years to maintain the law’s fundamental policy aims and its design philosophy.[73]

Another solution may be to task a relevant Parliamentary committee with responsibility for ensuring the level of complexity in drafting is appropriate to the task and that alternative approaches have been considered and have been determined to be not suitable for appropriate reasons. Appropriate committees might be the Senate Standing Committees for the Scrutiny of Bills and Delegated Legislation. The role of these committees currently differs. The role of the Senate Standing Committee for the Scrutiny of Delegated Legislation includes considering whether the drafting of delegated legislation is defective or unclear.[74] The role of the Senate Standing Committee for the Scrutiny of Bills is much more limited and does not extend to consideration of issues of drafting in any general sense.[75]

While there are limits on the ability of a Senate Committee to address issues of complex drafting, we have suggested an approach which may assist in Recommendation 2 below.

---

[68] Australian Government, *Restoring Trust in Australia’s Financial System: Government Response to the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry,* February 2019, p 38.
[69] ALRC Interim Report B, proposals B4 and B6.
[70] ALRC, *Background Paper FSL2 Legislative Framework for Corporations and Financial Services Regulation Complexity and Legislative Design*, October 2021, [83].
[71] Corporations Act, s 992A(4)(a).
[72] Corporations Act, s 992A(4)(b).
[73] ALRC, *Background Paper FSL2 Legislative Framework for Corporations and Financial Services Regulation Complexity and Legislative Design*, October 2021, [154] – [156].
[74] *Senate Standing Orders,* order 23(3)(e).
[75] *Senate Standing Orders,* order 24(1)(a).

(c) Explanatory material

Failing to clearly identify the purpose of particular requirements also means that readers must refer to other legislative sources to understand the intent underlying a regime and how to apply it in practice. This means that the legislative regime does not stand alone.

For example, for the anti-hawking regime to apply, there must be an *'offer, request or invitation*' relating to a financial product which must be made *'in the course of, or because of, an unsolicited contact*' with a *'retail client*'.[76] The Explanatory Memorandum and *ASIC Regulatory Guide 38: The hawking prohibition* need to be referred to when interpreting this as '*unsolicited contact*' is the only defined term in this provision.[77]

The Explanatory Memorandum provides an explanation of when an offer, request or invitation is made *'because of*' unsolicited contact by describing how there must be a *'causal nexus between the unsolicited contact and the offer, request or invitation*'.[78] In addition, the Explanatory Memorandum provides detail about the scope and form of the consumer's consent so that readers can understand when this prohibition applies. The need to refer to the Explanatory Memorandum is demonstrated by *ASIC Regulatory Guide 38: The hawking prohibition* which itself regularly references the Explanatory Memorandum to provide guidance on real-time interaction; offers, requests and invitations; and the meaning of *'because of*' in the hawking prohibition.

The reliance on explanatory memoranda to clarify complex legislative requirements is highly problematic. Explanatory memoranda do not have the force of law. The circumstances in which the courts will have regard to extrinsic material is complex and requires consideration of not only s 15AB of *Acts Interpretation Act 1901* (Cth) but also significant case law.[79] In any case, it makes it very difficult for a layperson to understand the operation of law when it is necessary to resort to extrinsic material to understand it. Explanatory memoranda are intended to function as an interpretive aid to the primary legislation and yet they are increasingly becoming a de facto extension of the statute without receiving the same scrutiny as the statute itself. Explanatory memoranda should operate only as a *'companion document to a bill, to assist members of Parliament, officials and the public to understand the objectives and detailed operation of the clauses of the bill'*[80] and refrain from declarations which are not backed by justification or which do not correlate with the primary statute.

The need to refer to explanatory material not only means that the legislative provisions do not stand alone but also ensures that legislation cannot be understood by consumers or industry participants without obtaining expert advice. This in turn increases training and compliance costs and makes it more difficult for consumers to hold providers to account.

Over the years, a practice has developed of responding to submissions on proposed legislation by incorporating a statement in the explanatory material to explain the intended effect of the legislation. While this is the point of explanatory material, it becomes a problem when the explanation takes the place of amending the substantive provision. This increases uncertainty where the explanation is necessary to apply the provision correctly.

There should be a clear delineation between what is included in the legislation itself and when it is appropriate to supplement that in explanatory material. This is not currently done in the Legislation Act which requires an explanatory statement to be made for regulations and other statutory instruments.[81] The Legislation Act merely states certain content requirements for an explanatory statement, including that it must explain the purpose and operation of the instrument. The Legislation Act does not impose any requirements relating to the delineation between what should be included in the instrument and as opposed to the explanatory statement.[82]

There does not appear to be any statutory equivalent to the Legislation Act for explanatory memoranda to bills of Parliament. The only guide and requirement for explanatory memoranda is the Legislative Handbook which is issued by the Department of Prime Minister and Cabinet and does not have the force of law. The Legislative Handbook states the purpose of explanatory memoranda, when they are required

[76] Corporations Act, s 992A(1).
[77] Corporations Act, s 992A(4).
[78] Explanatory Memorandum to Hayne Response Bill, [5.53].
[79] Pearce D, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019), p 87 - 89.
[80] Department of the Prime Minister and Cabinet, *Legislation Handbook*, February 2017, [7.1].
[81] *Legislation Act 2003* (Cth), s 15G(4).
[82] *Legislation Act 2003* (Cth), s 15J.

and their form and content.[83] However, there is nothing in the Handbook which expressly deals with the line between what should be contained in the relevant bill and what should be in the explanatory memorandum. The closest the Handbook gets to this is to state that:

> ***The notes must avoid repeating the words of the bill or amendments or restating them in alternative language.***[84] (emphasis from source)

The Handbook goes on to state:

> *Ideally, notes on clauses would (with equivalent requirements for notes on amendments):*
>
> *(a)* ***state the origin and intention of the clause*** *by setting out what action is provided for in the clause and how the clause came about (including reasons why a clause is drafted in a particular way and when the clause commences);*
>
> *(b)* ***provide examples*** *of the intended effect of the clause, or the problem it is intended to overcome;*
>
> *(c)* ***explain*** *how the clause fits within the existing legislative framework (if appropriate) and relate it to other provisions in the bill, particularly where related clauses do not appear consecutively in a bill;*
>
> *(d)* ***consider the audience*** *and tailor the content of the notes accordingly; for example, common concerns about business regulation or particular interest groups that could be affected by the legislation;*
>
> *(e)* ***explain the underlying policy*** *to assist the courts to interpret potentially ambiguous provisions by explaining the policy intention behind a clause or an amendment to a clause. This is especially important as an explanatory memorandum is extrinsic material to which a court can refer under section 15AB of the Acts Interpretation Act 1901 when interpreting legislation;*
>
> *(f)* ***address significant issues*** *as they arise during consultation on the legislation; any issues that are raised by OPC during the drafting process can be explained in the notes; and*
>
> *(g)* ***stand alone*** *as much as practicable, so that the clause note can be read separately and give the reader a complete understanding of the reason(s) for the legislative change without having to read the whole explanatory memorandum. In some cases, such as where amendments involve several consequential changes, there may be merit in grouping some clause notes together.*[85]

However, none of this guidance directly tackles the question of what should be included in explanation and what should be included in the Bill itself.

The Senate Standing Committees for the Scrutiny of Bills and Delegated Legislation do not have an express mandate to address this question either. The Senate Standing Committee for the Scrutiny of Delegated Legislation is required to consider whether explanatory material provides sufficient information to gain a clear understanding of the legislation.[86] That Committee also has the ability to consider *'any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate'*.[87] The mandate for the Senate Standing Committee for the Scrutiny of Bills does not extend to these matters.[88] There is therefore no express requirement to consider whether aspects of the explanatory material would be more appropriately addressed in the legislation itself.

---

[83] Department of the Prime Minister and Cabinet, *Legislation Handbook,* February 2017, [7.1] – [7.5].
[84] As above, [7.21].
[85] As above, [7.22].
[86] *Senate Standing Orders,* order 23(3)(g).
[87] *Senate Standing Orders,* order 23(3)(m).
[88] *Senate Standing Orders,* order 24.

Recommendation 2	The mandates for the Senate Standing Committees for the Scrutiny of Bills and Delegated Legislation should be expanded as follows: 2.1 The Committees should require the Government to report on the complexity of legislation and to confirm that alternatives to complex drafting have been considered and determined not to be appropriate. 2.2 The Committees should be required to consider whether aspects of the explanatory material for legislation would be more appropriately addressed in the legislation itself. 2.3 The Committees should also be required to certify that it is satisfied that legislation meets their standards for complexity and clarity and that the explanatory material does not contain elements that would be more appropriately addressed in the legislation itself. Failure to do would have the following consequences: • for a bill, it would not be able to proceed a second or third reading in the Senate; • for delegated legislation, the Committee would move a motion of disallowance.

This recommendation complements the ALRC's proposal to support best practice legislative design by proposing that the Office of Parliamentary Counsel should establish and support a community of practice for those involved in preparing legislative drafting instructions and drafting legislative and notifiable instruments.[89] This may promote higher standards in legislative drafting, reducing the level of scrutiny that the Senate Standing Committees would need to undertake.

Design solution

Implementation of our design principles can also assist to address the difficultly posed by explanatory material as follows:

- *Design principle 1:* Implementing a principles-based approach to the source legislation will reduce the need for explanation of particular requirements. Of course, there continues to be a need for explanatory material to accompany legislation. However, by clearly articulating a general principle in the legislation, the risk that the explanation becomes de facto legislation will be less.
- *Design principle 4:* Giving the Conduct Regulator the power to make detailed rules where required gives the Regulator the opportunity to clearly set out the various aspects of the requirements in the Rules as required. It will also give the Conduct Regulator the ability to integrate or provide supplementary guidance with the Rules. In this approach, there is no need for explanations to take on de facto regulatory status. The Conduct Regulator can simply adjust the Rules as required to clarify how they are to apply.
- *Design principle 5:* Requiring appropriate consultation to occur before any Rule is made will also assist to ensure that Rules are prepared in a form that is understood and does not require any explanation or any explanation can be included in the Rule or any accompanying guidance.
- *Design principle 8:* It is also important that the Rules made by the Conduct Regulator are subject to oversight by an independent authority which not only has regard to the effectiveness of the rule-making and enforcement activities of the Conduct Regulator but also ensuring the appropriateness of explanatory material.

(d) Multiple measures regulating similar activities

The anti-hawking regime is also an example of an area of regulation which interacts with other regulatory regimes in complex ways, hindering understanding, application, compliance and enforcement of the law.

[89] ALRC Interim Report B, proposal B14.

As discussed above, the anti-hawking regime seeks to prevent unfair sales practices by preventing sales arising from certain types of unsolicited contact. In doing so, it overlaps with a number of other regimes regulating insurance sales, including:

- Principles-based:
  - Prohibition of misleading or deceptive conduct;
  - Prohibition of unconscionable conduct;
- Prescriptive:
  - Deferred sales model (**DSM**);
  - Spam Act – prohibits unsolicited commercial electronic messages unless they only contain factual information and certain other information and regulates the form in which consent to electronic messages can be given;[90]
  - Do Not Call Register Act – prohibits unsolicited commercial voice calls and faxes to numbers on the Do Not Call Register and regulates the form in which consent to calls and faxes can be given;[91]
  - Privacy Act – prohibits use of personal information for direct marketing unless the consumer consented to the use, it is not reasonably practicable to obtain consent or the consumer would reasonably expect such use, and the consumer has not opted out from direct marketing communications.[92]

The principles-based obligations and the DSM regime are regulated by ASIC, while the Spam Act and the Do Not Call Register Act are regulated by the Australian Communications and Media Authority (ACMA) and the Privacy Act is regulated by the Office of the Australian Information Commissioner (OAIC).

Marketing of insurance is therefore subject to a maze of different provisions and regulators with differing and potentially inconsistent requirements and expectations. We discuss the implications of overlapping regulatory responsibilities in section 5.6 and the considerations relating to the overlapping regulation of marketing also inform Recommendation 28.

Deferred sales model (DSM)

The interaction of the anti-hawking regime with the DSM regime for add-on insurance products gives rise to further complexity and fragmentation (section 4.1(d) of this Report also outlines the complexity of the DSM legislative framework). Both regimes prohibit the immediate offer or sale of a financial product in order to prevent unscrupulous sales practices such as pressure selling. However, the anti-hawking prohibition is contained in the Corporations Act while the DSM regime for add-on insurance products is contained in the ASIC Act. This is a demonstration of the types of fragmentation in the financial services regulatory framework which requires providers, consumers and their advisers to refer to different pieces of legislation, explanatory memoranda, ASIC instruments and/or ASIC guidance to understand and apply regimes that address similar conduct.

There is additional complexity as the anti-hawking and DSM regimes treat the same products differently with the DSM regime exempting certain classes of add-on insurance, including comprehensive, compulsory third party and home building and contents insurance, while the anti-hawking regime does not.[93] The Explanatory Statement to the DSM regulations states that these insurance products are exempt as they '*provide historical value for money, are well understood by consumers, and there is a risk of underinsurance if certain product exemptions are not made*'.[94] However, the anti-hawking regime does not provide a similar exemption despite providing an exclusion for basic banking products based on the same rationale as is given for excluding some add-on insurance products from the DSM regime – they are '*well-understood by consumers*'.[95]

The regimes pose a significant problem for general insurance products which are typically sold at a discount by most major insurers when offered in connection with the offer of other general insurance products (via a multi-policy discount). Consumers may be deprived on this benefit due to the stringent regulatory measures.

---

[90] Spam Act, s 6 and 16, sch 1, item 1 and sch 2.
[91] Do Not Call Register Act, s 11 and 12B and sch 2.
[92] Privacy Act, NPP 7.1 – 7.3.
[93] ASIC Regulations, reg 12B.
[94] *Explanatory Statement to Australian Securities and Investments Commission Amendment (Deferred Sales Model) Regulations 2021* (Cth).
[95] The Treasury, *Media release: Outcome of consultation on deferred sales model for add on insurance products*, 8 July 2021.

More importantly, they increase the risk of underinsurance for consumers or non-insurance as insurers are not able to offer insurance products which provide valuable protection to consumers unless the consumer initiates contact or provides consent to the contact by the insurer. This can cause grave problems for consumers. As an example, an insurer cannot attempt to contact a customer more than 30 days after they have failed to renew a policy to offer to renew or reinstate cover or confirm that they have obtained alternative cover.[96] If the insurer does not manage to contact the customer within the first 30 days, for example if the customer does not respond to correspondence or take a call, the insurer is effectively precluded from trying to contact the customer after that time except by post or email that according to ASIC does not follow unsolicited contact.[97] However, the consumer may not be aware that their policy has lapsed, leaving them uninsured against their intentions. The interplay between the regimes therefore gives rise to an increased risk of underinsurance and non-insurance and demonstrates that the unique characteristics of insurance have not been given proper consideration.

The different regulatory approaches for insurance products make it more difficult for participants to comply with the law and ensure that all legislative requirements are properly understood so that the consumer protection objectives are met. As Godwin, Brand, and Langford have said, it '*appears relatively uncontroversial: the greater the complexity of legislation and the rules that it embodies, the less clear it is likely to become and the greater challenges for achieving compliance*'.[98]

Recommendations

The introduction of the DSM regime and ASIC's product intervention powers brings into question the need for general insurance to be subject to the sector-wide anti-hawking regime. While there is no doubt consumers can be taken advantage of through the sale of inappropriate general insurance products, it is generally recognised that mainstream consumer general insurance products are a public good[99] and that adequate cover is '*integral to protecting consumers' most valuable assets and to maintaining and protecting the living standards of all Australians and the economy overall*'.[100]

Given this, it is important that insurers and intermediaries are able to raise with consumers their need for insurance where that is appropriate (see the section 5.5 of this Report in relation to the regulation of personal advice for insurance). There should not by any impediments to the ability to educate consumers on these matters to reduce the risk that consumers do not have adequate insurance.[101]

Recommendation 3	Consistent with Recommendation 9, a post-implementation review of the Royal Commission reforms should consider whether the anti-hawking regime is having the intended effect in relation to general insurance or whether it would be more appropriate to apply the DSM regime where a general insurance product is being sold in an inappropriate way or for ASIC to make a product intervention order.

The DSM regime is an onerous regulatory regime which seriously interferes with a free market. It should therefore be confined to specific and identified products. An "in unless it's out" approach is not suitable here. There should be a clear power for the regulator to make products subject to the DSM regime if a problem is identified, but it should only apply to products which the regulator identifies as creating a serious risk of consumer detriment and disadvantage.

---

[96] An offer for the issue of a financial product that is substantially similar to a financial product already held by a consumer, or held during the preceding 30 days of the offer, is exempt from the anti-hawking regime if the offer is in the nature of a renewal under Corporations Regulations, reg 7.8.21A(j).

[97] ASIC has stated that '*requests or invitations made using non-real time channels (such as email) following an unsolicited contact may still constitute a breach of the hawking prohibition. This is because offers, requests or invitations cannot be made 'because of' an unsolicited contact that is in real time*': *ASIC Regulatory Guide 38: The hawking prohibition*, September 2021, [RG 38.45].

[98] Godwin A, Brand V and Teele Langford R, 'Legislative Design – Clarifying the Legislative Porridge' (2021) 38 *Corporate and Securities Law Journal* 280, p 281.

[99] Smee A, 'Determining general insurance profit margins' (Seminar Paper, Institute of Actuaries of Australia), 11 November 2003, p 10.

[100] Senate Economics References Committee, *Australia's general insurance industry: sapping consumers of the will to compare,* August 2017, [1.9].

[101] IAG, *Submission to ACCC Northern Australia Insurance Inquiry,* 11 April 2019, p 2.

Recommendation 4	Limit the DSM regime to problematic products specified by the Conduct Regulator after appropriate consultation. This would include the products which ASIC and the Financial Services Royal Commission have identified as junk insurance or having serious issues, such as tyre and rim insurance, gap insurance, loan termination insurance and consumer credit insurance.

Design solution

The rule-making power we have proposed in our design principles would also address the concerns we have identified with the anti-hawking and DSM regimes. The statute would set out a general fairness principle that applies to all financial service providers, including insurers and intermediaries (see Recommendation 10 below). This should preclude inappropriate sales conduct in relation to general insurance. However, if the Conduct Regulator did identify problematic sales behaviour, it would have the power to make Rules that apply to specific kinds of general insurance products or more generally. Those Rules could take the form of applying the DSM regime or, if necessary, a hawking prohibition, to particular insurance products after appropriate consultation. Also, where these prescriptive requirements are imposed, they should be identifiably intended to achieve a stated objective.

4.3 Consultation and implementation

(a) Adequacy of consultation

Section 17 of the Legislation Act requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether the particular consultation was appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the proposed instrument and experts within the field relevant to the instrument were actively engaged and had adequate opportunity to comment on its proposed content.[102]

Developing policy that is consistent with a government's long-term strategic priorities based on participation of and insights from industry, consumer groups and other stakeholders is essential to the development of effective regulatory measures. Consultation is an avenue of achieving efficient and effective regulation by examining the most appropriate form of regulation for all involved. This is done by assessing the costs, benefits and concerns of affected parties and proves most effective if consultation occurs early on in the policy development process.[103] Any issues of concern and potential deficiencies can be identified in the consultation phase, and can then be addressed in the development and design of regulation. Consultation further incentivises cooperation and compliance with proposed regulation by ensuring those that are required to comply have a say.

Currently, there are no requirements for the period and process for consultation. The Office of Best Practice Regulation has said that:

> *consultation with key stakeholders should be continuous and should start as early as possible… Depending on the significance of the proposal, between 30 to 60 days is usually appropriate for effective consultation.*[104]

We understand that the UK standard for consultation periods is also around two months.[105]

General practice is for the relevant government agency to issue a consultation plan paper, outlining the objectives and scope of the proposed regulation, the timing for both consultation and implementation and identify how and when feedback should be provided. The Office of Best Practice Regulation has indicated that regulators should have a consultation plan which identifies the nature of the consultation.

The goals of the Legislation Act are laudable and include:

[102] Legislation Act, s 17(2)(a)-(b).
[103] Australian Government, Department of Prime Minister and Cabinet, Office of Best Practice Regulation, *Best Practice Consultation*, March 2020, p 5.
[104] As above.
[105] Insurance Council of Australia, *Financial Services Legislation 'Interim Report A' submission*, 11 March 2022, p 2.

(b) *encouraging rule-makers to undertake appropriate consultation before making legislative instruments; and*

(c) *encouraging high standards in the drafting of legislative instruments and notifiable instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users; and …*

(e) *establishing improved mechanisms for Parliamentary scrutiny of legislative instruments;*[106]

Rule-makers are required to:

- undertake any consultation that is considered by the rule-maker to be appropriate and reasonably practicable: s 17;
- prepare and register an explanatory statement which among other things explains the purpose and operation of the instrument, describe any consultation undertaken or why no consultation was undertaken: s 15G and 15J(2).

However, there are no sanctions for failing to comply with these obligations. In particular, s 19 provides that the fact that consultation does not occur does not affect the validity or enforceability of an instrument. This is consistent with the fact that consultation is only required when considered to be appropriate and practicable.

While s 19 may be necessary for certainty, there needs to be a stronger focus on ensuring appropriate consultation does occur. As Professor Bottomley has said, the provisions of the Legislation Act give too much discretion to the law makers and do not provide sufficient guidance around the consultation process, including its scope and audience, timing and structure.[107]

The lack of sanctions and the effective discretion as to whether consultation occurs means an important procedural safeguard in the development of legislation can be missing when it is most required. As noted by Van Geelen, various bodies and individuals have referred to the importance of consultation:

- the Administration Review Council notes consultation is consistent with the principles of procedural fairness as it enables people with a particular interest to put forward their views;
- the ALRC has suggested there is considerable value in consultation if the regulated community's perceptions of fairness are important for compliance; and
- Professor Bottomley argues that consultation can serve as a form of ex ante accountability in forcing law makers to explain, justify, amend and/or abandon a law based on feedback.[108]

Consultation is therefore a critical procedural safeguard in the development of legislation.

In order to consult effectively, the Senate Standing Committee on Regulations and Ordinance has identified three key elements that should be incorporated into all consultation. These include:

- an adequate method and purpose of consultation: what is the purpose and parameters of the consultation?
- adequate bodies/groups/individuals consulted: who and/or which bodies or groups are to be targeted for consultation?
- adequate identification of issues raised in consultations: processes should be in place to identify the nature of any issues raised in consultations, as well as the outcome of the consultation process.[109]

Further to this, the Office of Best Practice Regulation notes that consultation should be focussed on a particular target group and incorporate the following elements:

- Continuous
  - Consultation should occur off the back of pre-existing relationships and dialogue with industry and stakeholders.

---

[106] Legislation Act, s 3.
[107] Bottomley S, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker' (2011) 39(1) *Federal Law Review* 1, p 26.
[108] Van Geelen T, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, p 312.
[109] Senate Standing Committee On Regulations And Ordinances, *Guideline on consultation*, 2020, p 2.

- Broad-based
    - Consultation should capture the diversity of stakeholders affected by the proposed changes, including but not limited to, industry, State, territory and local governments (if relevant) and relevant government agencies, particularly regulators to achieve greater insight and avoid overlapping regulatory functions.
- Accessible
    - Channels for consultation should be relevant to the groups being consulted. This requires rule-makers to consider strategies to assist stakeholders who might be significantly impacted by policy but do not have the resources and/or the ability to prepare a submission or response and responses to stakeholder queries should be prompt.
- Not burdensome
    - Consultation should not include unreasonable demands and should factor in adequate time for submissions.
- Transparent
    - Agencies should explain the objectives of the consultation process and the context in which consultation is taking place, and when and how the final decision will be made.
- Consistent and flexible
    - Consultation should incorporate consistent processes from previous consultations.
- Subject to evaluation and review
    - Agencies should evaluate consultation processes to ensure ongoing relevance and effectiveness.
- Not rushed
    - The targets of consultation should be given as much time as is reasonable to absorb the information provided and gain a proper understanding of the issues so they can offer a considered view. Depending on the complexity of the proposal, this could be as much as 60 days but should not be less than 30.
- A means rather than an end
    - Consultation should be approached as a way to improve decisions, not as a substitute for making decisions.[110]

Risks of inadequate consultation include:

- failing to identify all of the issues created by regulation as a result of not all stakeholders being heard;
- undue influence by groups that are better-resourced; and
- imposing an unreasonable or unrealistic regulatory burden on the regulated population.[111]

We note the Office of Best Practice Regulation's current guidance that the consultation period should be 30 to 60 days in length. The Insurance Council of Australia notes that the standard consultation period in the UK is around two months.[112] We are concerned that these periods are too short in length for standard consultation periods. There needs to be recognition of the capacity of regulated institutions and consumer groups to meet consultation timelines having regard to other calls on their time and resources. Shorter consultation periods also pose great difficulty where there are overlapping consultation periods. We believe a longer standard consultation period should be implemented and there should be appropriate consideration and coordination between regulators of consultations to ensure overlap is minimised (in Recommendation 27 below, we recommend improving coordination between financial service regulators and making but the effectiveness of those arrangements subject to review and oversight by the FRAA).

(b) Examples of inadequate consultation

There has been an increasing emphasis in recent times on pushing out regulation quickly to address perceived urgent issues of regulatory or market failure. This has resulted in significantly reduced and inadequate consultation on important measures.

---

[110] Office of Best Practice Regulation, *Australian Government Guide To Regulatory Impact Analysis*, 2020, p 45 - 46.
[111] Van Geelen T, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, p 312.
[112] Insurance Council of Australia, *Financial Services Legislation 'Interim Report A' submission*, 11 March 2022, p 2.

Case study – Reinsurance pool for cyclones

The legislation to establish a reinsurance pool for cyclones and related flood damage is an example of a highly truncated consultation process. On 4 May 2021, the Australian Government announced its intention to establish a reinsurance pool for cyclones and related flood damage in northern Australia following reports of significantly higher insurance premiums in this area. This was a significant piece of work with the Government itself acknowledging that the design of the reinsurance pool is *'a highly technical process, subject to trade-offs, and consequences that will require detailed consideration*'.[113]

The Consultation Paper asked for views on a number of design considerations, including the coverage of the pool, product design and insurer participation, governance and monitoring, links to risk reduction and the Australian Reinsurance Pool Corporation's terrorism reinsurance functions.[114]

Despite the breadth of the consultation and the detailed analysis that was required, the consultation period only lasted for 29 days,[115] which was a very tight timeframe for stakeholders to consider the questions and formulate views.

Further, the consultation period for the subsequent release of the exposure draft legislation[116] for the reinsurance pool was only 15 days.[117] This was an extraordinarily short time period for stakeholders to consider this draft, especially given core issues had yet to be considered.

On 7 February 2022, the Government announced that it had finalised the design of the reinsurance pool, stating it is expected to reduce insurance premiums by up to $2.9 billion for eligible household, strata and small business insurance policies over 10 years. The Government also stated that homeowners in northern Australia are expected to benefit from up to a 46% premiums discount, strata properties up to a 58% discount and small and medium sized businesses up to a 34% discount.[118]

However, the Government did not release any modelling or specific information about how such discounts were calculated and insurers were waiting for detail from the Australian Reinsurance Pool Corporation on pricing arrangements in order to calculate the impact on reinsurance costs and premiums.[119] The legislation was nevertheless enacted by Parliament.[120] The effect is that a significant proposal has been implemented without any reasonable degree of certainty that it will have its intended effect. In fact, modelling released by the Government in June 2022[121] indicates that up to 24 per cent of residential home policyholders in Queensland with minimal cyclone risk will see premium increases which in some cases may be greater than 20 per cent,[122] contradicting the earlier claim that homeowners would experience significant reductions in premiums.

Case study – DSM regime

Similar concerns about inadequate consultation can be levelled at some of the Financial Services Royal Commission reforms. For example, the Government's response to recommendation 4.3 of Financial Services Royal Commission made significant changes in establishing an industry-wide DSM regime (see 4.2(d) of this Report for more detail). However, inquiries leading to this proposal only investigated motor dealer and consumer credit add-on insurance in detail.[123] When considering adequacy of consultation, it

---

[113] Treasury, *Consultation paper: Reinsurance pool for cyclones and related flood damage*, May 2021, p 7.
[114] As above, p 7.
[115] The consultation period was from 21 May 2021 to 18 June 2021.
[116] Exposure Draft of *Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Cyclone reinsurance* released on 3 December 2021.
[117] The consultation period was from 3 December 2021 to 17 December 2021.
[118] Prime Minister, Treasurer, Minister for Agriculture and Northern Australia, Minister for Emergency Management and National Recovery and Resilience, Minister for Regionalisation, Minister for Regionalisation, Regional Communications and Regional Education, Assistant Treasurer, Minister for Housing, Minister for Homelessness, Social and Community Housing, *Joint media release: Morrison Government to deliver reduced premiums through reinsurance pool*, 7 February 2022: https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/morrison-government-deliver-reduced-premiums-through (accessed on 7 February 2022).
[119] Insurance Council of Australia, *Media release: Insurance Council welcome final Reinsurance Pool design*, 7 February 2022.
[120] *Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Bill 2022* received Royal Assent on 31 March 2022.
[121] The Hon Stephen Jones MP, Assistant Treasurer and Minister for Financial Services, *Media release: Modelling released for Reinsurance Pool*, 30 June 2022.
[122] Insurance Council of Australia, *Media release: Insurers welcome release of Reinsurance Pool modelling data*, 30 June 2022.
[123] ASIC investigated add-on insurance sold in car dealerships and consumer credit insurance (for example, *ASIC Report 470: Buying add-on insurance in car yards: Why it can be hard to say no,* February 2016; *ASIC Report 471: The sale of life insurance through car dealers: Taking consumers for a ride*, February 2016; *ASIC Report 492: A market that is failing consumers: The sale of add-on insurance through car dealers*, September 2016; *ASIC Report 622: Consumer credit insurance: Poor value products and harmful sales practices*, July 2019).

is also worth noting that no other comparable jurisdictions with Australia have an industry-wide DSM regime.[124]

Consultation on the DSM regime commenced on 9 September 2019 with the issue of a Proposal Paper for which the consultation period was only 22 days.[125] This required stakeholders to make submissions on the Government's proposals within a very short time period as well as submit whether they should be exempt from the regime in the primary legislation with the option of later seeking individual relief from ASIC. However, ASIC relief could only be applied for once the legislation was in force and the transition period proposed was not clear at that time.[126] Consultation was also very short for the DSM regulations as discussed in section 4.3(d) of this Report.

Making extensive proposals, but only consulting on them in a short period of time, creates significant risks. It raises questions about whether there is sufficient evidence to support the reform and its impact on industry participants and consumers. The DSM regime has been applied on all 'add-on' insurance products, whether or not the product provides good value for consumers. Although there is a process for seeking an exemption, it reverses the onus of proof by requiring the insurer to demonstrate that its product does provide good value. Given the importance of insurance in providing protection to consumers, this has the potential to reduce the availability of products when that protection is required.

Case study – Cash Settlement Fact Sheet (CSFS)

We discuss issues relating to the CSFS in section 5.4(a) of this Report.

(c) Consultation recommendations

Recommendation 5	Minimum consultation periods for legislation (including regulations, rules and statutory instruments) affecting the financial services sector should be legislated. 90 days would be appropriate for standard consultations. Failure to consult should give rise to the ability to seek a court order invalidating the instrument. The instrument should remain in force until the order is made. However, it should be possible to seek an interlocutory order to suspend the operation of the instrument until the matter is decided.
Recommendation 6	Where a measure is urgent, the relevant regulator should be able to seek a shorter consultation period or an exemption from consultation from an appropriate oversight body, such as the FRAA, having regard to the criteria for urgency set out in the relevant legislation. The FRAA should also review periodically the consultation undertaken by financial services regulators to confirm appropriate consultation has taken place and that it has been appropriately coordinated. If the FRAA is not satisfied that the regulator has consulted appropriately, it should be able to suspend the reform until appropriate consultation has taken place.

ALRC proposal

The ALRC also identifies consultation as an important safeguard in the law-making process and refers to submissions that express concerns that the present consultation process does not always result in meaningful consultation. In particular, the ALRC refers to the view of the Senate Standing Committee for the Scrutiny of Bills that '*where important elements of a regulatory regime are to appear in delegated legislation, enhanced consultation requirements should apply.*'[127]

Accordingly, the ALRC proposes to amend the Corporations Act to establish an independent Rules Advisory Committee comprising representatives from industry groups, consumer groups, and legal experts such as practitioners and academics.[128] The Minister and ASIC would be required to consult the

---

[124] The Treasury, *Proposal Paper: Reforms to the sale of add-on insurance products,* 9 September 2019, p 2.
[125] The consultation period was from 9 September 2019 to 30 September 2019.
[126] NIBA, *Reforms to the sale of add-on insurance products: Submission by NIBA*, 30 September 2019, [4(h)].
[127] ALRC Interim Report B, [2.86].
[128] As above, proposal B9 and [2.87].

Rules Advisory Committee and the public before making or amending any provisions of the ALRC's proposed Scoping Order or rules.

The ALRC therefore recognises the importance of consultation given the potential significance of scoping orders and rules. This is consistent with our recommendation to require consultation to take place. The ALRC does not however address minimum consultation periods.

One key difference from our recommendations is that the ALRC proposes that a lack of consultation should not affect the validity of delegated legislation. The ALRC states that this reflects the general position under the Legislation Act and recognises that consultation *'should act as a normative constraint on delegated law-making power as well as provide transparency and enhance scrutiny on the law-making process.'*[129]

While the ALRC goes on to specify that consultation can be dispensed with in emergency circumstances,[130] no further explanation is provided as to why consultation should not be mandatory where there is no emergency. In our view, Governments and regulatory authorities should be as accountable for following important requirements of the law as those regulated by the law. This is an important element of the rule of law. It is therefore our view that the Legislation Act should be amended to invalidate instruments that have been made without complying with mandatory consultation requirements where applicable.

Design solution

Our design principles also reflect the importance of consultation in the rule-making process by:

- requiring appropriate consultation to occur before a Rule is made – design principle 5 in section 6.2(d) of this Report; and
- giving the FRAA the role of overseeing the Conduct Regulator when making Rules, including whether it has undertaken appropriate consultation – design principle 8 in section 6.2(f) of this Report.

(d) Adequacy of implementation

A consistent theme relating to both consultation on and implementation of financial sector regulatory reforms is the impact it has on the conduct of business.[131] As Suncorp has noted:

> *Regulatory change in the banking system is proceeding at an unprecedented volume and pace. While well-intentioned, these regulations impose additional compliance burdens on all banking institutions*.[132]

These comments are equally applicable for the general insurance sector.

Challenges arise for both ends of the scale. Smaller firms lack the resources to manage implementation of large-scale reforms, particularly when they overlap. Larger firms have greater resources but often have less flexible infrastructure and require longer timelines to successfully implement new requirements in a manner that does not give rise to new non-compliance risks. At both ends of the scale, there is a significant risk of regulatory burn-out where the same people within organisations are undergoing constant change.

A constant theme within the financial sector regarding implementation of new regulations is the lack of time provided to do so. While resources and costs are the core issue for implementation, the challenge is exacerbated when insufficient time is given to properly implement new regulation.[133] In relation to the implementation of the Financial Services Royal Commission reforms, even Government noted that its implementation timeline was *'ambitious'* and that industry would need *'to also align with the urgency and priority the Government is giving to its implementation task'*,[134] making this an example of policy

---

[129] As above, [2.90].
[130] As above.
[131] The Financial Planning Association of Australia, *Future of Financial Advice (FoFA) Post Implementation Review Submission* 2017, p 4; CPA Australia, *Consultation Paper: Review of APES 230 Financial Planning Services,* 24 March 2020, p 1; Suncorp Group, *Submission – Banking Executive Accountability Regime,* 29 September 2017, p 2.
[132] Suncorp Group, *Submission – Banking Executive Accountability Regime*, 29 September 2017, p 2.
[133] As above, p 2.
[134] Australian Government, *Restoring Trust In Australia's Financial System: Financial Services Royal Commission Implementation Roadmap,* August 2019, p iv.

objectives taking priority over adequacy of implementation. The issue of lack of consideration and coordination of implementation timelines is not something that is unique to Australia. It reflects the experience within the sector across the globe.[135]

Financial sector companies have noted concerns regarding '*new regimes conflicting with existing laws*'.[136] As discussed throughout this Report, the problem of overlapping reforms is often caused by insufficient consultation and a lack of agency coordination and leads to confusion and complexity in the implementation process.

These concerns have been recognised in the UK. To address the issue, the *UK Government guidelines (HM Government 2011a) for PIRs* advises that departments should coordinate their activities where more than one review is required in overlapping policy areas. Framing individual proposals in a broader policy context results in consultation with more meaningful conclusions which has the potential to directly improve the quality of future policy development. Furthermore, by avoiding duplication of work across multiple agencies, statutory reviews become better targeted, more cost effective and in turn more efficient to implement.[137]

Short timelines

Successful and cost-effective implementation of new legislation is significantly affected by timing considerations. Industry requires time to be able to properly and successfully implement new legislation. The consultation process is an important part of this as discussed in sections 4.3(a) and 4.3(b) of this Report. However, implementation can also be affected by the process of making subordinate legislation.

For example, the *Australian Securities and Investments Commission Amendment (Deferred Sales Model Exemptions) Regulations 2021* (Cth) (**DSM regulations**) exempts certain classes of add-on insurance products from the DSM regime and was waited on by industry as it determined whether they had to comply with the strict deferred sales requirements. However, the regulations were only released on 17 September 2021 despite the regime commencing on 5 October 2021, giving insurers very little time to implement the deferred sales changes, reverse changes that had already been made and/or apply for individual relief if an insurer believed it met the relevant criteria.[138]

Inadequate implementation periods due to late release also extends to other regulatory material such as ASIC Regulatory Guides. While ASIC Regulatory Guides are not legally enforceable as they only represent ASIC's views on certain regulatory regimes, they are very useful to understand a regime and in particular, ASIC's expectations for the regime given ASIC is responsible for its enforcement. Regulatory guidance is also important in setting out ASIC's requirements for relief and relevant procedures for dealing with ASIC in connection with the regime.

However, when regulatory guidance is only released shortly before a regulatory regime commencing, it is very difficult for stakeholders to ensure they are meeting ASIC's expectations and implement all process and system changes. For example, the final version of *ASIC Regulatory Guide 38: The hawking prohibition* was only released on 23 September 2021 – only 12 days before the new regime commenced on 5 October 2021. Although the draft regulatory guide was released on 21 July 2021 (seven months after the Hayne Response Act received Royal Assent), the final version was different in key areas and therefore was not able to be relied on as providing indicative guidance during the implementation period.[139]

Another example is *ASIC Regulatory Guide 275: The deferred sales model for add-on insurance* which was released on 28 July 2021 only just over two months before the DSM regime commenced on 5 October 2021. This was particularly problematic for industry as the Regulatory Guide contained guidance on how ASIC would decide to grant individual relief when relief applications had to be submitted and decided before the new regime commenced.

---

[135] Deloitte, *Rethinking the response: A strategic approach to regulatory uncertainty in European insurance*, 2013, p 6.
[136] Suncorp Group, *Submission – Banking Executive Accountability Regime*, 3 August 2017, p 8.
[137] Australian Government Productivity Commission, *Identifying and Evaluating Regulation Reforms,* December 2011, p 24.
An example of overlapping reviews is the overlap between the Quality of Advice Review being undertaken at the same time as the ALRC's review. While we understand that the ALRC is closely consulting with the Quality of Advice Review, there is a risk that solutions proposed for the Quality of Advice Review will result in a two stage process with changes made for the Review being supplanted by changes made following the ALRC review.
[138] ASIC Act, s 12DY.
[139] For example, the factors ASIC considers when deciding to grant an exemption was updated to include complaints about the product and complaint outcomes.

This also applies to other ASIC material. As noted by the Financial Services Council, ASIC conducted a desktop review of PDSs to identify potentially unfair terms before the UCT regime commenced on 5 April 2021 (see sections 5.1(c) and 5.13 of this Report for more information about the UCT regime). The outcome of this review would have assisted industry to rectify any problematic terms before the regime commenced and therefore ensure that the intent of the regime was met. While the release of ASIC's review was expected before the end of 2020, a final letter that provided guidance was only given to insurers on 11 March 2021, which was just over 4 weeks before the legislation commenced. Public information via a media release was only published on 22 March 2021.[140]

This meant that insurers did not have sufficient time to take the guidance provided by ASIC into account. It also resulted in duplicated effort as reviews of PDSs and product terms needed to be reviewed again following the release of ASIC's review.

Recommendation 7	Regulators should be required to implement appropriate transition periods and measures to ensure regulated entities have sufficient time to implement the new requirements properly. Consultation on appropriate transition periods and measures should be part of the consultation process they are required to undertake. The implementation period should have explicit regard to: 7.1 the reasonable time required to implement the new requirements across affected parties; 7.2 the other regulatory changes affecting regulated entities, whether past, present or future; and 7.3 the time required for the regulator to provide guidance on, and to be in a position to enforce, the new requirements. The FRAA should also review periodically the transition periods and measures implemented by regulators and have the authority to override regulators either on its own motion or at the request of one or more regulated entities.

Recommendation 7 is focused on transition and implementation periods set by regulators rather than Parliament. This is appropriate if our design solution is implemented as the principled nature of the requirements in the FSA should not require amendment frequently if at all. However, until this occurs, it would be appropriate for relevant Parliamentary committees (e.g. the Senate Standing Committee for the Scrutiny of Bills) to be tasked with considering the adequacy of proposed commencement dates and transition periods in bills, not only for industry to implement the requirements of the bill but also and importantly for the relevant regulator to be able to develop, consult on and issue appropriate guidance on the new regime with sufficient time for industry to digest and implement that guidance before the new regime commences.

Explanatory material and guidance

Explanatory material also plays an important role for stakeholders when implementing legislation as an explanatory memorandum should set out '*a statement of the purpose of the legislation, an outline of why it is required, the effect of the principle provisions, an explanation of the policy background and notes on the clauses of the bill*'.[141] Therefore, explanatory memoranda is important in facilitating understanding of rights and duties under new legislation and helps industry participants comply with the law and ensure that its objects are met. However, this is hindered when an explanatory memorandum merely restates the law. This is a common criticism directed at explanatory memoranda when they do not explain the law or provide a rationale for or indicate the intended practical effect of the provisions.[142]

An example of this is the Explanatory Statement for the DSM regulations which simply restated the classes of add-on insurance products that were exempt and provided very little to no explanation as to why those products were exempted. This was particularly unhelpful for this regime as an explanation

---

[140] Financial Services Council, *ASIC performance against the Regulatory Performance Framework: Financial Services Council Submission*, 16 April 2021, p 5.
[141] Senate Standing Committee for the Scrutiny of Bills, *The Quality of Explanatory Memoranda Accompanying Bills,* Third Report of 2004, 24 March 2004, p 73.
[142] Hickman A, 'Explanatory memorandums for proposed legislation in Australia: Are they fulfilling their purpose?' (2014) 29(2) *Australasian Parliamentary Review* 116.

could have assisted industry participants in understanding the features of add-on insurance products that could be exempt and therefore, determine whether to apply for individual relief from ASIC.

Our recommendations relating to explanatory material can be found in Recommendation 2 in section 4.2(c) of this Report.

Post-implementation

The effectiveness of a new regime should also be considered after a regulatory regime has commenced. However, this does not occur on a systematic basis in Australia.

The Government does recognise a role for post-implementation reviews. The Office of Best Practice Regulation states that a post-implementation review evaluates whether an implemented policy is '*operating as intended and is effectively and efficiently meeting the Government's objectives in addressing the original problem*'.[143] This review must be conducted if any of the following criteria apply:

- *OBPR* [The Office of Best Practice Regulation] *has assessed the proposal as having a substantial or widespread economic impact.*
- *A RIS* [Regulation Impact Statement] *that had been through a final assessment by OBPR for the regulatory change was not prepared for the final decision and the change was neither minor nor machinery in nature.*
- *A regulatory change was granted a Prime Minister's exemption from the need to prepare a RIS.*[144]

An effective post-implementation review requires:

- terms of reference that are not narrowly based;
- timely and thorough review processes;
- adequate funding; and
- extensive consultation and should be ongoing.[145]

Post-implementation reviews are not regularly conducted for financial services legislation as a regulation impact statement is often prepared.

A post-implementation review can perform a useful role by reviewing the implementation of regulation and assessing its impacts, including how well it is achieving its original objectives and the regulatory costs. Therefore, it is arguably more useful to asses regulation than a regulation impact statement as the legislation has actually been implemented and its real life impacts can be observed.

The most recent example of a post-implementation review of specific general insurance regulation was Treasury's post-implementation review of the financial claims scheme for general insurance policyholders. The review was conducted by Treasury in 2012 in relation to the *Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008* which introduced a financial claims scheme to protect general insurance policyholders in the event of a failure of a general insurer. A regulation impact statement was not produced for this Act as it was introduced during the global financial crisis when immediate action was determined to be necessary.

The post-implementation review assessed the scheme by:

- characterising the problem the scheme was designed to address;
- describing the key features of the scheme and assessing the effectiveness of it against the Government's objectives in implementing the scheme;
- undertaking an impact analysis to investigate any unintended consequences of the scheme, including consulting with key stakeholders (general insurers and consumers); and
- concluding that the scheme should continue in its current form, supported by the fact it was consistent with international best practice, formed just one part of a broad range of financial system stability tools and is post-funded.[146]

---

[143] The Office of Best Practice Regulation, Department of the Prime Minister and Cabinet, *Guidance Note: Post-implementation Reviews*, March 2020, p 1.
[144] As above, p 2.
[145] Kenny A, 'Post Implementation Reviews of Recent Australian Tax Reform' (2012) 7 *Journal of the Australasian Tax Teachers Association* 79, p 81.
[146] The Treasury, *Post-Implementation Review — Financial Claims Scheme for General Insurance Policyholders*, October 2012, [3], [80] – [84].

A post-implementation review was also conducted by Treasury for certain regulations that were introduced as part of the Future of Financial Advice (**FOFA**) reforms. In this case, the review was conducted as the regulation impact statements prepared for these regulations were not approved by the Office of Best Practice Regulation.[147] The Treasury asked a number of questions as part of the review, including:

- *Has the regulation achieved its intended objective?*
- *Were there impacts on business other than those identified?*
- *Were there impacts on consumers other than those identified?*
- *What were the compliance costs of the announced measures?*
- *Do you have any concerns or comments regarding the impact and operation of the regulation?*
- *What are your views regarding the regulatory option chosen by the Government compared to the alternative options which the Government could have pursued? What are the key costs and benefits of these alternative options compared to the chosen option?*[148]

However, it is unclear what happened after the review or how Treasury responded as we have been unable to find a public record of the outcome of the review.

Most recently, the Government has commissioned the Quality of Advice Review which asks how the regulatory framework could better enable the provision of high quality, accessible and affordable financial advice. This has arisen from the recommendations of the Financial Services Royal Commission to assess the effectiveness of measures to improve the quality of financial advice following their implementation.[149]

We believe that post-implementation reviews perform a useful role in assessing the success of reforms in addressing the problems they are trying to resolve and whether they meet the goals of smart regulation (see discussion in section 6.1(b)(v) of this Report). Such reviews enable assessment of whether the objectives of the regulation have been met having regard to the insight of stakeholders who have implemented or experienced the reforms in practice.

We query why post-implementation reviews are not conducted for all significant reforms. The current general rule of only conducting a post-implementation review if a regulation impact statement was not prepared or approved does not make sense. While it is appropriate for Government to properly assess the impact of proposed regulation before it is made, it is not possible to assess all of the impacts of reforms before they are introduced, nor is it possible to assess the success of the reforms in addressing the issues they were intended to address or whether they were the most effective manner of addressing those concerns.

(e) Implementation recommendations

Recommendation 8 Post-implementation reviews should be conducted of all significant changes to the financial services regime, whether those changes are made by Parliament, in the regulations or in rules, standards or other delegated legislation and whether or not a risk impact statement has been prepared or approved. The review should:

8.1 occur within five years of the reform being made;

8.2 involve issuing an issues paper and provide for a consultation period of at least three months;

8.3 issue a final paper which should be made public within six months after it is issued or before the next Federal election, whichever is sooner; and

8.4 be conducted by:

- the Government in case of changes to an Act of Parliament or regulations (unless proposed by the Conduct Regulator – see

[147] The Treasury, *Post-Implementation Review Future of Financial Advice*, May 2017.
[148] As above.
[149] The Treasury, *Quality of Advice Review Issues Paper*, March 2022, [1.1].

	section 6.2(c) of this Report). Of course, a relevant Parliamentary committee may wish to conduct its own review of reforms; • the relevant regulator in the case of reforms they make or propose. Such reviews should be considered by the FRAA as part of its role to oversee financial services regulators.
Recommendation 9	Given the issues we have raised in relation to many of the Financial Services Royal Commission reforms in this Report, a post-implementation review of those reforms should be conducted as soon as practicable.

Design solution

Our design principles propose that the FRAA would be given the role of overseeing the Conduct Regulator when making Rules (see design principle 8 in section 6.2(f) of this Report). We envisage oversight involving:

- periodic and ad hoc reviews initiated by the FRAA; and
- providing stakeholders with the ability to request a review of a Rule made by the Conduct Regulator, including transition periods and measures for the Rule.

This would give the FRAA the ability to not only conduct post-implementation reviews but also provide a mechanism for enabling the issues relating to implementation to be considered by an independent authority before a Rule is implemented.

The role of the FRAA would extend to consideration of the form of Rules (including whether they are too prescriptive or whether they are prescriptive enough to provide necessary certainty for consumers and industry) and whether they are required or whether the principle articulated in the FSA does not require elaboration in the Rules.

Chapter 5 – Issues

In this section of the Report, we identify some of the key regulatory issues affecting the general insurance sector and propose solutions which we believe would improve outcomes for consumers and industry participants.

5.1 Multiple duties addressing the same concern – consumer protection and fairness

Insurers are subject to multiple, overlapping and often uncertain fairness obligations, some of which are owed to retail clients and others to all clients.

Those duties include:

- as a financial services licensee, to do all things necessary to ensure that the financial services covered by its AFSL are provided efficiently, honestly and fairly;[150]
- not to engage in misleading or deceptive conduct;[151]
- not to engage in unconscionable conduct;[152]
- not to include unfair terms in insurance contracts;[153]
- to act towards the insured in respect of any matter arising under the insurance contract with the utmost good faith;[154]
- where an insurance contract permits the insurer to refuse to pay a claim because of an act or omission of any person after the contract was entered into which does not cause or contribute to the claim, the insurer may only reduce the amount paid for the claim by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act or omission;[155]
- other specific measures in the Insurance Contracts Act;
- to be honest, efficient, fair, transparent and timely in dealings with customers;[156]
- in effect as a result of AFCA's jurisdiction over complaints, to make decisions which are fair in all the circumstances.[157]

There is no single source of truth for consumers, their advisers, insurers, regulators or dispute handling bodies. These rules are spread across three statutes and related regulations and explanatory material, Court cases interpreting these duties, industry codes, ASIC Regulatory Guides and the AFCA Complaint Resolution Scheme Rules (**AFCA Rules**), Operational Guidelines and determinations. They each do a different job but with the same goal of ensuring consumers are treated fairly, and they each have limitations.

This complexity was recognised in the Financial Services Royal Commission which resulted in Recommendation 7.4, in that as far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter. This is important as by *'drawing explicit connections in the legislation between the particular rules that are made and the fundamental norms to which those rules give effect, the regulated community and the public more generally will better understand what the rules are directed to achieving.*'[158]

In the Final FSRC Report, Commissioner Hayne identified *'six norms of conduct*' in the financial regulatory system:

- obey the law;[159]

---

[150] Corporations Act, s 912A(1)(a).
[151] Corporations Act, s 1041H and ASIC Act, s 12DA. There are also parallel obligations in the product disclosure regime in Part 7.9 of the Corporations Act.
[152] Corporations Act, s 991A and ASIC Act, Subdiv C, Div 2, Pt 2.
[153] ASIC Act, Subdiv BA, Div 2, Pt 2.
[154] Insurance Contracts Act, s 13-14.
[155] Insurance Contracts Act, s 54.
[156] GICOP, [21].
[157] AFCA Rules, 13 January 2021, A.14.2.
[158] Final FSRC Report, vol 1, p 44.
[159] ALRC Interim Report A, [13.37]:

- do not misled or deceive;
- act fairly;
- provide services that are fit for purpose;
- deliver services with skill and reasonable care;
- when acting for another, act in their best interests.[160]

We have considered these norms in section 6.2(a) of this Report.

Commissioner Hayne went on to note that:

> *The six norms of conduct I have identified are all reflected in existing law. But the reflection is piecemeal.[161]*

(a) Efficiently, honestly and fairly

Insurers who hold an AFSL are required to do all things necessary to ensure that the financial services covered by its licence are provided efficiently, honestly and fairly.[162] The obligation has been described by the Federal Parliament as one of the *'minimum standards of conduct'*[163] and by ASIC as *'principles-based and designed to apply in a flexible way'*.[164] The Financial Services Royal Commission stated that this obligation is an *'overarching and fundamental'* requirement.[165]

Commissioner Hayne remarked that read properly s 912A(1)(a) would embrace all of the six norms described above.[166]

The difficulty with s 912A(1)(a) is that there is uncertainty whether the obligation should be read as a single phrase or as three separate obligations. O'Bryan J set this out in *ASIC v Westpac Securities:*

> *The primary judge traced the legislative history of the words "efficiently, honestly and fairly" now found in s 912A(1)(a) of the Act. As her Honour observed, the phrase appears to have its origin in the former s 60 of the Securities Industry Code of each of the States which provided that a dealer's licence might be revoked if the National Companies and Securities Commission (a predecessor body to ASIC) was satisfied that the dealer did not perform the duties of a holder of such a licence efficiently, honestly or fairly. The phrase was considered by Young J in Story v National Companies and Securities Commission (1988) 13 NSWLR 661 (Story) at 672. His Honour concluded that:*
>
> > *...the group of words "efficiently, honestly and fairly" must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.*
>
> *As the primary judge observed, that approach to the interpretation of the words has been followed in numerous cases, including by Foster J in ASIC v Camelot at [69]-[70] and by Beach J in ASIC v Avestra Asset Management Limited (In Liq) [2017] FCA 497; (2017) 348 ALR 525 at [191].*
>
> *Although not the subject of argument on this appeal, **I have considerable reservations about the view that the words "efficiently, honestly and fairly" as used in s 912A(1)(a) of the Act should be read compendiously in the manner suggested by Young J in Story.** His Honour gave two reasons for interpreting the phrase in that manner. The first is that it is impossible to carry out all three tasks concurrently. His Honour explained that conclusion by reference to the following example (at 672):*
>
> > *To illustrate, a police officer may very well be most efficient in control of crime if he just shot every suspected criminal on site. It would save a lot of time in arresting, preparing for*

'The norm of 'obey the law' is arguably referable to specific statutory provisions [referencing Corporations Act, s 912A(1)(c) and (ca)], although could be considered redundant because the requirement to obey is fundamental to all law, and is not a norm specifically attributable to this statutory regime.'

[160] Final FSRC Report, vol 1, p 8 - 9.
[161] As above, p 9.
[162] Corporations Act, s 912A(1)(a).
[163] Revised Explanatory Memorandum to Financial Services Reform Bill, [4.32].
[164] *ASIC Regulatory Guide 104: AFS licensing: meeting the general obligations*, April 2020, [104.11].
[165] Interim FSRC Report, vol 1, p 21.
[166] Final FSRC Report, vol 1, p 9.

> > *trial, trying and convicting the offender. However, that would hardly be fair. Likewise, a judge could get through his list most efficiently by finding for the plaintiff or the defendant as a matter of course, or declining to listen to counsel, but again that would hardly be the most fair way to proceed.*
>
> *The second is the use of the conjunction "and" rather than the disjunctive "or" in the phrase "efficiently, honestly and fairly".*
>
> *With respect, it is not apparent that either reason provides a sound basis for reading the phrase, as it appears in s 912A(1)(a) of the Act, compendiously in the manner suggested by his Honour. In particular, it is not apparent why a licensee cannot comply with each of the three obligations, efficiently, honestly and fairly, applying the ordinary meaning of each word. One of the meanings of the word "efficiently", and the meaning well adapted to the statutory provision, is competent, capable and having and using the requisite knowledge, skill and industry: cf ASIC v Camelot at [69(c)]. The word "honestly" includes dishonesty in the criminal sense but may also comprehend conduct which is not criminal but which is morally wrong in the commercial sense: R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA) [1989] SASC 1941; (1989) 1 ACSR 93 at 110.* ***The word "fair" as used in s 912A(1)(a) has not received detailed judicial consideration. However, it seems to me that there is no reason why it cannot carry its ordinary meaning which includes an absence of injustice, even-handedness and reasonableness.*** *As is the case with legislative requirements of a similar kind, such as provisions addressing unfair contract terms, the characterisation of conduct as unfair is evaluative and must be done with close attention to the applicable statutory provision: cf Paciocco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199 at [364].* ***It seems to me that the concepts of efficiently, honestly and fairly are not inherently in conflict with each other and that the ordinary meaning of the words used in s 912A(1)(a) is to impose three concurrent obligations on the financial services licensee: to ensure that the financial services are provided efficiently, and are provided honestly, and are provided fairly.***[167] (emphasis added)

Most judgements seem to have followed the 'compendious' interpretation to date. Nevertheless, as O'Bryan J's judgement demonstrates, there is room for considerable uncertainty on this question which is yet to be finally settled by the High Court. It is certainly not a duty that is capable of being easily understood or applied by affected parties, whether they be consumers or their representatives, or industry participants.

Another drawback of this obligation is that it only applies to licensees[168] and only to financial services they are authorised to provide under their licence. While Australian insurers do typically hold an AFSL, it is not essential that they do so or that they be authorised for all financial services they provide given various exemptions that apply.[169] Furthermore, certain activities may not be regulated as financial services at all under the licensing regime and the obligation may not therefore apply to those activities. This was the reason why claims handling and settling was made a financial service.[170] As noted in the Explanatory Memorandum for the Bill making this change, one of the reasons for making this change was to *'ensure insurance claims are handled and settled efficiently, honestly and fairly'.*[171] However, there are other activities which are not clearly regulated as financial services, such as:

- referrals;[172] and
- purely administrative activities.[173]

The efficiency, honesty and fairness obligation therefore remains a duty which only applies to certain activities engaged in by insurers and intermediaries.

---

[167] *Australian Securities and Investment Commission v Westpac Securities Administration Limited* [2019] FCAFC 187 per O'Bryan J at [422] – [426].
[168] This obligation applies to AFS licensees (Corporations Act, s 912A(1)(a)) and to Australian credit licensees (*National Consumer Protection Act 2009* (Cth), s 47(1)(a)), although insurers would typically only be the former.
[169] For example, the exemptions for product issuers (Corporations Act, s 911A(2)(b) and (c) and Corporations Regulations, regs 7.1.33H and 7.6.01(1)(q)) and for APRA-regulated insurers for wholesale clients (Corporations Act, s 911A(2)(g)).
[170] Hayne Response Act.
[171] Explanatory Memorandum to Hayne Response Bill, [7.9].
[172] While there are licensing exemptions for referrals (Corporations Act, s 911A(1)(e) – (ea)), it is not clear that referrals would amount to either financial product advice or arranging (the only possibly relevant categories).
[173] Conduct done in the course of work of a kind ordinarily done by clerks or cashiers is not the provision of a financial service (Corporations Act, s 766A(3)).

(b) Insurance specific fairness obligations

Duty of utmost good faith

Licensed insurers are not only subject to the efficiently, honestly and fairly obligation, they also have a duty to act with utmost good faith under the Insurance Contracts Act and at common law. This is achieved by:

- implying a term in each insurance contract requiring each party to act towards the other in respect of any matter arising under or in relation to the contract with the utmost good faith;
- making failure by an insurer to comply with the term a breach of the Act which is a civil penalty provision; and
- prohibiting a party from relying on a term of the contract if it would be to fail to act with the utmost good faith.[174]

The Insurance Contracts Act does not define 'utmost good faith'. It is the codification of a long-standing common law principle and it can be taken from the case law that the duty generally:

- requires the parties to an insurance contract and third party beneficiaries to act openly, honestly and fairly in their dealings in the performance of the contract, each with due regard for their own interests and for the legitimate interests of others; and
- may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured.[175]

The duty is not unlimited however. There is some authority to suggest that the duty to pay due regard to the interests of the insured as well as the insurer may not arise where the policy gives the insurer a clear right to prefer its own interests over those of the insured,[176] for example, in exercising a contractual right that is designed to allow an insurer to limit its liability in certain cases.[177] Further, the 'fairness' requirement does not oblige either party to surrender any commercial advantage.[178]

This duty clearly overlaps with a licensed insurer's duty to act honestly, efficiently and fairly under the Corporations Act. It is an example of duplication, where a licensee could potentially fall foul of both provisions, which in substance address the same concern. This means that a licensee could be subject to multiple civil penalties for the same wrongful act which contradicts the principle of double jeopardy which applies to criminal offences (i.e. 'a person who has been acquitted on a criminal charge should not be tried again on the same charge').[179] While the Courts have acknowledged the principle that double punishment should be avoided in the context of civil penalties,[180] the Full Court of the Federal Court has stated that a judge is *'not obliged'* to impose a single or concurrent penalty for a contravention arising out of the same course of conduct or the one transaction *'if the resulting penalty fails to reflect the seriousness of the contraventions'*.[181] Further, Justice Yates of the Federal Court of Australia provides that the *'rationale of avoiding double punishment is inapplicable'* in the context of civil penalty context given that deterrence is the direct objective of these penalties.[182] Therefore, there is the potential for licensees to be penalised multiple times for the same conduct.

Other insurance specific measures

The notion of fairness also underpins the remedy in s 54 of the Insurance Contracts Act. This section has the effect that an insurer may not deny cover based on a technical breach of the policy or other act or omission after the policy was entered into unless the breach, act or omission could reasonably be said to have caused or contributed to the loss the subject of the claim. In this circumstance, the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interest were prejudiced as a result of that act. This is also reflected in s 18 of the *Insurance Act 1902*

---

[174] Insurance Contracts Act, s 13-14.
[175] *CGU Insurance Limited v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1, per Gleeson CJ and Crennan J at [15].
[176] *Re Zurich Australian Insurance Ltd* [1999] 2 Qd R 203; (1999) 10 ANZ Ins Cas 61-429.
[177] *Allianz Australia Insurance Limited v Anthony Vitale and Anor* [2014] NSWSC 364 at [125] (Sackar J), citing *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Camellia Properties v Wesfarmers General Insurance Ltd* [2013] NSWSC 1975 and *Matton Developments Pty Ltd v CGU Insurance Limited (No 2)* [2015] QSC 72 at [247] (Flanagan J).
[178] *Allianz Australia Insurance Ltd v Anthony Vitale* [2014] NSWSC 354 [125].
[179] *Davern v Messel* (1984) 155 CLR 21, per Murphy J at [338].
[180] *Pearce v R* (1998) 194 CLR 610 at [40]; *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27 at [195] and *Australian Competition and Consumer Commission (ACCC) v Yazaki Corp* [2018] FCAFC 73 at [234].
[181] *Australian Competition and Consumer Commission (ACCC) v Yazaki Corp* [2018] FCAFC 73 at [235] which was followed in *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd (No 3)* [2021] FCA 170 at [13].
[182] *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306 at [130].

(NSW) which provides that a court may excuse a failure of the insured to observe or perform a term or condition under the contract of insurance on the grounds that the insurer was not prejudiced by that failure.

(c) Unfair contract terms (UCT)

Insurers have recently also become subject to the UCT regime in the ASIC Act.[183] Under the regime, terms in standard form contracts with consumers and small businesses may be void if they are 'unfair' because they cause a significant imbalance in the parties' rights and obligations arising under the contract and are not reasonably necessary to protect the legitimate interests of the provider.[184] Where a term has been declared void, the contract will continue to bind the parties to the extent that it is capable of operating without the term.[185] What is 'unfair' is not defined exhaustively in the Act.

It is not currently a contravention of the ASIC Act to either include, apply or rely on an unfair contract term in an insurance contract. However, *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* introduces a civil penalty regime prohibiting the use of and reliance on unfair contract terms in standard form contracts which will commence on 10 November 2023.

The UCT regime is challenging for insurers. It creates inherent uncertainty for an industry which prices insurance cover based on the risk of an event occurring and manages this risk by strictly defining what is covered and what is not covered.

The reach of the UCT regime is an example of this uncertainty. The UCT regime does not apply to terms that define the main subject matter of the contract.[186] The main subject matter is defined narrowly in the context of insurance contracts and only captures terms that describe what is being insured.[187] The general insurance industry has raised concerns that this narrow interpretation means that exclusions clauses become meaningless because they are outside the main subject matter of the contract and can therefore be subject to UCT review.[188] The Government made a deliberate decision to not adopt a broader definition of the main subject matter and follow the approach in other jurisdictions such as the European Union which exempts from its UCT regime terms that define or circumscribe the insured risk and the insurer's scope liability i.e. the scope of cover.[189] The European approach recognises the need for certainty in the insurance market.

As a public good, insurance can only operate effectively where common risks are pooled and more specialised risks are excluded or priced separately. Increased uncertainty can only result in one or more of the following occurring in the longer run:

- higher premiums;
- reduced availability of certain types of cover;
- higher risk of insurer failure.[190]

The UCT regime seeks to address unfair terms in insurance contracts (along with other consumer contracts). However, as noted above, the Insurance Contracts Act deals with issues of unfairness by

---

[183] *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020* (Cth) Sch 1, commenced on 5 April 2021.
[184] ASIC Act, subdivision BA, s 12BF - 12BM.
[185] ASIC Act, s 12BF(2).
[186] ASIC Act, s 12BI(1)(a).
[187] ASIC Act, s 12BI(4).
[188] Insurance Council of Australia, *Submission to the Unfair Terms in Insurance Contracts Draft Regulation Impact Statement For Consultation, 28 February 2012*, p 17.
[189] The Treasury, *Proposals Paper: Extending unfair contract terms protections to insurance contracts*, June 2018, p 14.
[190] In its submission to Treasury's consultation on 'Extending Unfair Contract Terms to Insurance Contracts', the Insurance Council of Australia stated:

> *However, we are seriously concerned that the draft Bill, if enacted, would harm rather than improve consumer outcomes. In its current form, the draft Bill would operate more severely, by prescribing special rules on insurance, and create far more uncertainty, than the general UCT regime does for other sectors of the economy. If insurers cannot rely on the terms forming the basis of their contracts, they will need to reprice the risks being underwritten and there will be significant implications for their reinsurance arrangements and the capital they need to hold. In turn, this will likely affect the scope of policy coverage and lead to higher premiums for consumers. In particular circumstances, insurers will be pressured to withdraw cover entirely.*

Insurance Council of Australia, Submission to the Treasury, *Extending unfair contract terms to insurance contracts: Exposure Draft of the Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019* (28 August 2019), p 1.

implying a duty of utmost good faith into insurance contracts. It also imposes a number of specific obligations and restrictions on insurers to ensure they deal fairly with insureds when it comes to:

- terms of the insurance contract;[191]
- sum insured;[192]
- effect of transfer of insured property;[193]
- claims;[194]
- subrogation;[195]
- prohibiting mandatory arbitration;[196] and
- termination of insurance.[197]

Specific fairness obligations are therefore to be found in the Insurance Contracts Act.[198] General fairness obligations are found elsewhere without any attempt to rationalise how those obligations should apply to insurers or insurance contracts.

Multiple duties achieving similar ends does not produce a more competitive, innovative industry delivering solutions consumers require. Rather it imposes high costs and barriers to entry, produces an industry that is geared towards compliance and reducing regulatory risk and restricts consumer choice.[199] This is because resources are diverted to satisfy compliance requirements, which include process and system changes as well as staff training, resulting in companies taking a short term and reactive approach as they deal with current issues, rather than investing in long term innovation and growth opportunities.[200]

Mandel and Carew of the Progressive Policy Institute, a public policy think tank in the United States, analyse this problem and attribute it to the reactive nature of regulation. Mandel and Carew specifically refer to it as *'regulatory accumulation'*, being the *'natural build-up of regulations over time'* and outline how regulations can *'overlap or conflict, become the primary focus of company management, or even interfere with a company's willingness and ability to innovate'* as they continue to grow.[201] Further, they highlight how regulatory accumulation *'imposes an unintended, unobserved, and underappreciated economic cost'* as a result of the cumulative cost for companies to comply with regulations –it becomes more expensive to comply with all the rules taken together compared to complying with each rule separately.[202] The multiple fairness obligations applying to insurance as they have accumulated over time in response to concerns about unfair practices is a good example of this phenomenon in the Australian regulatory landscape.

Regulatory accumulation also imposes actual monetary costs. For example, a 2016 study commissioned by the Mercatus Center in the United States estimates that cumulative regulations have cost an average reduction of 0.8% in annual growth of the United States gross domestic product since 1980, the effects of which compound over time.[203] Multiple overlapping regulations therefore have a real cost to the economy and innovation.

---

[191] Insurance Contracts Act, s 40-41 and 44-45.
[192] Insurance Contracts Act, s 42 and 49.
[193] Insurance Contracts Act, s 50.
[194] Insurance Contracts Act, s 39, 46-47, 53 and 56.
[195] Insurance Contracts Act, s 65-67.
[196] Insurance Contracts Act, s 43.
[197] Insurance Contracts Act, s 38, 59 and 63.
[198] Other issues arising from the interaction of the Insurance Contracts Act and the UCT regime are discussed in section 5.13 of this Report.
[199] For example, research commissioned by CPA Australia on the high cost of regulatory burden for public practitioners due to ever-increasing and overlapping financial services regulation. Practitioners are required to comply with the obligations in the Corporations Act, *Tax Agent Services Act 2009* (Cth), *National Consumer Credit Protection Act 2009* (Cth) and ASIC Act which include adhering to overlapping ethics standards and acquiring multiple licences and registrations. Further, the Report comments that there is often 'no harmonisation between these regulatory frameworks or even within a single regulatory framework', which exacerbates the problems of costly duplication. This current siloed model of regulation is also found to increase compliance costs which are passed on to consumers as higher advice fees which is turn limits the number of people that can access the service. CPA Australia, *Regulatory Burden Report*, 2019, p 10.
[200] As above.
[201] Mandel M and Carew DG, 'Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform' (2013) *Progressive Policy Institute Policy Memo*, p 3.
[202] As above, p 4.
[203] McLaughlin P, Ghei N and Wilt M, *Regulatory Accumulation and Its Costs: An Overview*, (2018) *Mercatus Center, George Mason University*, p 2.

(d) General Insurance Code

The GICOP requires insurers who adopt it[204] to be honest, efficient, fair, transparent and timely in their dealings with customers,[205] which mirrors and adds to the obligation in s 912A(1)(a) of the Corporations Act. This general duty is supplemented by the many specific requirements of the GICOP. Complaints regarding compliance with the GICOP can be considered by AFCA where they relate to retail insurance.[206] Customers can also report breaches of the GICOP to the General Insurance Code Governance Committee[207] which may impose sanctions for the breach, by requiring the insurer to:

- take rectification steps;
- audit its compliance with the Code;
- publish corrective advertising or an admission of breach;
- compensate affected individuals; or
- make a community benefit payment of up to $100,000.[208]

ASIC can also designate one or more provisions of the GICOP as enforceable code provisions if it considers that it satisfies specific criteria.[209] During the Financial Services Royal Commission, Commissioner Hayne specifically recommended that provisions of the GICOP that '*govern the terms of the contract made or to be made between the insurer and the policyholder designated as 'enforceable code provisions*''.[210]

The GICOP has now been updated post the Financial Services Royal Commission and consultation has commenced about making some sections of the GICOP enforceable. However, consultation is only in its early stages and a completion date is not yet known.

(e) AFCA

AFCA was established by the Government in 2018 to replace the Financial Ombudsman Service Limited, Credit and Investments Ombudsman and the statutory Superannuation Complaints Tribunal. AFCA's remit extends to insurance complaints among others, subject to certain limitations.[211]

The AFCA Rules provide that:

> *When determining any other complaint, the AFCA Decision Maker must do what the AFCA Decision Maker considers is* ***fair in all the circumstances*** *having regard to:*
> *(a) legal principles;*
> *(b) applicable industry codes or guidance;*
> *(c) good industry practice; and*
> *(d) previous relevant Determinations of AFCA or Predecessor Schemes.*[212] (emphasis added)

AFCA decision makers are not bound by rules of evidence or previous decisions.[213] However, they are required to support consistency of decision making subject to other obligations.[214]

As AFCA states:

> *The effect of this is to move decisions away from relying strictly on a legal interpretation of the applicable legislation or the terms and conditions of the disputed financial product to a decision which also contemplates fairness. Setting out guidance as to how the principle of fairness can be applied is beyond the scope of these Operational Guidelines. Despite this, AFCA recognises that legal principles alone do not have the flexibility to allow a claim to be decided on other factors which are particular to a specific situation or which are subjective to a particular complainant. …*

---

[204] On 1 July 2021, the Code had 49 subscribers which represented most of the retail insurance brands in Australia in Insurance Council of Australia, *Current Code Subscribers,* https://insurancecouncil.com.au/code-of-practice/code-subscribers/ (accessed 3 June 2022).
[205] GICOP, [21].
[206] GICOP, [154].
[207] GICOP, [164].
[208] GICOP, [173]-[174].
[209] Hayne Response Act, Sch 1.
[210] Final FSRC Report, vol 1, p 316, recommendation 4.9.
[211] AFCA Rules, B.2.1 and C.1.
[212] AFCA Rules, A.14.2.
[213] AFCA Rules, A.14.3.
[214] AFCA Rules, A.2.1(d).

> *AFCA must deliver not just procedural fairness but also substantive fairness. It is this substantive fairness that some might say is intangible. Despite this, we can all recognise an unfair outcome because it offends our common set of basic values as to what is just and reasonable. As a first step, AFCA must identify the existence and nature of any inherent unfairness. …*
>
> *We are not, however, required to strictly apply legal principles. Where we consider that it is fair in all the circumstances to depart from legal principles, we will explain in the Determination our reasons for doing so.*[215]

AFCA has recognised that the principle of 'fairness' requires further delineation and subsequently launched its Fairness Project. The aim of the Project was to create a framework for AFCA to ensure that it operated within its fairness jurisdiction and made decisions and provided dispute resolution services in a fair, independent and consistent way. Accordingly, the Fairness Project produced a fairness framework for AFCA focusing on understanding and explaining AFCA's jurisdiction, ensuring consistency of experience, delivering a fair process and providing a fair outcome.[216] However, AFCA states that it did not seek to define what 'fairness' meant in the framework and that AFCA is rather guided by the law and equity in its assessment of complaints.[217]

The AFCA Fairness Project developed what AFCA describes as an 'internal navigation aide' being the Fairness Navigation Tool to help ensure consistency in AFCA's approach. The Tool (shown below) outlines 10 primary legal, regulatory and code obligations (however, their source is not identified) and then poses 10 framing questions to assist staff link issues and explore what is fair in all circumstances.[218]

However, the AFCA Fairness Project Report states that the Tool does not set a new standard of conduct for financial firms.[219] While this may be technically true, there is no doubt that financial service providers will need to have regard to AFCA's 'obligations' and approach not only when considering complaints but also in designing policies and procedures.

---

[215] AFCA, *Operational Guidelines to the Rules*, 1 April 2022, p 70-71.
[216] AFCA, *Report on outcomes: Fairness Jurisdiction Project*, 11 May 2022, p 5-6.
[217] As above, p 10.
[218] As above, p 13.
[219] As above p 14.

Retail insurers are therefore subject to a nascent equitable remedy which has all the challenges associated with the development of a new jurisdiction. The approach AFCA takes to resolving complaints has a direct bearing on the way insurers conduct their retail business. The old certainties are gone and a new principle applies – to treat customers fairly in all the circumstances.

This is one of the subjects considered by the recent review of AFCA.[220] The Review found that:

> *While the cases examined as part of the Review did not show evidence of an inappropriate application of AFCA's fairness jurisdiction, they highlighted a broad interpretation of the fairness jurisdiction beyond that grounded in the four considerations outlined in the AFCA Rules.* [221]

The Review provided the following example of such a 'broad interpretation':

> *For example, in one of the cases examined, AFCA awarded a 15 per cent increase in the payout to the complainant under a home insurance policy where the insurer had reached its maximum liability under the policy. This was awarded as an uplift on the sum insured. The imposition of the uplift was not based on any provision in the policy documents, legal principles or industry codes, but rather was based on an assessment of fairness that AFCA found the insurer owed to the complainant in the exercise of its discretion on the method of settlement under the policy.*[222]

Accordingly, the Review found that applying a broad and ungrounded interpretation of fairness risks AFCA holding financial firms to standards that go beyond the law, contract or industry codes of practice and therefore, makes it difficult for these firms to understand AFCA's decision making in order to ensure compliance.[223] This can in turn impact on the costs of underwriting and providing insurance which affects affordability for consumers.

The Review also noted concerns about inconsistency in AFCA's decision making[224] and AFCA's approach to apportioning liability.[225] Therefore, the Review found that AFCA *'needs to exercise caution in the application of its fairness jurisdiction'*[226] and makes the following recommendation:

> *Recommendation 2*
>
> *In making its decisions, AFCA should consider what is 'fair in all the circumstances' having primary regard to the four factors identified in its Rules – legal principles, industry codes, good industry practice and previous decisions.*[227]

This demonstrates the difficulty of having multiple fairness regimes as each body that administers it may apply fairness considerations differently, which ultimately has the potential to undermine fairness in the provision of financial services.[228]

AFCA must also refer systemic issues arising from the consideration of complaints under the scheme to ASIC, APRA or the Commissioner of Taxation as appropriate.[229] 'Systemic issue' is not defined in the legislation, but ASIC defines a systemic issue is an issue that may:

- affect more than one complainant;
- involve many complaints that are similar in nature;
- affect all current or potential complainants at a particular firm; or
- affect more than one firm.[230]

AFCA therefore operates as a quasi-regulator of the financial services sector and its approach to determining when an insurer acts unfairly has a material impact on the decisions made and approach taken by insurers in the development and distribution of products for consumer and small business

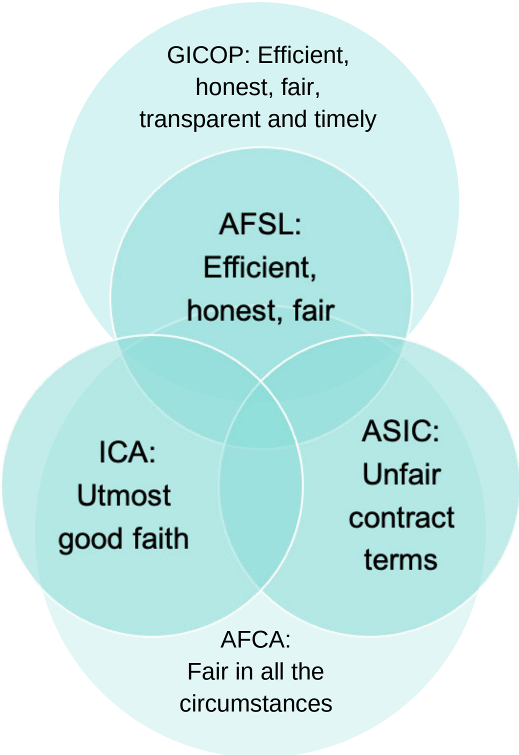
---

[220] The Review was established by the Minister for Superannuation, Financial Services and the Digital Economy on 19 February 2021 in accordance with *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth), s 4.
[221] The Treasury, *Review of the Australian Financial Complaints Authority*, August 2021, [4.46].
[222] As above, [4.47].
[223] As above, [4.48].
[224] As above, [4.52].
[225] As above, [4.55].
[226] As above, p ix.
[227] As above, [4.48].
[228] As above, [4.52].
[229] Corporations Act, s 1052E(4).
[230] ASIC Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority, June 2018, [RG 267.198].

markets.

(f) Simplifying the fairness obligations

There is significant overlap and duplication between the various fairness obligations as shown in the following diagram.



The Government's objectives for the financial sector include:

- efficiency, flexibility and innovation in the provision of financial services;[231]
- commercial certainty, reducing business costs and the efficiency and development of the economy;[232]
- a viable, competitive and innovative insurance industry;[233]
- restoring trust in the financial system and delivering better consumer outcomes, while maintaining the flow of credit and continuing to promote competition following the Financial Services Royal Commission;[234]
- strengthening Australia's financial system with effective corporate, competition and consumer regulation and building a stronger financial system that is resilient.[235]

Having overlapping obligations on such an important topic in different statutes is not consistent with these objectives. It does not increase efficiency or commercial certainty and potentially increases business costs and therefore does not improve the viability, competitiveness or innovation of the insurance industry.

Further, overlapping obligations raises the risk that a single instance of unfair conduct may give rise to multiple civil penalties. As discussed in section 5.1(b) above, while the Courts have acknowledged the principle of avoiding double punishment, recent cases have suggested this does not apply in the context of civil penalties if the resulting penalty does not reflect the seriousness of the offence.

---

[231] Corporations Act, s 760A(a).
[232] ASIC Act, s 1(2)(a).
[233] Insurance Act, s 2A(1)(a).
[234] Australian Government, *Restoring trust in Australia's financial system: Government Response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, February 2019, p 1.
[235] The Treasury, *Corporate Plan 2021 – 2022,* August 2021, p 12.

Simplifying these duties would have many benefits. A simple set of duties is easier for both consumers and industry participants to understand. It is easier for a consumer to know what to expect and to identify failures to meet the required standard. It is also easier to train those dealing with consumers and to apply the duty in consumer interactions and marketing.

Further, Mandel and Carew identify that the following three types of regulatory accumulation impose costs above that of individual regulations:

1. *'pebbles in a stream'* – too many regulations that cause a blockage effect and thereby, increase costs and slow innovation, to no fault of any individual regulation;
2. *'interactions between regulation'* – multiple regulations that interact in both obvious and non-obvious ways that raise costs for businesses; and
3. *'behavioural overload'* – an increased number of regulations forcing management to prioritise compliance over growth and innovation.[236]

Given that the multiple fairness obligations evidence all of the problems of regulatory accumulation identified above, there are strong grounds for consolidating the overlapping fairness obligations to the extent possible to remove additional unnecessary costs.

The question then is what duty or duties should apply. As noted above, Commissioner Hayne identified *'acting fairly'* as one of the six norms of conduct in the financial regulatory system.[237] There certainly does seem merit in separating the fairness obligation from efficiency and honesty to make it clear that it applies as a separate obligation.

(i) Duty of utmost good faith considerations

The challenge for insurance is that it has a long history with well established concepts, such as the duty of utmost good faith. There is a risk that replacing concepts which have a long developed case law will create uncertainty for little benefit.

One possibility for the insurance sector might be to take the established concept of the duty of utmost good faith and apply it more broadly – to require insurers and consumers to act with utmost good faith in all their dealings with each other. If this approach were adopted, the duty would apply not only to the manner in which terms are applied but also how those terms are drafted in the first place and all other interactions with consumers. It would not therefore only be an implied term of the insurance contract but would also be a duty which clearly applies before and after an insurance contract is formed. Such an approach would make the obligations to act honestly, transparently, in a timely manner or with reasonable care[238] redundant.

Another possibility would be to replace the duty of utmost good faith with a duty to act fairly. If this duty applied to all financial services and products, it would have the advantage that the same duty would apply across the financial sector which would certainly make it easier for consumers and their advisers to understand the duty owed to consumers.

However, while it may be argued that replacing the duty of utmost good faith with a duty to act fairly would not make a significant difference to the duties owed by insurers to consumers, it would have an impact on the duties owed by consumers. There is an element of a reciprocal exchange of obligations which is unique and in some contexts critical to insurance. However, the absence of a duty of utmost good faith for consumers is unlikely to have much impact on the process of entering into insurance contracts given it is effectively subsumed by the duty of disclosure[239] and for consumer contracts more recently the duty to not make a misrepresentation.[240] However, the duty of utmost good faith does have an important role as a reciprocal obligation in relation to insurance claims.[241]

A third possibility would be to retain the existing duty of utmost good faith in insurance and to introduce a new duty for financial service providers, including insurers and insurance intermediaries, to act fairly in

[236] Mandel M and Carew DG, 'Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform' (2013) *Progressive Policy Institute Policy Memo*, p 3.
[237] Final FSRC Report, vol 1, p 8 - 9.
[238] Corporations Act, s 912A(1)(a); GICOP, [21]; Final FSRC Report, vol 1, p 8 - 9.
[239] Insurance Contracts Act, Pt IV, Div 1.
[240] Insurance Contracts Act, Pt IV, Div 1A.
[241] Callinan and Heydon JJ refer to the doctrine of clean hands when describing the duty of utmost good faith as '*it invokes notions of reciprocity*' in *CGU Insurance Limited v AMP Financial Planning Pty Ltd* [2007] HCA 36 at [257].

their dealings with consumers. This would mean retaining two overlapping duties which achieve similar outcomes.

The case law does indicate that the duty of utmost good faith not only incorporates concepts of fairness but may extend beyond that. Gleeson CJ and Crennan J of the High Court have stated that *'an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured'* and reject the narrow view that the absence of good faith is limited to dishonesty.[242] Callinan and Heydon JJ agreed with this and refer to the equitable doctrine of an absence of clean hands in describing conduct that may constitute an absence of utmost good faith.[243] Further, Callinan and Heydon JJ state that utmost good faith will *'usually require something more than passivity: it will usually require affirmative or positive action on the part of a person owing a duty of it'.*

Based on these judicial formulations, it has been suggested that while *'there is little doubt that 'fairness' is an essential element of the duty of utmost good faith'*, the *'meaning of the duty goes beyond the term 'fairness''*.[244] There is therefore commentary that the duty of utmost good faith means that consumers are afforded with additional protections beyond the subjective term of 'fairness' when entering into an insurance contract[245] which include considerations of honesty and commercial standards of decency and reasonableness. Despite this, it is difficult to imagine a scenario where a breach of the duty of utmost good faith would not breach a duty to act fairly.

(ii) Introducing a new fairness obligation

Replacing multiple fairness-related obligations with a single duty to act fairly in dealings with consumers and small business would address many of the issues identified above. Imposing such a duty reflects the current reality of AFCA's fairness jurisdiction which requires insurers to ensure the outcomes of their decisions are fair for consumers. It has the additional advantage that as a legal duty it is amenable to interpretation not only by the Conduct Regulator and AFCA but also by the courts. Judicial consideration can provide additional guidance to AFCA in applying its fairness considerations and may help lead to more consistent decision making by AFCA in this regard.

Another advantage of imposing a fairness obligation is that it can apply to the non-insurance activities of insurers (e.g. deposit bonds) and to insurance intermediaries who will only be subject to the duty of utmost good faith when acting as agent of the insurer. It also means that insurers and intermediaries who deal with consumers and small business would be subject to the same simple duty which can apply to all financial service providers with retail clients.

The question then is whether a new fairness obligation should be imposed in addition to or as a replacement for the duty of utmost good faith. While the courts have indicated that the two concepts are not fully congruent, it does not seem necessary or appropriate to apply two such similar duties on dealings with consumers and small business. At the end of the day, ensuring that insurers and insurance intermediaries act fairly in their dealings with consumers and small business should be sufficient. If the outcome is fair to the consumer in the circumstances, no further remedy should be necessary. We therefore believe that there would be no need for the duty of utmost good faith to continue to apply to the conduct of insurers and their agents in relation to retail insurance contracts if a duty to act fairly is introduced.

We do not believe it is necessary or appropriate to impose a duty to act fairly in relation to commercial insurance. We therefore propose that the duty of utmost good faith would continue to apply to commercial insurance. Noting that the duty of utmost good faith also applies to the conduct of policy holders when making a claim under an insurance policy, it would also be appropriate to retain that duty for consumers in connection with claims they make.

A broker acting as agent for the insured will have common law duties to exercise due care and skill in advising his or her clients.[246] These are duties that apply to both consumers and commercial clients. It

[242] *CGU Insurance Limited v AMP Financial Planning Pty Ltd* [2007] HCA 36 at [15].
[243] As above, [257].
[244] Mann P and Drummond S, 'Utmost good faith, unconscionable conduct and other notions of fairness — Where are we now?' (2017) 29 *Insurance Law Journal* 1.
[245] Enright I, Mann P, Pynt G, 'General Insurance: Background Paper 14' (2018) *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, p 86.
[246] Tarr J-A, 'The regulation of insurance intermediaries in the Australian financial services market' (2010) 38(6) *Australian Business Law Review,* p 345.

seems appropriate to require brokers (and other intermediaries) who deal with consumers to act fairly in their dealings with consumers.

(iii) Content of a fairness obligation

One difficulty of an obligation to act fairly is the inherent uncertainly of what the obligation requires in different circumstances. Fairness will depend on the circumstances and the perception of whether conduct is fair will depend on the relative position of the parties. What an insurer considers to be fair will not necessarily be what an insured consumer considers to be fair in the same circumstances. As an English judge has observed:

> *The very nature of "unfairness" is very wide, and permits reasonable people to disagree.*[247]

Fairness in financial services is *'to be judged having regard to the interests of both parties'*.[248] That is, fairness is not one sided and so it should deliver outcomes taking into account the circumstances of all involved parties. However, it is difficult to define or state what fairness is. It has been judicially observed that the term does not admit a comprehensive definition[249] and unfairness reflects a *'moral or ethical standing'*, the identification of which is an evaluative task.[250] It has also been observed that judicial statements and definitions provide limited assistance as to the scope of 'fairness' as they are inherently circular and simply re-express the concept of fairness in terms of other values and societal norms.[251]

It is therefore important that:

- any fairness obligation should be objective, i.e. the conduct should be regarded as fair from the point of view of a reasonable person in the circumstances;
- fairness should be determined by having regard not only to the consumer's circumstances but also having regard to the insurer's circumstances, including the information reasonably available to the insurer at the time the decision is made; and
- the Conduct Regulator should have the power to prescribe rules which define fair conduct in specified circumstances to provide certainty for insurers and insurance intermediaries where the Conduct Regulator determines that is appropriate.

This aligns with Anderson's suggestion for the three possible dimensions of fairness that are considered by the ALRC to be useful to understand the fairness obligation as part of the efficiently, honestly and fairly obligation,[252] being:

- conduct that involves the exploitation of another's vulnerability is likely to be unfair;
- fairness involves the suppression of individual interest; and
- fairness involves reciprocity, including reasonable terms and both parties receiving fair or agreed value.[253]

The ALRC also explores the ambiguity in the definition of fairness[254] and therefore proposes to insert a note to accompany the 'efficiently, honestly and fairly' obligation to provide examples of conduct that may contravene the requirement to act fairly, including examples of conduct that:

- exploits another person's vulnerability, or is otherwise unconscionable;
- substantially and adversely affects the interests of another, undertaken in the pursuit of self-interest; and
- indicates a lack of reciprocity, including a lack of fair or agreed value, such as by the making of misleading or deceptive representations.[255]

While examples may be useful in the context of the current law, our preferred approach as indicated above and in our design solution would be for the Conduct Regulator to have the power to make Rules

---

[247] *R (Norwich and Peterborough Building Society) v Financial Ombudsman Service Ltd* [2003] 1 All ER (Comm) 65, per OuseleyJ at [77].
[248] *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) (No 3)* [2020] FCA 208, per Beach J at [522].
[249] *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 37 ALR 455, [172].
[250] *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, [363] – [364].
[251] Donald S, 'Regulating for Fairness in the Australian Funds Management Industry' (2017) 35 *Company and Securities Law Journal* 406, p 417.
[252] ALRC Interim Report A, [13.95].
[253] Anderson J, 'Duties of Efficiency, Honesty and Fairness Post-Westpac: A New Beginning for Financial Services Licensees and the Courts?' (2020) 37(7) *Company and Securities Law Journal* 450, p 458.
[254] ALRC Interim Report A, [13.74] – [13.83].
[255] As above, [13.95] and proposal A20.

after appropriate consultation which can define fair conduct in specific circumstances where additional certainty or clarification is required. Such an approach would render the inclusion of examples in the statute itself unnecessary.

(iv) Replacing efficiently, honestly and fairly

The uncertainties associated with the obligation to do all things necessary to ensure that financial services are provided efficiently, honestly and fairly are discussed above.[256] We therefore recommend that it be replaced with the duty to act fairly.

This position differs from the ALRC's proposal to split the efficiently, honestly and fairly duty into three separate duties.[257]

Providing services efficiently[258] and with skill[259] could well be regarded as being an essential element of acting fairly and with utmost good faith. However, we acknowledge that a person could be inefficient and unskilled and still act with utmost good faith.

Nevertheless, we do not believe it is appropriate to impose a separate duty of efficiency on insurers or insurance intermediaries. Efficiency is an inherently commercial concept and difficult to judge in particular circumstances without having to consider all of the relevant business circumstances and the decisions made in the course of conducting that business all of which not only affect the 'efficiency' of the services provided, but also the cost and availability of products and services. Neither courts nor regulators are well placed to make judgements about these matters which should be left to the marketplace to determine.

Skill and competence are another matter. AFS licensees are required to maintain the competence to provide the financial services they are authorised to provide and ensure that their representatives are adequately trained and are competent to provide those financial services.[260] These obligations are expressed in a manner that speak to the organisational measures the licensee has in place. They do not directly apply to the services provided by licensees. We believe it would be appropriate for financial service providers, including insurers and insurance intermediaries, to be required to provide services to consumers with skill and competence.

The ALRC has taken a different path by proposing to replace the word 'efficiently' in s 912(1)(a) with 'professionally'.[261] The ALRC notes that the Courts have interpreted 'efficiently' to impose a requirement on licensees to be *'competent, capable and having and using the requisite knowledge, skill and industry'*[262] rather than the *'lay sense'* of the term, being operational efficiency.[263] While that may be correct, the purpose of principles-based regulation and establishing norms of conduct is that they should be expressed in terms and have connotations that are generally understood, or as the ALRC has put it, *'words and phrases should, to the extent possible, be used in the sense of their ordinary meaning.'* The ALRC itself notes that the use of the term 'competent' is supported by at least one commentator and that it is the term used in place of 'efficiently' in the Hong Kong legislation.[264]

There is a real risk that using the term 'professional' in this context will be understood to import all the duties which apply at general law to professionals. This would not be an appropriate outcome. If the intent is to require providers to provide services competently then that is the term that should be used.

We also believe that there is no need to impose an obligation to act honestly. It is difficult to conceive how a financial services provider could provide a financial service fairly and with skill and competence and yet act dishonestly. Commissioner Hayne did not identify acting honestly as one of the six norms of conduct which apply to financial services conduct, presumably on the basis that it is implicit in the other norms identified.

---

[256] See section 5.1(a) above.
[257] ALRC Interim Report A, proposal A20 and [13.64].
[258] Corporations Act, s 912A(1)(a); GICOP, [21].
[259] Final FSRC Report, vol 1, p 8 - 9.
[260] Corporations Act, s 912A(1)(e) - (f).
[261] ALRC Interim Report A, proposal A20.
[262] *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170, per O'Bryan J at [426].
[263] ALRC Interim Report, [13.68].
[264] As above, referring to Latimer P, 'Providing Financial Services "Efficiently, Honestly and Fairly"' (2006) 24(6) *Company and Securities Law Journal* 362, 373

It is also worth noting that there is a separate prohibition on engaging in dishonest conduct in relation to a financial product or financial service,[265] making dishonest conduct an offence[266] subject to a penalty of up to 15 years imprisonment.[267] There is no need to impose this obligation twice.

(g) Consumer protections

The fairness obligations discussed above are supported by key consumer protection measures. These measures all reflect notions of 'fair play' in dealings with consumers. Insurers (along with other businesses) should not engage in unconscionable, misleading or deceptive conduct or the other conduct prohibited in Subdivision D of Division 2 of Part 2 of the ASIC Act and are entitled to expect the services they receive meet the requirements of the implied warranty in s 12ED of the ASIC Act.

It is reasonable and appropriate for insurers to be subject to these measures and for them to be contained in a statute that applies to all financial service providers.

The difficulty with these measures is that they are duplicated, sometimes in slightly different forms, across up to three different pieces of legislation. This is demonstrated in the table in Appendix 2 of this Report. As that table demonstrates, the ASIC Act, Corporations Act and the ACL contain similar consumer protection measures in the form of prohibitions against unconscionable, dishonest, misleading or deceptive conduct or statements as well as prohibitions on certain conduct like bait advertising and referral selling.

While there have been some efforts to ensure no overlap between the various provisions, some overlap does exist. For example, misleading and deceptive conduct by an insurer relating to a financial service will breach both s 12DA of the ASIC Act and s 1041H of the Corporations Act. Although such conduct would not breach the ACL (because it relates to financial services), the existence of those regimes adds to the complexity and confusion of the regulatory regime applying to the insurance sector. Insurers will be subject to the ACL prohibition when they engage in conduct that does not relate to financial services. Multiple regimes achieving similar or identical ends adds cost by increasing training costs and the level of expertise and time required to advise consumers and industry participants on consumer remedies.

The overlap between the ASIC Act and Corporations Act consumer protection measures also means that the same conduct can give rise to multiple offences.

It would be appropriate for the ACL to live up to its name as the single source of truth for all consumer protection measures. Each State and Territory has applied the ACL as a law of its own jurisdiction and therefore, it is enforced by State and Territory consumer agencies as State and Territory laws. Accordingly, there are two layers of enforcement of the ACL: the ACCC and State and Territory consumer agencies. Further, the ACL is integrated into each State and Territory's Fair Trading Act, meaning that some States and Territories may have additional consumer protections. Using the NSW *Fair Trading Act 1987* as an example, s 47A imposes a number of disclosure obligations on both businesses and intermediaries including:

- Businesses must disclose terms or conditions of contracts that substantially prejudice the consumer including terms which:
  - exclude the liability of the supplier;
  - provide that the consumer is liable for damage to delivered goods;
  - permit the supplier to provide data about the consumer, or data provided by the consumer, to a third party in a form that may enable the consumer to be identifiable by the third party; or
  - require the consumer to pay an exit fee, a balloon payment, or other similar payment.

- Intermediaries must disclose if they have commission or referral arrangements with another supplier.

[265] Corporations Act, s 1041G.
[266] Corporations Act, s 1311.
[267] Corporations Act, sch 3.

This disclosure obligation applies to financial services and is not found in the ACL. NSW Fair Trading notes that while businesses and intermediaries may have other obligations in accordance with other legislation, these obligations will operate concurrently.[268]

This example demonstrates the potential for additional and potentially inconsistent obligations to arise under State and Territory regimes. This is in addition to the overlaps between the ASIC Act and Corporations Act.

There are therefore multiple enforcement layers and the risk of double punishment which could be removed by consolidating the consumer protection provisions in the ACL. The ACL should then be the sole source of consumer protection laws applying to financial services and should not be supplemented by State or Territory regimes.

This conclusion is consistent with the ALRC proposals. The ALRC recognises that the overlapping prohibitions on unconscionable conduct as well as conduct or representations that are false, misleading or deceptive contribute to unnecessary complexity.[269] Therefore, in accordance with the principle that *'terminology should be used consistently to reflect the same or similar concepts'*, the ALRC proposes to consolidate these prohibitions into a single provision. It is true that the ALRC proposes that this provision be s 12CB of the ASIC Act for unconscionable conduct and another provision for conduct or representations that are false, misleading or deceptive.[270] However, the substance of the ALRC's proposal is consistent with this Report's recommendation.

(h) Regulating consumer protections

A question remains whether there should be a single regulator with authority to enforce the ACL, presumably the ACCC. However, there is no particular requirement for a single regulator to be responsible for enforcing a piece of legislation. For example, ASIC and APRA share enforcement responsibilities for the Insurance Act (although APRA is responsible for all but one section of the Insurance Act).[271] This is done on a much greater scale in the *Superannuation Industry (Supervision) Act 1993* (Cth) which is administered not only by both APRA and ASIC but also by the Commissioner of Taxation[272] and in some cases joint responsibility is given to both APRA and ASIC to administer particular provisions generally[273] or to all three regulators depending on the nature of the obligation or fund.[274]

It would therefore be possible to divide responsibility for the ACL between the ACCC and ASIC or any other financial services regulator based on the nature of the services provided.

There are arguments for and against having a separate financial services regulator wholly responsible for regulating the conduct of financial services providers.

An important criticism of the desire to have a separate financial services regulator wholly responsible for regulating conduct of financial service providers is that consumer protection should be administered on an economy-wide basis. The key benefit of a single economy-wide regulator that is given the authority to regulate an entire policy subject, such as consumer protection, is that it can ensure continuity of consumer protection regulation across multiples industries, ultimately achieving competitive impartiality.[275] When this occurs, regulations are taken on equally by all relevant industries so that regulation does not create economic distortions by favouring some sectors over others and preventing an uneven distribution of resources across industries. Conversely, when there are sector specific regulators, there is a danger that regulation will not be consistent, and inevitable differences in regulation will distort economic and commercial choices.[276]

Another perspective is that where numerous regulators exist, each with specific regulatory responsibilities for a particular sector of the economy, each regulator is more susceptible to industry lobbying and

[268] NSW Fair Trading, *New disclosure obligations for NSW businesses*, https://www.fairtrading.nsw.gov.au/resource-library/publications/new-disclosure-obligations-for-nsw-businesses, (accessed on 3 June 2022).
[269] ALRC Interim Report A, p 530.
[270] As above, proposals A22 and A23.
[271] Insurance Act, s 8.
[272] *Superannuation Industry (Supervision) Act 1993* (Cth), s 5-6.
[273] For example, s 29JCA which deals with false representation about RSE status: s 6(1), item 4.
[274] For example, Part 3 which deals with operating standards: s 6(1), item 7.
[275] Hanratty P, *The Wallis Report on the Australian Financial System: Summary and Critique*, 23 June 1997, p 9.
[276] As above, p 23.

pressure.[277] The narrow focus of a specialised regulator's work, the corresponding focused industry opposition to it, and its limited ability to generate political support in other areas of the political economy, make it vulnerable to 'capture' by the industry.[278] This scenario could ultimately render the standards of regulation less rigorous and demanding than for the rest of the economy.

A counter argument to an economy-wide single regulator is the risk of deficiency in resources and specialised knowledge. There is evidence that the volume of regulations per year is rapidly increasing and the pressure on economy-wide regulators has intensified to the point where some are stretched for resources.[279] Having specialised regulators would not only help mitigate the pressures felt by economy-wide regulators, but allow for clearer mandates to be administered by a body with specialised knowledge about particular industries which should ensure greater efficiency.

Having a single regulator responsible for the enforcement of the ACL simplifies the regime for consumers and ensures greater consistency in approach in administration, particularly where similar conduct by the same provider may otherwise fall under the auspices of two different regulators.

Nevertheless, it is more consistent with the twin peaks model of regulation of the financial sector for there to be a single financial services conduct regulator with full responsibility for administering consumer protection laws for financial service providers.[280]

(i) Recommendations

We therefore make the following recommendations relating to fairness obligations and consumer protection measures.

Recommendation 10	Impose a fairness obligation (i.e. duty to act fairly) on financial service providers, including insurers and insurance intermediaries, that would apply to all dealings with consumers and small businesses (as defined – see sections 5.2(a) and 5.2(b) below) – i.e. it should not be limited to the financial services covered by an AFSL. This duty would only apply to dealings which relate to the provision of financial services and products – e.g. it would not apply to dealings with employees or shareholders which would continue to be subject to the specific duties that apply in those contexts.
Recommendation 11	As a consequence of the above recommendation: 11.1 remove the licensing obligation to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly in s 912A(1)(a) of the Corporations Act; 11.2 replace the duty of utmost good faith with the duty to act fairly for retail and small business insurance (the duty of utmost good faith would continue to apply to other commercial insurance and to the conduct of consumers when making a claim); 11.3 exclude insurance contracts from the operation of the UCT provisions in Subdivision BA of Division 2 of Part 2 of the ASIC Act.
Recommendation 12	Financial service providers including insurers and insurance intermediaries should be required to provide services to consumers and small businesses with skill and competence.
Recommendation 13	All general consumer protection measures should be in one place. One approach could be to repeal Part 2 of the ASIC Act and making all financial service providers subject to the ACL (subject to the exclusion of insurance contracts from Part 2-3 of the ACL consistently with Recommendation 11). The Conduct Regulator could then be responsible for enforcing the ACL in relation to financial services and products, including general insurance. State and Territory consumer protection laws should not apply to financial services.

---

[277] As above, p 23.
[278] As above, p 23.
[279] ACCC, Submission to the Productivity Commission, *Study into Consumer Law Enforcement and Administration* (August 2016), p 10.
[280] *Financial System Inquiry Final Report,* March 1997, [7.2.4].

Design solution

The above recommendations are consistent with the regulatory design principles proposed in section 6.2 of this Report which propose a principle to act fairly which is supplemented by Rules made by the Conduct Regulator. To the extent that specific obligations need to be imposed to ensure providers meet the requirements of 'fairness', 'utmost good faith' or 'competence', that can be done by the Conduct Regulator in the Rules after appropriate consultation with industry and consumer groups. This should also ensure that a one-size-fits-all approach is not taken and Rules can be applied and tailored to specific situations as appropriate.

5.2 Inconsistent terms and definitions

The lack of consistency and structure in the use of definitions and terms across corporations and financial services legislation has long been the subject of criticism.[281] A key issue is the use of different terms to capture similar or same concepts which has given rise to complexity and inconsistency in the application of the law.

Not only does the inconsistent use of terms and definitions generate confusion when determining the application of legislative requirements, it also creates inconsistency in the application of the law.

As Justice Graham in the Federal Court notes, spreading the definitions and provisions across various legislative sources creates unnecessary complexity in the law, requiring *'hours of study, reference to numerous sections and regulations, which themselves make no sense without reference to numerous definitions, often shrouded in obfuscation, and, needless to say, strewn throughout the Corporations Act and the Corporations Regulations'*.[282]

This problem is articulated by Godwin, Brand and Langford:

> *it appears to be generally settled that the use of complex definitions and overlapping provisions within one piece of legislation and across two or more pieces of legislation adds to the level of complexity in legislation*.[283]

The authors also explore how this issue has been the subject of judicial comment in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* where Rares J considers this issue in the context of the *'myriad of complex definitions of what is a financial product or a financial service'*. Upon analysing the various terms, Rares J comments:

> *Why is there a difference? Why does a court have to waste its time wading through this legislative porridge to work out which one or ones of these provisions apply even though it is likely that the end result will be the same?*[284]

The use of inconsistent definitions and terms means that significant effort must be expended to interpret them and this contributes to the overall complexity of the legislation.

Furthermore, it directly impacts consumers as the different terms and definitions result in the inconsistent application of consumer protection provisions. An example of this is the inconsistent usage of the terms 'retail client' and 'consumer' as explored below.

[281] Commentary about legislative complexity due to the use of complex definitions and overlapping provisions is set out in Godwin A, Brand V and Teele Langford R, 'Legislative Design - Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280, 291.
[282] *Ku v Song* (2007) 63 ACSR 661, [175].
[283] Godwin A, Brand V and Teele Langford R, 'Legislative Design - Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280, 291.
[284] [2012] FCA 1028, [948].

(a) Case study – retail clients and consumers

The terms 'retail client' and consumer' are used across financial services legislation, including legislation concerning general insurance, to identify people who require consumer protection. The table below summarises the different terms the law uses:

Table 2

Legislative source	Term
Corporations Act	'Retail client'
ASIC Act	'Consumer' 'Consumer contract'
Insurance Contracts Act	'Consumer insurance contract' 'Prescribed contract'
AFCA	'Consumer' 'Eligible person'

We discuss the role of the term 'prescribed contract' in section 5.3(d) of this Report.

(i) Corporations Act – Retail clients

The terms 'retail client' and 'wholesale client' were introduced by the Financial Services Reform Act in response to the recommendations of the 1997 Financial System Inquiry (Wallis Inquiry). These terms were introduced so that consumer protection provisions would only apply to 'retail clients' as it was *'recognised that wholesale clients do not require the same level of protection, as they are better informed and better able to assess the risks involved in financial transactions'*.[285]

'Retail client' is defined in s 761G of the Corporations Act and its meaning differs according to the financial product it relates to (i.e. general insurance product, superannuation product, retirement savings account or other).

In relation to a general insurance product, a person is a 'retail client' if they are an individual or small business and they receive a financial service in relation to certain types of listed general insurance products defined in the regulations.[286] These categories of general insurance products replicate the categories of insurance contracts which are subject to the standard cover provisions in the Insurance Contracts Act with identical definitions for most of the general insurance products,[287] and the addition of two new categories: personal and domestic property insurance[288] and medical indemnity insurance.[289] The 'retail client' definition for general insurance therefore depends on the type of product purchased and apart from medical indemnity insurance, reflects the categories of policies *'regarded by industry as "consumer" policies'.*[290] The following explanation is provided for this:

> *General insurance is treated differently from other financial products for two reasons. First, it is difficult to identify a meaningful monetary limit for insurance, as either the premium or sum insured could be used. Secondly, if the premium were relied upon, few (if any) policies would exceed the product-value test outlined below, with the result that all purchasers of general insurance policies would be retail clients. It is not desirable from a policy perspective to capture wholesale products, such as marine insurance and property insurance for businesses, which are also general insurance products. Such an approach would also be inconsistent with the concept of consumer insurance policies in existing insurance legislation.*[291]

---

[285] Revised Explanatory Memorandum to Financial Services Reform Bill, [2.25].
[286] Corporations Act, s 761G(5).
[287] The exceptions are 'home building' and 'travel insurance'. These terms have substantially the same meaning under the Corporations Regulations and the Insurance Contracts Regulations but with additional inclusions or exclusions.
[288] Revised Explanatory Memorandum to Financial Services Reform Bill, [6.23].
[289] Corporations Regulations, reg 7.1.17A.
[290] Revised Explanatory Memorandum to Financial Services Reform Bill, [2.28].
[291] As above.

The following explanation was provided for the inclusion of medical indemnity insurance as a retail product:

> *Traditionally, medical indemnity cover has been provided by Medical Defence Organisations (MDOs) in the form of discretionary cover, which would generally have attracted the 'retail client' obligations under the FSRA, and the two-year transition period. Under the Medical Indemnity (Prudential Supervision and Product Standards) Act 2003 providers of medical indemnity cover must, from 1 July 2003, provide such cover under contracts of insurance. In the absence of the proposed regulations, this legislation would mean that the FSRA obligations attach to such contracts immediately on and from 1 July 2003. It would also mean that medical indemnity cover would not attract the increased consumer protections available under the FSRA.*[292]

In a sense a product based definition applies to superannuation and retirement savings accounts as well, as all investors in those products are treated as retail clients without regard to their personal circumstances.[293]

However, for other types of financial products, the tests for determining whether a client is a retail client depend on the client's characteristics rather than the nature of the product. There are five limbs to this general 'retail client' definition:

- a product-value test, where a person is a retail client if they purchase a financial product, or a financial service in relation to that product, and the value of the product is $500,000 or less;[294]
- a small business test, where a business that employs less than 20 people, or 100 people if the business includes the manufacture of goods, is a small business and therefore, a 'retail client';[295]
- an individual wealth test, where a person is a retail client if their net assets is worth $2.5 million or less or their gross income is $250,000 per annum or less for each of the last two financial years, as certified by an accountant;[296]
- the person is not a professional investor;[297] and
- the person is not a sophisticated investor, i.e. a licensee provides a service to a person they certify has sufficient experience to be treated as a wholesale client.[298]

Retail clients receive important protections that include, but are not limited to:

- disclosure (e.g. retail clients must receive a PDS, FSG and/or SOA depending on the financial product or service they are provided with);
- the financial services provider they deal with must be licensed;
- restrictions on how financial products and services are promoted and advertised to them;
- access to dispute resolution processes; and
- access to compensation arrangements.

(ii) ASIC Act – Consumers and consumer contracts

Unlike the Corporations Act, the ASIC Act uses the term 'consumer' to identify people to whom consumer protection measures apply.

There are a number of alternative limbs to the definition of 'consumer' in the ASIC Act. Under s 12BC of the ASIC Act, a person is taken to acquire a financial service as a consumer if:

- the price of the service does not exceed $100,000;[299] or
- the service is of a kind ordinarily acquired for personal, domestic or household use or consumption; or

---

[292] Explanatory Statement to *Corporations Amendment Regulations 2003 (No. 5) 2003* (Cth).
[293] Corporations Act, s 761G(6).
[294] Corporations Act, s 761G(7)(a); Corporations Regulations, regs 7.1.18(2), 7.1.19(2), 7.1.20(2), 7.1.22(2), 7.1.22A(2), 7.1.23(2), 7.1.24(2) and 7.1.25(2).
[295] Corporations Act, s 761G(7)(b) and (12).
[296] Corporations Act, s 761G(7)(c); Corporations Regulations, reg 7.1.28.
[297] Corporations Act, s 9 and 761G(7)(d).
[298] Corporations Act, s 761GA.
[299] ASIC Regulations, reg 2DA.

- the service is acquired for use or consumption in connection with a small business and if the price of the service exceeds $100,000,[300] the service is of a kind ordinarily acquired for business use or consumption.[301]

The ASIC Act uses the different concept of 'consumer contract' to identify contracts that are subject to the UCT regime. One might expect that a consumer contract would be a contract acquired by a consumer as defined in s 12BC of the ASIC Act. However, that is not the case. 'Consumer contract' is defined in s 12BF(3) as *'a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption.'* This definition has some key differences to the ASIC Act definition of 'consumer':

- it only applies to individuals – 'consumers' can include other types of entities if they acquire services ordinarily acquired for personal, domestic or household use or consumption;
- it is a subjective test because it depends on the actual purpose of the acquisition – the definition of 'consumer' is an objective test because among other things it depends on the ordinary purpose of the acquisition of the service and not the individual consumer's purpose;
- contracts are not automatically deemed to be consumer contracts if the price is less than $100,000; and
- it does not apply to small businesses (noting that the UCT regime applies to 'small business contracts' which is separately defined – see section 5.2(b) of this Report below).

Like retail clients, people classified as consumers and contracts classified as consumer contracts receive important protections that include:

- voiding unfair contract terms (applicable to insurance contracts entered into, renewed or varied from 5 April 2021);
- prohibitions on providers inducing an acquisition of a service by providing a benefit for referrals;[302]
- prohibitions on harassment or coercion in connection with financial services;[303]
- caps on commissions for add-on risk products supplied in connection with motor vehicles;[304]
- prohibition on third parties selling add-on insurance products to consumers;[305]
- overriding the effect of any governing law term of the contract;[306]
- warranties in relation to the supply of financial services.[307]

(iii) Insurance Contracts Act – Consumer insurance contracts

The Insurance Contracts Act uses a different term again – 'consumer insurance contract' – to identify contracts subject to the new duty to take reasonable care not to make a misrepresentation. This duty was recently introduced by the Hayne Response Act in response to the findings of the Financial Services Royal Commission. Specifically, Commissioner Hayne found that the duty of disclosure imposed on insureds did not *'recognise the breadth and depth of the gap between what a consumer knows and what an insurer knows is relevant. That is, the duty fails to recognise the extent of the information asymmetry between a consumer and an insurer'.*[308] Therefore, Commissioner Hayne recommended the replacement of this duty for consumer contracts of insurance with a duty to take reasonable care not to make a misrepresentation. He recognised that the modified form of this duty which applied to 'eligible contracts of insurance'[309] did not have the same concerns but stated that his recommended duty was *'substantially less complex than the modified forms of duty contained in sections 21A and 21B of the Insurance Contracts Act.'*[310]

---

[300] As above.
[301] This aspect of the definition is itself unnecessarily complex when it seems what is intended is simply that the service is acquired in connection with a small business.
[302] ASIC Act, s 12DH.
[303] ASIC Act, s 12DJ.
[304] ASIC Act, s 12DMC.
[305] ASIC Act, s 12DQ. Interestingly, the sale of add-on insurance by a person who supplies the principal product is not limited to consumers.
[306] ASIC Act, s 12EA.
[307] ASIC Act, s 12ED.
[308] Final FSRC Report, vol 1, p 297.
[309] This term was removed from the Insurance Contracts Act by the Hayne Response Act.
[310] Final FSRC Report, vol 1, p 300.

Commissioner Hayne introduced the concept of 'consumer insurance contract' to identify the types of contracts which should be subject to the new duty. While he did not define it, he based the new duty on the duty which applies in the UK to 'consumer insurance contracts' which are defined there as a contract between an insurer and *'an individual who enters into the contract wholly or mainly for purposes related to the individual's trade, business or profession'*.[311]

The UK definition is not adopted in the Hayne Response Act. Instead, the Government introduced a definition that is based on similar 'consumer' definitions in the ASIC Act.

'Consumer insurance contract' is defined in s 11AB(1) of the Insurance Contracts Act as a contract of insurance that is *'obtained wholly or predominantly for the personal, domestic or household purposes of the insured'.* This definition is said to be '*consistent with the definition of 'consumer contract' … in section 12BF(3) of the ASIC Act.*'[312] However, the definition is not identical. Unlike the ASIC Act definition, it does not refer to individuals, although it is likely to have the same effect. There is no other explanation for the adoption of this definition and in particular why this definition has been chosen rather than the retail client definition in the Corporations Act which has a similar effect to the concept of 'eligible contracts of insurance' repealed by the Hayne Response Act and the concept of 'prescribed contract' which still applies in the Insurance Contracts Act (see section 5.3(d) of this Report).[313] There is simply an acknowledgement that consumer insurance contracts *'are likely to include contracts previously classified as eligible contracts of insurance'.*[314]

(iv) Inconsistent definitions

The following table shows the inconsistency of the various concepts developed to determine when consumer protection measures should apply.

Table 3

Concept	**Type of contract**	**Personal, domestic or household use or consumption** *ordinarily acquired for*	**Personal, domestic or household use or consumption** *wholly or predominantly for*	**Individual**	**Price does not exceed $100,000**	**Use or consumption in connection with a small business**
Retail client	✓[315]	✗	✗	✗	✗	✗
Consumer	✗	✓	✗	✗	✓	✓
Consumer contract	✗	✗	✓	✓	✗	✗
Consumer insurance contract	✗	✗	✓	✗	✗	✗
Prescribed contract	✓[316]	✗	✗	✗	✗	✗

All of these terms have the same purpose: to identify when additional protections should apply to interactions between insurers and their customers. There is no logic in having different standards apply based on arbitrary differences in definitions. It creates complexity without any corresponding benefit for either consumers or insurers. It does in fact mean that some 'consumers' will not receive some consumer protections that apply to other 'consumers'.

---

[311] As above, p 299, footnote 166, citing *Consumer Insurance (Disclosure and Representations) Act 2012* (UK), s 1.
[312] Explanatory Memorandum to Hayne Response Bill, [2.39].
[313] Insurance Contracts Act, s 35. The concept of 'prescribed contracts' and standard cover is discussed in section 5.3(d) of this report.
[314] Explanatory Memorandum to Hayne Response Bill, [2.41].
[315] Includes personal and domestic property insurance medical indemnity insurance.
[316] Does not include personal and domestic property insurance medical indemnity insurance.

The ALRC has also questioned the operation of the retail client definition in the Corporations Act and notes the inconsistency with the definitions of 'consumer' in the ASIC Act and states that achieving greater alignment of the definitions would be desirable.[317]

The question then is what term and definition would be most appropriate for the general insurance industry.

We believe that the best term is 'consumer'. While 'retail client' is a familiar concept in the financial services licensing and disclosure regimes, it is not particularly relevant to general insurance which has traditionally differentiated between domestic and commercial insurance. 'Consumer' is a term which we believe is widely understood in the community to connote the general public when purchasing goods and services and it is the term currently used in the ACL to identify those who are subject to additional consumer protection.

However, we do believe that the definition of 'retail client' is the best approach for defining 'consumer'. The benefit of an approach which defines 'consumer' by reference to the type of insurance they acquire is that it provides clarity and certainty to both consumers and industry. This has the same broad effect as the approach taken in the ASIC Act definition of 'consumer' which provides that it includes a service ordinarily acquired by a consumer. However, although the ASIC Act definition is an objective test, it leaves open the question of what products are ordinarily acquired by consumers, which the 'retail client' definition answers. To the extent that the types of insurance contracts that should benefit from consumer protections may change in the future, the definition should provide the ability to expand the range of consumer products in the Rules.

We do not favour the approach taken in the definitions of 'consumer contract' or 'consumer insurance contract' as the test is wholly subjective and requires insurers to be satisfied of the purpose for which their customer has purchased the insurance. Given the nature of the market, we believe it is simpler for all concerned to treat products which provide certain kinds of cover as being issued to 'consumers'.

The ALRC has asked whether a different approach should be adopted that would involve removing the special general insurance definition of 'retail client' and instead defining a retail client as any person who does not fall within one of the following categories:

- professional investor;
- sophisticated investor; or
- a business other than a small business.[318]

The ALRC notes that special provision has been made for general insurance because *'it is difficult to identify a meaningful monetary limit for insurance'*[319] but does not provide any justification for suggesting removing that part of the definition. It appears to be sacrificed to the altar of simplification. The effect of the ALRC's suggestion would be that all general insurance would be treated as being provided to retail clients unless it is provided to a medium or large business. As noted above, we believe that the simpler approach for general insurance is to apply the definition to specified types of products and for all individual clients of those types of products to be treated as retail clients unless the Rules provide otherwise.

Recommendation 14	Replace concepts of 'retail client', 'consumer', 'consumer contract' and 'consumer insurance contract' in the Corporations Act, ASIC Act and Insurance Contracts Act with one concept and require this term be used in the FSA, regulations, Rules and statutory instruments where consumer protection measures are imposed.

We recommend the following term and definition be used for general insurance products:

> ***consumer** means an individual who purchases an insurance product which provides one or more of the following types of insurance cover:*

[317] ALRC Interim Report A, [12.77] - [12.83].
[318] This is the effect of the proposal in Question A16: ALRC Interim Report A, p 480.
[319] ALRC Interim Report A, [12.42] citing the Revised Explanatory Memorandum to Financial Services Reform Bill, [2.26].

(a) motor vehicle insurance as currently defined in Corporations Regulation 7.1.11 in respect of [specify number] of vehicles;

(b) home building insurance as currently defined in Corporations Regulation 7.1.12 in respect of [specify number] of properties;

(c) home contents insurance as currently defined in Corporations Regulation 7.1.13 in respect of [specify number] of properties;

(d) sickness and accident insurance as currently defined in Corporations Regulation 7.1.14 in respect of the insured or a relative (as currently defined in Corporations Regulation 7.1.17) of the insured or a person with whom the insured resides;

(e) consumer credit insurance as currently defined in Corporations Regulation 7.1.15 in respect of the insured or a relative (as currently defined in Corporations Regulation 7.1.17) of the insured or a person with whom the insured resides;

(f) travel insurance as currently defined in Corporations Regulation 7.1.16 in respect of the insured or a relative (as currently defined in Corporations Regulation 7.1.17) of the insured or a person with whom the insured resides;

(g) personal or domestic property insurance as currently defined in Corporations Regulation 7.1.17;

(h) an insurance product acquired by a small business;

(i) insurance cover provided by an insurance product specified in the Rules where [the Conduct Regulator] has determined that the insurance product is ordinarily acquired for personal, domestic or household use or consumption.

This definition is not identical to the definition of 'retail client' in the Corporations Act for the following reasons:

- We have contemplated specifying a number of vehicles and properties in the first three categories. We propose defining by reference to the number of insured properties to easily identify whether a person falls within the definition of 'consumer'. Where a person is insuring multiple vehicles or properties, this is likely to be indicative of financial wealth, sophistication or business conduct, making it less likely that this person requires consumer protection. For example, this ensures that fleet insurance is not caught up in the definition where taken out by an individual. Consistent with our design principles, the Conduct Regulator should undertake consultation with industry and stakeholders to identify the number of vehicles and properties that are appropriate for the 'consumer' definition to apply. This will ensure that the knowledge and experience of industry is used to inform the Conduct Regulator in identifying those that require consumer protection.
- We have introduced the concept of insuring relatives and people the insured resides with in the sickness and accident insurance and consumer credit insurance categories on the basis that where a person is not insuring a relative the insurance is unlikely to be taken out for personal, domestic or household purposes. This is consistent with the approach currently taken for travel insurance.
- We have not included medical indemnity insurance. There does not seem to be any need to provide consumer protections for medical indemnity insurance unless the purchaser is a small business in which case they should be protected as a small business.
- We propose extending the definition to include small businesses. We have discussed the definitions of 'small business' below.

Recommendation 15	Ensure consistent use of terminology to capture the same concepts to reduce complexity and confusion when identifying the application of regulatory obligations. All financial services legislation and legislative instruments should use the same terms and definitions for the same or similar concepts. This requirement should have overriding effect. In particular, one definition of 'consumer' should be used across all financial services legislation and legislative instruments.

(b) Case study – small business

Similar concerns arise in relation to the term 'small business' which is defined differently both within and between different statutes.

As outlined above in relation to the definitions of 'retail client' and 'consumer', the concept of 'small business' is included and defined as part of those terms. Like 'retail client' and 'consumer', the 'small business' term is intended to identify businesses that require consumer protection. The table below summarises how 'small business' is inconsistently defined.

Table 4

Legislative source	Term	Definition
Corporations Act[320] ASIC Act[321] GICOP[322]	'Small business'	A business that employs less than 20 people or 100 people if the business includes the manufacture of goods.
ASIC Act	'Small business contract'	At least one party to the contract is a business that employs less than 20 people when the contract is entered into and either the upfront price payable under the contract does not exceed: • $300,000; or • $1,000,000 if the contract has a duration of more than 12 months.[323]
AFCA Rules	'Small business'	A primary producer, meaning a primary production business within the meaning of s 995.1(1) of the *Income Tax Assessment Act 1997* (Cth), or other business that had less than 100 employees at the time of the act or omission by the financial firm that gave rise to the complaint.[324]
	'Small business insurance product'	A general insurance policy other than an excluded product where the complaint is between a small business and a general insurance broker. For other types of complaints involving a small business, it is a policy or part of a policy that provides certain types of insurance cover.[325]

The term 'small business' was introduced in the Corporations Act to ensure that businesses other than small businesses are treated as wholesale clients in relation to financial products or services provided for use in connection with that business. Therefore, small businesses are treated like individual retail clients in the Corporations Act and receive the same consumer protections.

'Small business' is also given the same meaning in the ASIC Act as it was intended to replicate the definition of 'small business' contained in Corporations Act.[326] The term mirrors its purpose in the Corporations Act as a 'small business' falls within the definition of a 'consumer' in the ASIC Act, meaning that small businesses also receive consumer protections.

However, issues of inconsistency arise when observing how 'small business' is defined in relation to a 'small business contract' in the ASIC Act for the purposes of the UCT regime. A 'small business contract' is limited to businesses with fewer employees (i.e. it does not contain an exception for manufacturing businesses) and the definition also includes transaction value thresholds. The extension of the UCT

320 Corporations Act, s 761G(12).
321 ASIC Act, s 12BC(2).
322 GICOP, Pt 16.
323 ASIC Act, s 12BF(4).
324 AFCA Rules, s E.1.
325 AFCA Rules, s E.1.
326 *Revised Explanatory Memorandum to Financial Services Reform (Consequential Provisions) Bill 2001* (Cth), [3.5].

regime to small businesses recognises that small businesses, like consumers, *'are vulnerable to unfair terms in standard form contracts as they are often offered contracts on a 'take it or leave it' basis and lack the resources to understand and negotiate contract terms'.*[327] However, defining the term 'small business contract' in a different manner to 'small business' means that some businesses will not have the benefit of all the consumer protection measures in the ASIC Act.

This risk is compounded by the AFCA Rules which provide a different definition again which adds confusion and complexity to the financial services regulatory environment and makes it difficult for small businesses to determine their rights.

It is also worth noting that none of the small business definitions are founded on a sound basis. They all rely on the number of employees. The difficulty is that these regimes are entity-based. There is no requirement to consider numbers of employees of related or associated entities. Furthermore, it means that a business that does not have employees but relies on contractors will technically always be treated as retail clients or consumers and other parties, such as partners and directors, are not included in the test. It is also a historical anomaly that manufacturing businesses are treated differently from other businesses in the ASIC Act, the Corporations Act and the GICOP (but not in the definition of 'small business contract' in the ASIC Act – 20 employees for all businesses – or in the AFCA Rules – 100 employees for all businesses). It is also notable that the AFCA Rules provide that primary producers are small businesses no matter the size of the business.

The small business threshold for the UCT regime will change by increasing the number of employees to 100 employees and introducing an alternative annual turnover threshold of less than $10 million.[328] There is no indication that any consideration is being given to making this change to other definitions of 'small business'.

The ALRC has also identified the inconsistencies in the definition of 'small business' and suggested that *'[c]onsideration should … be given to whether the definition should be standardised between the Corporations Act and the ASIC Act.'*[329]

Recommendation 16	Apply one definition of 'small business' in financial services legislation and legislative instruments and require it to be used consistently.

We recommend the following definition of 'small business' be used:

> *A business is a **small business** unless the total gross annual revenue of the business and any other businesses carried on by the person who carries on the business or any related body corporate or associate of that person is at least $10 million as certified by a qualified accountant within two years before the product or service is provided.*

We believe gross revenue is a more useful determinant of whether a business should be treated as a small business or not. The requirement for it to be certified by a qualified accountant mirrors the definition of 'retail client' for non-superannuation investments. While we are not particularly wedded to the threshold of $10 million, we note that it is consistent with paragraph (e) of the definition of 'professional investor' in the Corporations Act, although we acknowledge that refers to assets rather than revenue. It is also consistent with the Federal Government's proposal for an alternative annual turnover test of less than $10 million (see above).

(c) Solutions

To address the issue of inconsistent terminology, the ALRC has recommended focusing on the unnecessary complexity caused by defined terms with more than one meaning and simplifying these provisions.[330] The Government has also proposed to address complexity in the design of definitions before the ALRC finalises its review under the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022*. The proposals include removing defined terms that are

---

[327] *Explanatory Memorandum to Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* (Cth), [1.2].
[328] *Treasury Laws Amendment (More Competition, Better Prices) Bill 2022* received Royal Assent on 9 November 2022 and will commence (in relation to the UCT regime) on 10 November 2023.
[329] ALRC Interim Report A, [12.91].
[330] ALRC Interim Report B, recommendation 17.f.

not subsequently used or used only in one section of the Corporations Act or the Corporations Regulations.

Our design principles also address the issues raised by inconsistent terms and definitions. One key element is to move financial services regulation into a separate statute (see section 6.2(b) of this Report). This would involve:

- consolidating the consumer protection provisions in Chapter 7 of the Corporations Act and the ASIC Act into the new Act; and
- moving the Insurance Contracts Act into the new Act as a separate Chapter.

This would ensure that different terms and definitions are not scattered across legislation. It also facilitates greater oversight of the use of terms and definitions as they are located in one piece of legislation for consistent usage, including the application of consumer protection provisions.

Key terms that are central to the principles based legislation should be required to be used and applied consistently across financial services legislation, including the Rules.

Principles-based legislation (section 6.2(a) of this Report) should also ensure that definitions are not used in the primary legislation as a means of 'switching on and off' substantive obligations which is a flaw with the current use of definitions in the Corporations Act identified by the ALRC.[331] The ALRC has proposed a set of principles as to when to define[332] which is consistent with the principles-based approach we have suggested.

We propose that regulations should be used for the purpose of adjusting the boundaries of financial services regulation and consumer protection regulation (section 6.2(c) of this Report). This will require adjustments to definitions. Appropriate drafting conventions should be adopted to ensure that this is done in a manner which does not add complexity to the regime. For example, it may be appropriate for a regulation to entirely replace a particular definition so that it can be read in one place. However, where this occurs, the authorised copy of the primary legislation should refer to or incorporate the revised definition (making it clear that the source of the revised definition is the regulations).

5.3 Product disclosure

The Financial Services Reform Act introduced a financial product and service disclosure regime into the Corporations Act in 2002 following recommendations made by the Financial System Inquiry (Wallis Inquiry) to consolidate disclosure regulation which was undertaken by a variety of different statutes and agencies at that time. The disclosure regime aimed to make disclosure requirements for retail financial products and services consistent and comparable.[333] It remains to this day one of the primary measures intended to protect and empower consumers on the basis that more information should lead to better informed consumers and improved consumer outcomes. As noted in the Wallis Inquiry:

> *Disclosure regulation is at the core of any scheme to protect consumers as it allows them to exercise informed choice. However, it is the quality and usefulness of information which are important, not its quantity. Excessive or complex information can be counterproductive as it may confuse consumers and discourage them from using disclosure documents. Complex disclosure requirements also increase industry's compliance costs which are ultimately borne by consumers.*[334]

However, the Corporations Act disclosure regime has evolved into an ineffective, complex and conflicting regime that is not operating as intended. This has long been acknowledged by industry, consumer bodies, regulators and the Government, with the Deputy Chair of ASIC stating that *'it's time to "call time" on disclosure as the default consumer protection'.*[335] It has also been the subject of various reviews and

---

[331] ALRC, '2. Preliminary Analysis', *Review Of The Legislative Framework For Corporations And Financial Services Regulation: Inquiry Approach*, 17 December 2020: https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/inquiry-approach/2-preliminary-analysis/.
[332] ALRC Interim Report A, p 15.
[333] *Financial System Inquiry Final Report,* March 1997, [7.3.2].
[334] As above.
[335] ASIC Deputy Chair Karen Chester, *ASIC Media Release 19-279: ASIC 'calls time' on disclosure reliance* (14 October 2019).

studies, with the Treasury most recently consulting on improving disclosure and consumer understanding of general insurance in 2019.[336]

The problems that have been identified in relation to the disclosure regime include:

- the fragmentation of the disclosure regime both within statutes and across different levels of the legislative hierarchy – the modifications, exceptions and additional requirements made by regulations, legislative instruments and regulatory guidance contribute significantly to the complexity of the regime and result in conflicting requirements;
- the numerous disclosure requirements and documents that are *'perceived by industry, government and consumer groups to be overly complex, lengthy and ineffective in enabling consumers to make informed choices at the point of sale'*;[337]
- the incorrect presumption that *'what is given to a consumer in writing will be read, and if read, will be understood'*;[338]
- its one size fits all approach with little consideration for how it operates in different parts of the financial sector – this is a particular problem for general insurance which is subject to significant conduct regulation outside the Corporations Act in the Insurance Contracts Act and the General Insurance Code;
- more recently, the introduction of additional disclosure requirements under State laws (e.g. under the *Fair Trading Act 1987* (NSW), businesses must disclose certain terms or conditions of contracts that substantially prejudice the customer[339] and intermediaries must disclose if they have commission or referral arrangements with another supplier[340]).

Reflecting on the insufficiency of the disclosure regime, ASIC Deputy Chair Karen Chester has stated that *'the over reliance on disclosure in some ways proved an enabler of the poor conduct and poor consumer outcomes revealed by the Financial Services Royal Commission'*.[341]

There is widespread consensus that the disclosure regime requires review and update not only to assist consumers to make better informed decisions about financial products and services by providing them with the information they need, in the form they need it and when they need it but also to:

- take into account the DDO regime[342] which imposes a new duty on product issuers to ensure the suitability of products for consumers and which therefore arguably changes the nature and timing of information requirements; and
- reflect new technologies and patterns of consumer behaviour.

Given the many challenges of interpreting, navigating and complying with the disclosure regime, we will only explore a few of the issues through the case studies below.

(a) Case study – disclosure documents

There are a multitude of disclosure documents that must be given to retail clients for general insurance products and these form an integral part of the disclosure regime. The disclosure documents are primarily mandated under Chapter 7 of the Corporations Act and supplemented by the disclosure requirements in the Insurance Contracts Act.

The following table summarises the documents that may be required for a general insurance product provided to a retail client.

Table 5

Document	Description	Required by
PDS / Policy wording	Provides information about the insurance product, including its terms, conditions, limits and exclusions.	Division 2 of Part 7.9 of the Corporations Act

[336] Treasury, *Disclosure In General Insurance: Improving Consumer Understanding,* Discussion Paper, January 2019.
[337] Insurance Council of Australia, *Too long; Didn't Read: Enhancing General Insurance Disclosure*, October 2015.
[338] Final FSRC Report, vol 1, p 174.
[339] *Fair Trading Act 1987* (NSW), s 47A.
[340] *Fair Trading Act 1987* (NSW), s 47B.
[341] ASIC Deputy Chair Karen Chester, *ASIC Media Release 19-279: ASIC 'calls time' on disclosure reliance*, 14 October 2019.
[342] Corporations Act, Pt 7.8A.

Key Facts Sheet	Provides key information in relation to home building and home contents insurance policies.	Division 4 of Part 4 of the Insurance Contracts Act
TMD	Provides information about the target market, distribution conditions and information relating to the review and monitoring of a financial product. ASIC does not consider it to be a consumer-facing disclosure document.[343]	Part 7.8A of the Corporations Act
FSG	Provides information about the financial services offered in relation to a general insurance product.	Division 2 of Part 7.7 of the Corporations Act
Statement of Advice	Provides information about personal advice given to a retail client – for sickness and accident and consumer credit insurance.	Division 3 of Part 7.7 of the Corporations Act
Cash Settlement Fact Sheet	Provides information about cash payments to settle part or all of a general insurance claim.	Division 3A of Part 7.7 of the Corporations Act
Transaction confirmation	Confirms details of transactions between an insurer and insured.	Section 1017F of the Corporations Act
Renewal notice	Informs the insured that their insurance policy is about to expire and whether the insurer will negotiate to renew or extend cover.	Section 58 of the Insurance Contracts Act
Cancellation notice	Informs the insured that the insurer proposes to cancel a contract of insurance.	Section 59 of the Insurance Contracts Act

Prescriptive requirements apply not only to the content of these documents but also to the circumstances in which they are given.

(b) Case study – PDS

There is considerable complexity and conflict within the PDS regime alone. The original intention underlying the introduction of the PDS regime was to *'provide consumers with sufficient information to make informed decisions in relation to the acquisition of financial products, including the ability to compare a range of products'*.[344] The regime was designed as a principles-based approach to disclosure obligations, *'however…over time the consistency of disclosure requirements has been eroded by the introduction of tailored requirements for specific products, persons, and circumstances through various means, resulting in a complex patchwork of regulatory requirements'*.[345] Informed decision-making is a central theme underlying the disclosure regime which is reflected in the legislation itself. In addition, the legislation requires PDSs (and FSGs and SOAs) to be *'worded and presented in a clear, concise and effective manner'*.[346] This requirement expresses the desired outcome from the disclosure regime.

However, the simple principle-based disclosure regime has been overlaid with a number of prescriptive requirements across various legislative sources, including the statute itself, regulations, legislative instruments and regulatory guidance, that expand, modify and provide exemptions from those requirements. There is also no identifiable principled basis on how these requirements are split across statute, delegated legislation and regulatory guidance.

---

[343] *ASIC Regulatory Guide 274: Product design and distribution obligations*, December 2020, [274.138].
[344] Revised Explanatory Memorandum to Financial Services Reform Bill, [14.18].
[345] ALRC Interim Report A, [9.20].
[346] Corporations Act, s 1013C(3).

This is clearly evidenced by the preliminary analysis of the legislative framework for PDSs that was undertaken by the ALRC in 2020.[347] The flowchart for the PDS regime shows numerous exclusions and exemptions from the PDS requirements across the Corporations Act and Corporations Regulations. In addition, the ALRC found 62 instruments listed as 'currently in operation' on the ASIC website as at 10 July 2020, that provided exemptions from the requirements of Part 7.9 of the Corporations Act, including 32 instruments that provided a general exemption from the disclosure requirements under Part 7.9.

For general insurance products, the modification of the PDS regime is significant as general insurance is subject to a tailored PDS regime. The tailored PDS regime removes the bulk of the general PDS content requirements to avoid duplication with the policy terms and conditions.[348]

The extract of the primary PDS provisions which apply to general insurance PDSs in Appendix 3 of this Report demonstrates the following:

- Significant tailoring of the PDS regime has been required, with key requirements being removed, including the general requirement in s 1013E that a PDS must contain any other information that might reasonably be expected to have a material influence on a retail client's decision whether to acquire the product.
- It is not possible to determine the content requirements for a general insurance PDS from the Corporations Act on its own. In fact, the most important requirement is found in the regulations, being the requirement for the PDS to include the terms and conditions of the policy document.[349] Ironically, this critical requirement for general insurance PDSs is not even numerically the first regulation dealing with general insurance PDSs in the Corporations Regulations, that honour goes to the regulation dealing with PDSs for unauthorised foreign insurers.[350] Those regulations are not even consecutive regulations – there are eight regulations between them, only one of which is specific to general insurance.[351]
- The amendments to the PDS regime demonstrate that it was not designed for general insurance products. As with many aspects of the financial services regime in the Corporations Act, it is a regime designed first for investment products and which general insurance products have had to be shoehorned into.

Not only does this create significant complexity when navigating through the PDS regime and interpreting its requirements, it also results in the production of a lengthy and complex document which is difficult for consumers to understand and costly to maintain. This issue was specifically highlighted by the Wallis Inquiry as, *'excessive or complex information can be counterproductive as it may confuse consumers and discourage them from using disclosure documents. Complex disclosure requirements also increase industry's compliance costs which are ultimately borne by consumers'*.[352]

The Senate Economics References Committee inquiry into the general insurance industry (**Senate GI Inquiry**) described this as an example of information asymmetry where the consumer has *'access to relevant information, but not in a usable format; for example, it may be too complex for the consumer to understand'*.[353] It found that *'information asymmetry that favours insurers can hinder consumer decision-making because of a lack of understanding about premium pricing, policy coverage and personal risk' which in turn leads to poor consumer outcomes such as 'inflated premiums, underinsurance or coverage that is appropriate to their needs'*.[354]

The issue is that mandating disclosure requirements is not of itself sufficient to address the problems of information asymmetry. This is because most consumers do not access and/or read the PDS and even where they do, many misunderstand it due a myriad of problems, including the complexity of the document, behavioural biases, cognitive overload and a tendency to place greater reliance on sales staff.[355] This is evidenced by the multiple studies and reports into disclosure in the general insurance

[347] ALRC, *Disclosure: Preliminary Analysis of Legislative Framework for Product Disclosure Statements and Product Disclosure Statements,* 5 March 2021: https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/disclosure/ (accessed on 24 February 2022).
[348] *ASIC Regulator Guide 168: Disclosure: Product Disclosure Statements (and other disclosure obligations),* October 2011, [RG 168.10].
[349] Corporations Regulations, reg 7.9.15E.
[350] Corporations Regulations, reg 7.9.15.
[351] Corporations Regulations, reg 7.9.15D.
[352] *Financial System Inquiry Final Report*, March 1997, [7.3.2].
[353] Senate Economic Reference Committee, *Australia's general insurance industry: sapping consumers of the will to compare,* 10 August 2017, [3.3].
[354] As above, [3.2].
[355] Insurance Council of Australia, *Too long; Didn't Read: Enhancing General Insurance Disclosure*, October 2015.

sector. For example, the Insurance Council of Australia found in its 2017 research on general insurance product disclosures that only two in ten respondents reported having used the PDS as an information source prior to purchasing a policy, and fewer actually used it as the main source of information.[356] A similar finding was made by consumer research commissioned by ASIC which found that two in every ten consumers who took out new home building insurance or considered switching read the PDS.[357] The qualitative research also found that 'reading' the PDS generally meant reading selected pages of the PDS and not all of it.[358]

Furthermore, even with the prescriptive PDS content requirements, consumers do not necessarily make better informed decisions. For example, a case study on home contents insurance conducted by Monash University, and referenced in *ASIC Report 632 Disclosure: Why it shouldn't be the default*, found that even where participants were provided with a Key Facts Sheet or a PDS, 59% of participants made suboptimal choices.[359]

There is no doubt that achieving effective disclosure for general insurance products is difficult and it is made more so by the prescriptive content requirements contained across multiple legislative sources. As underlined by the Senate GI Inquiry, there is an additional challenge specific to the general insurance sector given the various conditions, exclusions and definitions attached with general insurance products.

For example, IAG has told us that the content requirements for the PDS account for approximately five A4 pages in PDSs produced by IAG. This includes information about the complaints process, the financial claims scheme, cash settlement of claims, calculation of premiums, GST charges and privacy protections. Coupled with the other sections of the PDS and Supplementary PDS[360] (if applicable), it means that a lengthy disclosure pack is sent to customers that is unlikely to be read given its length.

Therefore, while the PDS regime is a consumer protection measure, its prescriptive requirements are actually counter-productive, conflict with the principle of 'clear, concise and effective' disclosure and do not lead to good consumer outcomes. Accordingly, the PDS regime requires review and reform to address its shortcomings and respond to the unique characteristics of general insurance products.

(c) Case study – Key Facts Sheet

The recognised deficiencies of the PDS regime led to the introduction of the Key Facts Sheet for home building and contents insurance.[361] It was introduced as a result of the Queensland floods in 2011, following concerns that consumers lacked understanding of their insurance cover and did not read the PDS. Accordingly, the Key Facts Sheet is required to be only a one page document (double-sided) which outlines key information in relation to home building and contents policies, including the maximum level of cover and the events covered. The purpose of the Key Facts Sheet was to provide this information *'in an easy to read and consumer friendly layout, enabling consumers to access the key information in a simple and effective way.'*[362] It was also intended that the format would assist consumers to make product comparisons when consumers are making purchasing decisions relating to home building and contents insurance.[363]

The Key Facts Sheet does not replace the PDS requirement for home building and contents insurance and the timing for giving it is different to the timing for a PDS.

Timing for Key Facts Sheet	Timing for PDS
As soon as reasonably practicable, but not later than 14 days, after: • the consumer first requests information about the product;	At or before the time a regulated person (which includes an insurer): • recommends a retail client acquire the product;

[356] Insurance Council of Australia, *Consumer Research on General Insurance Product Disclosures: Research findings report*, February 2017, [5].
[357] *ASIC Report 416*: *Insuring your home: Consumers' experiences buying home insurance*, October 2014, p 85.
[358] As above, p 45.
[359] ASIC Report 632, p 14.
[360] Supplementary PDSs can be used to update or include additional information in a PDS or to correct an error or omission in the PDS: Corporations Act, s 1014A.
[361] Revised Explanatory Memorandum to *Insurance Contracts Amendment Bill 2012* (Cth), [2.4].
[362] As above, [2.5].
[363] As above, p 9 and [4.156].

• the consumer enters into the insurance contract with the insurer, unless: • the insurer has already provided the Key Facts Sheet to the consumer; • the insurer reasonably believes that someone else has already provided the consumer with the Key Facts Sheet; • the consumer seeks information or enters the insurance contract through an insurance broker; or • the consumer does not provide an address to be sent the Key Facts Sheet or informs the insurer that they do not want a Key Facts Sheet.[364]	• offers to issue or arrange for the issue of the product to a retail client; • issues the product to a retail client, unless: • the client expressly requests the recommendation or product immediately or by a specified time and it is not reasonably practical to give the PDS in time, in which case the regulated person must orally communicate certain information, ask whether the client would like other information and give the PDS as soon as practicable with 5 business days after the date the product is issued;[365] • in the case of issuing or offering to issue or arrange for the issue: o there are reasonable grounds to believe that the client has been given a PDS for the product before;[366] o the product is part of a bundled contract of insurance and the regulated person reasonably believes the client does not intend to acquire the product;[367] o no product is issued to the client;[368] or o where the client has requested the recommendation or product immediately but the regulated person does not have the correct address for the client after taking reasonable steps to obtain it;[369] • the client already holds a product of the same kind and the regulated person reasonably believes that the client has all the information in the PDS through a previous PDS and other prescribed disclosures;[370] or • the product is an interim contract of insurance.[371]

There is no rationale for such different timing obligations for documents that are designed to achieve similar ends and particularly given the Key Facts Sheet cannot really be understood on its own. (The PDS provisions referred to above are also a case study of the fragmentation of the regime, with some provisions found in the Corporations Act, others found in regulations which purport to insert subsections into the Act or in one case replace altogether a section of the Act, meaning the Act is not a reliable source of truth in relation to the timing requirements for giving a PDS.)

The Key Facts Sheet content, format and provision requirements are prescribed in both the Insurance Contracts Act and the Insurance Contracts Regulations, with the Insurance Contracts Regulations setting

[364] Insurance Contracts Regulations, reg 13.
[365] Corporations Action s 1012G as replaced by Corporations Regulations, reg 7.9.15H.
[366] Corporations Act, s 1012A, 1012B and 1012D(1).
[367] Corporations Act, s 1012D(9G) as inserted by Corporations Regulations, reg 7.9.07D.
[368] Corporations Act, s 1012D(9J) as inserted by Corporations Regulations, reg 7.9.07E.
[369] Corporations Act, s 1012D(9L) as inserted by Corporations Regulations, reg 7.9.07F.
[370] Corporations Act: s 1012D(2).
[371] Corporations Act, s 1012D(9).

out the requirements in highly prescriptive specific detail. It is not clear why this disclosure requirement is contained in the Insurance Contracts Act and Regulations and not the Corporations Act and/or Regulations.

Another concern is how the Key Facts Sheet represents the cover provided under an insurance policy to consumers. The strict requirements for the content and length of the Key Facts Sheet inadvertently oversimplifies what is covered under a policy and can therefore mislead consumers. For example, the Senate GI Inquiry referenced statements made by industry representatives that *'two distinct policies can appear to offer the same insurance cover'* due to the tendency of Key Facts Sheets to oversimplify policies.[372] Therefore, using the Key Facts Sheet may actually lead to poor consumer outcomes and increase the risk of underinsurance where consumers are misled as to the cover they are purchasing. In other instances, the strict content requirements results in insurers constantly needing to refer the consumer to the PDS, which raises further questions about the efficacy of the document.

Studies have found low consumer awareness and usage of the Key Facts Sheet. For example, research conducted by the Insurance Council of Australia on general insurance product disclosures found that only 48% of respondents were aware of the Key Facts Sheet and respondents seldom used it as a main source of information.[373] Furthermore, an experiment conducted by Monash University referenced in ASIC Report 632, found that even where consumers were provided with a Key Facts Sheet, only two-fifths (41%) of participants selected the objectively best insurance product.[374]

It is therefore questionable why a Key Facts Sheet in its current form should be required to be provided to consumers given it overlaps with the PDS and may even misrepresent cover provided under an insurance policy. The introduction of the Key Facts Sheet in its current form is a case study of mandated disclosure not correlating with better consumer outcomes.

We do however believe that with appropriate consultation and consumer testing there is potential for the Key Facts Sheet to be replaced with a better form of product summary which enables consumers to identify the key features of an insurance product and compare it with similar products. Comparison of general insurance products is particularly useful and important for consumers as they are often comparing on a broadly similar basis (i.e. cover, conditions and exclusions). However, the current content and structure of the disclosure documents do not facilitate this. Therefore, the Key Facts Sheet should be replaced and the replacement should be robustly tested with stakeholders, including industry and consumers, so that it can be reformed as a useful comparison tool.

(d) Case study – Insurance Contracts Act and standard cover

The standard cover regime was introduced in the Insurance Contracts Act to standardise the terms and conditions of cover for certain classes of general insurance products known as 'prescribed contracts'. Prescribed contracts are prescribed by the Insurance Contracts Regulations and comprise the following:

- motor vehicle insurance;
- home buildings and contents insurance;
- sickness and accident insurance;
- consumer credit insurance; and
- travel insurance.

The idea underlying the introduction of standard cover was to enhance the comparability of general insurance products by outlining the basic level of cover for a particular class of insurance so that a policy could be compared against the standard. By restricting the scope of variation between insurance contracts, the standard cover regime aimed to ensure that commonly expected events were covered so that consumers would understand their cover and the risk of underinsurance could be minimised.[375]

While the regime was intended to achieve a positive consumer outcome, the standard cover regime as it operates today is an example of a redundant regime which requires review. This is because insurers can and do simply and easily opt out of the standard cover regime by clearly informing a consumer in writing

---

[372] Senate Economic Reference Committee, 10 August 2017, [3.71].
[373] Insurance Council of Australia, *Consumer Research on General Insurance Product Disclosures: Research findings report,* February 2017.
[374] Case study referenced in ASIC Report 632.
[375] Treasury Discussion Paper, 'Disclosure in general insurance: improving consumer understanding', January 2019, p 19.

that an insurance contract provides less than standard cover or where a consumer knows or ought to know this.[376] An insurer may inform a consumer by simply providing them with the policy terms[377] or the PDS (which is required to contain the policy terms).[378]

Given how easy it is to depart from the standard cover regime, the Senate GI Inquiry recommended a review of the regime and this was further explored by the Treasury's discussion paper concerning disclosure in general insurance.[379]

Based on the submissions to and findings of the Senate GI Inquiry, there is a clear consensus among consumers, industry and Government that the standard cover regime is ineffective. The provision of a PDS is not sufficient to inform consumers that an insurance policy provides less than standard cover given that the majority of consumers do not read the PDS and even where they do, it is a skimming exercise. We are not aware of any cover that is issued in Australia based on standard cover terms which therefore only operates where a customer has not been provided with a copy of the policy terms either before or within 14 days after the policy is entered into.[380] Furthermore, many consumers are unaware of the standard cover regime in the first place and therefore do not understand the nature of standard cover, whether their insurance contract offers standard cover[381] or the implications of greater or lesser cover.[382]

The standard cover regime is therefore an example of regulation that does not achieve its intended purpose. Its objective to help consumers compare insurance policies has not been achieved. Its only effect is to require insurers to provide the policy terms to consumers which is an outcome also and better achieved by the PDS regime.

As the PDS for general insurance products is required to contain the policy terms and conditions, the standard terms regime is effectively redundant and should be repealed.

(e) Recommendations

Recommendation 17	Replace the requirement to provide consumers with a PDS for a general insurance product with the requirement to provide a policy document. Given the extensive modification of the PDS regime for general insurance, there is no benefit in maintaining a separate concept which is more suitable for investment products.
Recommendation 18	Require the policy document to meet the residual PDS requirements that apply to general insurance products. It must be dated, worded and presented in a clear, concise and effective manner and identify the insurer. It must include information about the dispute resolution, the cooling-off regime and the requirements for unauthorised foreign insurers where applicable.[383] There is no need to require the policy document to include information about significant benefits, characteristics, features, rights, terms, conditions or obligations as they will in any case be set out in the policy document and schedule.
Recommendation 19	Replace the Key Facts Sheet with a more effective summary (**Product Summary**) for assisting consumers to compare general insurance products. The Product Summary should extend to the same classes of general insurance products that are subject to the standard cover regime (i.e. not be limited to home building and contents insurance) and identify key elements and features of a particular insurance product. The key elements as well as the content and format requirements of the Product Summary and how it is to be made

[376] Insurance Contracts Act, s 35(2).
[377] *Hams v CGU Insurance Ltd* [2002] NSWSC 843; *Marsh v CGU Insurance Ltd* [2003] NTSC 71; *Marsh v CGU Insurance Ltd* [2004] NTCA 1.
[378] Corporations Regulations, reg 7.9.15E.
[379] Treasury Discussion Paper, 'Disclosure in general insurance: improving consumer understanding', January 2019.
[380] This is the effect of s 69(2) of the Insurance Contracts Act.
[381] Consumer Action Law Centre submission to the Senate Standing Committee on Economics inquiry into Australia's general insurance industry, 2017.
[382] Insurance Council of Australia, *Submission to the Treasury Discussion Paper - Disclosure in general insurance: improving consumer understanding*, 1 March 2019.
[383] Corporations Regulations, reg 7.9.15.

	available to consumers should be developed by the Conduct Regulator in consultation with industry and consumer groups. Also, similar to the current Key Facts Sheet, there should be a limit on the length of the Product Summary (e.g. one or two A4 pages long)[384] to ensure it is maintained as a simple form of disclosure which can be used to compare general insurance products.
Recommendation 20	Repeal the standard cover regime in s 35 of the Insurance Contracts Act.

Design solution

Our design principles address complexity and fragmentation in the disclosure regime by recommending a principles-based approach to disclosure. As part of that approach, we have suggested principles we believe would be appropriate for general insurance, including in particular a principle that would require providers to ensure that consumers have the information they can reasonably be expected to need to decide whether to acquire the policy and this information must be communicated in a way that is clear, fair and not misleading (general insurance principle 4 in section 6.2(a) of this Report). This redirects the focus of disclosure to the objective sought to be achieved, namely helping consumers make better informed decisions, and away from the box-ticking exercise of complying with numerous prescriptive disclosure requirements that do not necessarily help the consumer.

Examples of a principles-based approach remain in the disclosure regime today with the requirement for PDSs to be 'clear, concise and effective' and ASIC's principles for good disclosure.[385] Our solution therefore seeks to return to a principles-based regime so that the attention is on effectively communicating with consumers, considering their ability to absorb information[386] and responding to consumer needs.

The Conduct Regulator will however have the power to make Rules under our design solution where it determines that a principles-based approach is not working and specific requirements need to be imposed to ensure consumers receive appropriate disclosure in particular circumstances.

5.4 Other disclosure obligations

(a) Case study – Cash Settlement Fact Sheet (CSFS)

The CSFS is another example of a mandatory disclosure document which may have unintended negative outcomes for consumers.

The CSFS is a document that must be offered to retail clients who are offered a cash payment to settle part or all of a general insurance claim if there are other legally available options to settle the claim,[387] such as repair or replacement.[388] The CSFS must contain certain information, including the sum insured, options for settlement legally available under the insurance product and the amount of the cash settlement offered.[389] This disclosure document was introduced in the Hayne Response Act, as part of the reforms making insurance claims handling and settling a financial service.

One of the problems with the CSFS is that it does not have a clear policy rationale and this has led to confusion for consumers. The issues relating to cash settlement identified by the Financial Services Royal Commission primarily related to the handling of claims made under a home insurance policy marketed as the 'Complete Replacement Cover'.[390] However, it is not clear how the provision of a CSFS addresses the issues raised in this case study as it concerned the insurer's failure to disclose that a cash settlement could be offered under the policy instead of 'complete replacement', i.e. rebuilding of the home, and the fact that the cash settlement did not reflect the true cost of repair (amongst other things). The CSFS was introduced in response to the Financial Services Royal Commission recommendation that claims handling activities should not be excluded from the definition of 'financial service'.[391] However, the

[384] The current Key Facts Sheet is required to be no more than one A4 page long: Insurance Contracts Regulations, reg 12.
[385] *ASIC Regulatory Guide 168: Disclosure: Product Disclosure Statements (and other disclosure obligations)*, October 2011.
[386] Insurance Council of Australia, *Too long; Didn't Read: Enhancing General Insurance Disclosure,* October 2015.
[387] Corporations Act, s 948B.
[388] *ASIC Information Sheet 253: Claims handling and settling: How to comply with your AFS licence obligations*, May 2021, p 25.
[389] Corporations Act, s 948F.
[390] Final FSRC Report, vol 2, Insurance Case Study 10, p 433-444.
[391] Final FSRC Report, vol 1, recommendation 4.8.

Financial Services Royal Commission did not make any recommendation or finding relating to the need for CSFSs and there is no explanation in the explanatory materials for either the Hayne Response Bill or the earlier Exposure Draft of the Bill as to how the provision of a CSFS would have solved the issue which arose in the case study.

The introduction of the CSFS therefore seems to be an instance of a solution in search of a problem. The Government needed to be seen to do something in response to issues identified by the Financial Services Royal Commission in relation to claims handling and decided without explanation that making claims handling a regulated activity was not enough. However, the solution in this case adds complexity and cost without clear identifiable benefits. It is therefore another example of the consequences of a lack of appropriate consultation discussed in section 4.3 of this Report – appropriate consultation not only means asking for feedback but also being receptive to the legitimate concerns raised by stakeholders.[392]

The disclosure regime is already complex and consumers are provided with many disclosure documents that are not being used or reviewed.[393]

It is true that providing consumers with a CSFS may assist them to understand their settlement options and therefore to decide whether to accept a cash settlement. However, the failure to have a clearly identifiable purpose for regulation makes it difficult to identify and link the underlying policy objective and the fundamental norm of behaviour targeted by a legislative provision.[394]

An example of the difficulties caused by the CSFS is where a consumer pays for the replacement of an item and then seeks reimbursement under their insurance policy as the PDS lists reimbursement as an option in addition to an insurer repairing or replacing an item. Given there are other legally available options to settle the claim, the consumer must be provided with a CSFS even though they are only seeking cash as a reimbursement. The logic of requiring a CSFS to be provided in this scenario is questionable.

In practice, having a requirement that only applies to certain claims in certain circumstances adds complexity and cost to the claims process. We understand that this complexity has led certain insurers to provide the CSFS whether or not other settlement options are available. We also understand that consumers are confused where a CSFS is given where the cash settlement is for only part of their claim as they may believe that their entire claim is settled and further entitlements are extinguished.

Furthermore, the requirement to provide a CSFS is not consequence neutral. It must be given in writing when the cash settlement offer is made. This makes it difficult to make cash offers over the phone. The insurer will need to be satisfied that the customer has received the CSFS. The requirement to provide it is therefore likely to delay the claims settlement process and lead to poor consumer outcomes. Most consumers want to receive their cash settlement immediately. IAG has told us that delays in payment of claims is a significant reason for complaints received at IAG, and the requirement to provide this document lengthens this process.

The delay to the settlement process is of particular concern in emergency and crisis situations as emergency payments, including cash instruments like store credits and gift cards, cannot be accessed by consumers until they have received the CSFS. Requiring consumers to consider their options and seek professional advice is likely to add stress to an already stressful situation. While ASIC has recently granted relief from the requirement to provide the CSFS where a cash payment is less than $5,000 in emergency situations, this relief only applies in limited circumstances (e.g. the verbal cash settlement offer must be made within 14 days of the insurable event) and the insurer must take all reasonable steps to give the CSFS to the client within 48 hours of the verbal cash settlement offer if the CSFS is given electronically or within 5 business days if the client cannot or does not want to be given the CSFS electronically.[395] Importantly, if a cash settlement is offered in these circumstances, the insurer must also provide the client with the right to reverse the cash settlement offer within 12 months from the date of cash payment without imposing any interest or fees.

---

[392] For example, IAG raised the concern that it is not clear how the CSFS would address issues raised in the Financial Services Royal Commission: IAG Submission, 13 January 2020, [6(a)], p 8: Making-insurance-claims-handling-a-financial-service-IAG-submission-130120.pdf Making-insurance-claims-handling-a-financial-service-IAG-submission-130120.pdf (accessed on 10 October 2022). There was no response to this concern in the Explanatory Memorandum to Hayne Response Bill.
[393] ASIC and the Dutch Authority for the Financial Markets, *Disclosure: Why it shouldn't be the default* (Report 632, October 2019), p 20.
[394] ALRC, 'Inquiry Approach: Preliminary analysis', 17 December 2020, https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/inquiry-approach/2-preliminary-analysis/ (accessed on [date]).
[395] *ASIC Corporations (Cash Settlement Fact Sheet) Instrument 2022/59.*

In addition, if the cash settlement is of low value, it is questionable how the delay incurred by the provision of the CSFS is outweighed by its benefits. The lack of monetary or other thresholds for this requirement (such as limiting it to certain classes of insurance or claims) seems to mean that some payments will be unnecessarily delayed, even though consumers may require the payment as a matter of urgency.

The requirement to provide a CSFS to a client also means that all parties on the policy must be provided with this document. This is a serious risk in situations of family and domestic violence and for consumers experiencing vulnerability which was not accounted for in the legislation and only recently addressed (more than a year after its commencement) in *ASIC Corporations (Cash Settlement Fact Sheet and Confirming Transactions) Instrument 2022/809*. Under this Instrument, the providing entity is exempt from the requirement to provide a CSFS where it reasonably believes that giving the CSFS would pose an unacceptable risk of a person experiencing family violence. While this exception is welcome and necessary, it adds to complexity of complying with the CSFS regime and creates a risk for providers in making this judgement and relying on the Instrument.

Recommendation 21 Consistent with Recommendation 9, a post-implementation review of the Royal Commission reforms should consider whether CSFSs are useful for consumers or whether any concerns relating to cash settlement offers could be addressed by the introduction of a duty to act fairly (see Recommendation 10).

Design solution

Consistent with our comments in section 5.3(e), applying a principles-based approach which includes a principle of meeting the information needs of consumers removes the need to set out prescriptive disclosure requirements and documents in the primary statute. Instead, the principle redirects focus on disclosure assisting consumers with decisions in relation to financial products and services as opposed to undertaking a compliance or box-ticking exercise of providing consumers with additional disclosure documents which may never be read.

Where cash settlements are offered to consumers, the general principle of fairness that we have recommended (general insurance principle 3 in section 6.2(a) and Recommendation 10) should ensure that the settlement is appropriate and fair. The Rules can impose additional requirements to ensure settlement offers are fair where required, for example in post disaster or high stress scenarios.

(b) Case study – disclosure in the modern age

There are other examples of complexity and inconsistency in the disclosure regime that extend beyond the requirement to provide numerous disclosure documents.

For example, electronic communication for general insurance products is inconsistently regulated across the Corporations Act and the Insurance Contracts Act. While ASIC facilitates electronic disclosure under the Corporations Act through relief provided by ASIC Instruments,[396] there is no similar relief for the Insurance Contracts Act meaning that hard copy disclosure remains the default method under the Insurance Contracts Act due to the requirement to 'give' consumers notices.

Further, there is inconsistency in the application of the *Electronic Transactions Act 1999* (Cth) which applies to the Insurance Contracts Act but not to the Corporations Act. The regulation of electronic disclosure for general insurance therefore lacks clarity and consistency. This is a serious concern considering that internet usage is pervasive in Australia[397] with nearly all Australian adults (99%) having access to the internet[398] and the ever increasing number of people transacting digitally[399] (with ACMA finding that 92% of participants in its annual survey performed banking activities online in June 2021).[400]

---

[396] *ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647* and *ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649*.
[397] *ASIC Consultation Paper 224: Facilitating electronic financial services disclosures* (November 2014), p 6.
[398] ACMA, *Communications and media in Australia: How we use the internet* (Report, December 2021).
[399] *ASIC Media Release 15-198: New digital disclosure measures to enhance consumer understanding and cut red tape* (28 July 2015).
[400] ACMA, *Communications and media in Australia: How we use the internet* (Report, December 2021).

Insurers incur significant costs in developing and maintaining paper disclosure documents. For example, we have been told that IAG spends around $18 million per year just on printing and posting customer policy documents (e.g. PDSs, renewal documents) and this does not include the salaries and related costs of staff maintaining these documents. Costs could be lowered and insurers could become more efficient if electronic delivery was consistently enabled by legislation. These improvements in efficiency and reduced costs would ultimately benefit consumers through lower premiums and faster delivery of disclosure documents and potentially more effective forms of disclosure. For example, the Insurance Council of Australia Effective Disclosure Taskforce suggests that:

> *Electronic forms of disclosure also have the potential to enable insurers to better target information that is relevant to a consumer. Insurers should actively explore and adopt new forms of electronic disclosure that enable information to be delivered in more relevant and personalised ways. This will be facilitated by appropriate law reform to enable electronic communication as the default method of providing insurance product disclosure.* [401]

Treasury's recent consultation on Modernising Business Communications: Improving the Technology Neutrality of Treasury Portfolio Laws and the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022* are positive developments that may assist in having this issue addressed.[402]

Recommendation 22	Introduce new, consistent measures to permit, facilitate and encourage electronic disclosure. All documents should be able to be delivered electronically without requiring consumer consent provided the provider is reasonably satisfied that the consumer has the means of receiving the electronic disclosure, e.g. through the consumer providing their email address or mobile telephone number.

Design solution

Our proposal for a principles-based regulatory regime means that insurers and intermediaries can communicate with clients in any way that is fair, having regard to the needs of vulnerable consumers, and suitable (general insurance principles 3, 4 and 6 in section 6.2(a)(iv) of this Report). If need be and after appropriate consultation, the Conduct Regulator can prescribe specific requirements where there is evidence that providers are not meeting these obligations satisfactorily.

5.5 Advice obligations

The legal framework relating to financial product advice is complex, ambiguous and unduly onerous, which makes it difficult for insurers (and other financial product providers) to help their customers.

Under s 766B(1) of the Corporations Act, 'financial product advice' is defined as:

> *a recommendation or a statement of opinion, or a report of either of those things, that:*
>
> *(a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or*
>
> *(b) could reasonably be regarded as being intended to have such an influence.*

There are two forms of financial product advice, 'personal advice' and 'general advice'.

Personal advice is defined as:

> *financial product advice that is given or directed to a person (including by electronic means) in circumstances where:*

---

[401] Insurance Council of Australia, *Too long; Didn't Read: Enhancing General Insurance Disclosure*, October 2015, p 3.
[402] The Insurance Council of Australia made a submission regarding this issue (March 2021) in response to the Treasury's Consultation Paper, *Modernising Business Communications: Improving the Technology Neutrality of Treasury Portfolio Laws*.

(a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs; or

(b) a reasonable person might expect the provider to have considered one or more of those matters.[403]

General advice is financial product advice that is not personal advice.[404]

The definition of personal advice is therefore wide and likely to catch many communications with consumers that are intended to be of a general nature. This is because it captures:

- any statement of opinion and not just recommendations;
- reporting other people's opinions and recommendations;
- not only advice on particular products in particular circumstances, but also opinions on classes of products;
- not only where a person intends to give advice, but also where that intention could reasonably be deduced;
- opinions where only one aspect of a person's objectives, situation or needs is considered; and
- where a person might expect one aspect to have been considered whether or not it is.

Where an opinion is considered personal advice, the provider must comply with a wide array of obligations, which requires careful consideration of the customer's particular circumstances. This inevitably increases the time, cost and risk associated with each instance in which personal advice is provided. As a result, it is our experience that insurers are reluctant to freely offer advice to consumers in relation to their products, out of fear of it becoming personal advice. This means consumers cannot easily access the help or information that they need, at the time they are obtaining an insurance product, which hinders consumers in choosing policies with suitable cover[405] and therefore, could result in consumer harm through purchases of inappropriate insurance products, underinsurance or non-insurance.

While general insurance is less regulated in this regard than other financial products, the characterisation of conduct as personal advice with the suggestion of additional obligations and therefore risk, both under the Corporations Act and general law, creates a strong disincentive for insurers to provide assistance to consumers which could be characterised as personal advice. This disadvantages consumers by reducing the assistance available to them when making important insurance-related decisions.

(a) Current legal framework

There are a number of different obligations which apply to financial product advice under the current legal framework. The table in Appendix 4 of this Report outlines the legal framework for financial product advice and summarises the obligations. Key obligations include the general law duty of care and fiduciary duties as well as statutory obligations to act in the best interests of clients and provide financial services efficiently, honestly and fairly.

(b) Case study – helping the customer

The purpose of conduct regulation is to set the minimum standards which industry participants are expected to comply with when providing services to consumers. However, good regulatory design must aim to facilitate good customer experience and not compliance for compliance sake.[406]

The objectives of regulation of financial product advice include to ensure that:

- consumers receive advice is that is appropriate for them personally;
- advice is not conflicted; and
- consumers do not think they are getting personal advice when they are not.

[403] Corporations Act, s 766B(3).
[404] Corporations Act, s 766B(4).
[405] Insurance Council of Australia, Submission to the Treasury, *Submission to Financial System Inquiry Interim Report,* August 2014, p 8.
[406] ALRC Interim Report A, p 80 at [2.124].

These goals are important when it comes to investment advice. However, it comes at a cost. ASIC notes in its consultation paper released in November 2020 that a number of sources estimate the average cost of comprehensive personal advice in Australia is between $2,600 and $2,900.[407] Further, there are fewer options for consumers to obtain personal advice in relation to general insurance as many insurers operate on a no-advice or general advice model in relation to general insurance products.[408]

We contend that the reason for this is that the regulatory regime applying to general insurance advice is part of the regime which also applies to investments. It is true that the requirements for general insurance advice are considerably less than those applying to investment advice. The following obligations do **not** apply to general insurance:

- the client priority rule;
- the requirement to provide a statement of advice (apart from sickness and accident and consumer credit insurance).

However, general insurance advice is still subject to the following key obligations:

- a best interests duty applies – while the safe harbour to comply with this obligation has fewer minimum elements than for investment advice, the requirements still form part of the best interests duty which colours the understanding of what these elements require;
- describing it as personal advice risks importing general law standards for the provision of personal advice;
- disclosure of any conflicts of interest in the form of a FSG or equivalent disclosure; and
- training obligations – noting that general insurance is a tier 2 product under ASIC's training requirements in Regulatory Guide 146 and the professional standards in Division 8 of Part 7.6 of the Corporations Act do not apply to general insurance advisers.

The consequence of treating general insurance advice as a sub-set of financial product advice with restricted obligations but still in the same universe of regulation is that in our experience there is a significant reluctance to provide consumers with assistance that is relevant to their personal circumstances. Insurers and their agents avoid asking personal questions except as required to provide a quote and are then very careful not to express an opinion on important matters such as the type of cover that a consumer may require, options available to consumers, the amount of cover and individual cover limits.[409] This reluctance is directly contrary to the goal of the recently introduced DDO regime:

> *These obligations are designed to assist consumers to obtain appropriate financial products by requiring issuers and distributors to have a customer-centric approach to designing, marketing and distributing financial products.[410]*

While it is important to ensure that products are designed in a manner which makes them suitable for their intended consumers, it is equally important that consumers have the assistance they require to decide whether to acquire these products.

The essential nature of general insurance products is also significant. While there is evidence of poorly designed general insurance products which do not provide value for consumers,[411] mainstream general insurance products such as home, contents and car insurance are recognised as providing good value and to be important for consumers.[412] As a general rule, insurance of property and income is recognised as a public good that benefits both society and individual consumers.[413] There is therefore no need to treat general insurance advice in the same way as investment or even life insurance advice, particularly where that advice is received from the insurer or an agent of the insurer where the insurer's interest in promoting their own products is obvious.

The overlay of the advice obligations in impeding customer understanding and choice of general insurance products is demonstrated by the following factual scenario.

---

[407] *ASIC Consultation Paper 332: Promoting access to affordable advice for consumers*, November 2020, p 20.
[408] Insurance Council of Australia, Submission to the Productivity Commission, *Competition in the Australian Financial System* (19 March 2018), p 3-4.
[409] IAG, Submission to the Treasury, *Financial System Inquiry,* March 2014, p 7.
[410] Revised Explanatory Memorandum to *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019* (Cth), [1.5].
[411] *ASIC Report 492: A market that is failing consumers: The sale of addon insurance through car dealers,* September 2016, p 19.
[412] The Geneva Association, *The Social and Economic Value of Insurance* (A Geneva Association Paper, September 2012), p 3.
[413] As above.

Consumer insurance enquiries

An example illustrating the difficulty faced by both consumers and insurers in facilitating conversations about general insurance can arise from something as basic as requesting information and a quote to purchase car insurance.

For example, IAG has told us that NRMA Insurance receives many enquiries from consumers who have purchased a car and are seeking to obtain insurance for it. Consumer queries range from which insurance to obtain for a low value car and/or when they have a low income, whether comprehensive or third party insurance is more suitable for them, what level of cover and optional extras they should select and who to cover under their policy such as under 25 year old dependents.

The customer will provide this information to the insurer to receive assistance in determining their insurance needs. However, answering these questions involves providing advice (i.e. a recommendation or opinion which influences a decision relating to a financial product, being the insurance policy) to the consumer which is likely to be personal advice as the insurer is likely to consider at least one of the customer's objectives, financial situation and needs. If the insurer chooses to provide the assistance requested, the insurer will then need to comply with the following personal advice obligations (across licensing, conduct and disclosure):

- be licensed to provide personal advice;
- maintain and ensure training and competence to provide personal advice, including the relevant RG 146 qualification;[414]
- prepare and provide the customer with a FSG[415] as well as an SOA if the insurance is for sickness and accident or consumer credit;[416]
- act in the client's bests interests and provide appropriate personal advice;[417] and
- warn the client if personal advice is based on incomplete or inaccurate information.[418]

These type of requirements may be necessary for investment products but are overly cumbersome for general insurance products[419] that generally meet a straightforward need of the consumer to insure their property or livelihood. It also means significant costs and time must be incurred to comply with the advice regime.

Consequently, many insurers operate on a no-advice or general advice model which is difficult to maintain as *'the difference between information that is personal advice, general advice and factual information can be minute; a single word in some circumstances'.* [420] This is identified by the Insurance Council of Australia as driving insurers to focus on compliance and training staff on operating within the insurer's advice regime rather than helping the consumer.[421]

This in turn produces poor outcomes for consumers as insurance sales staff will almost certainly have more knowledge about the insurance products than a consumer given their specialist training and experience. In particular, insurance staff are likely to be in a significantly better position to identify a suitable sum insured for home building insurance and to answer questions about the features and exclusions of a product.

As the Insurance Council of Australia has stated, the current advice regime hinders insurers from engaging and assisting consumers with choosing policies best suited to their needs and this results in a detrimental outcome for both industry and customers.[422] It also contributes to underinsurance and non-insurance as consumers do not read and/or understand the factual information that is provided to them when making their decision. As noted in *ASIC Report 415 Review of the sale of home insurance*, consumers who called their insurer frequently sought assistance about how to best decide on a sum insured amount. In many instances, sales staff advised they were not able to provide any assistance and

---

[414] ASIC's training requirements are set out in *ASIC Regulatory Guide 146: Licensing: Training of financial product advisers* (July 2012).
[415] Corporations Act, Pt 7.7, Div 2, Subdiv A.
[416] Corporations Act, Pt 7.7, Div 3.
[417] Corporations Act, Pt 7.7, Div 2.
[418] Corporations Act, s 961H.
[419] Insurance Council of Australia, Submission to the Productivity Commission, *Competition in the Australian Financial System,* 19 March 2018, p 3.
[420] As above, p 4.
[421] As above.
[422] As above.

most consumers went on to make uniformed and therefore poor decisions in relation to the sum insured amount, thus exposing themselves to a greater risk of underinsurance.[423]

(c) Adapting the advice regime for general insurance

The lack of clarity around the advice distinctions has disincentivised many general insurers from providing advice to consumers.

This conflicts with the desire and needs of consumers to receive advice from their insurer. As noted in *ASIC Report 632 Disclosure: Why it shouldn't be the default*,[424] ASIC consistently finds in its consumer research that *'many consumers pay more attention to, and are more influenced by, what they are told by sales staff than disclosure documents'.* The Insurance Council of Australia's research on general insurance product disclosure also supports this conclusion as it finds that consumers use call centres as one of the top three key sources of information pre-purchase of a general insurance product.[425] Specifically, many consumers contact the call centre to clarify details, determine the best deals and ask questions if the process became too confusing. Not only does this evidence how disclosure documents are ineffective in informing consumers, it shows how consumers want and need advice from their insurer during their decision making process.

We believe that the regime should facilitate the provision of advice in relation to general insurance products by imposing less burdensome requirements. This reflects the fact that general insurance products:

- have a fundamentally different character to investment products;
- meet a simpler need;
- have a very different (and significantly lower) risk profile.

Further, advice assists consumers to obtain adequate insurance cover which is '*integral to protecting consumers' most valuable assets and to maintaining and protecting the living standards of all Australians and the economy overall*'.[426]

Removing the obligations for personal advice imposed in relation to general insurance products could be one means of achieving this. Many of the obligations relating to personal advice already do not apply to general insurance products. For example, an SOA is not required to be given for most general insurance products; general insurance is not subject to the ban on conflicted remuneration;[427] many of the steps to discharge the best interests obligation do not have to be fulfilled in relation to general insurance product advice;[428] and the conflicts priority rule does not apply to general insurance products.[429]

There may be a concern that removal of existing personal advice protections will increase the risk of consumer harm. However, as demonstrated above, many of the personal advice obligations do not apply to general insurance products. Consequently, any additional risk is small. Consumer risk in this case would most likely take the form of over insurance i.e. customers obtaining more cover than they need or obtaining insurance they are unlikely to need or eligible to claim on. However, implementation of our proposals would ensure consumers and regulators will have remedies to prevent this such as the obligation to require advice providers to act fairly (see Recommendation 10 above) and a product recommendation regime founded on having a reasonable basis for the recommendation (see our Recommendation 23).

While the fairness obligation should provide sufficient consumer protection in relation to insurers and single line intermediaries (i.e. intermediaries that only advise or distribute on one insurer's products), this may not be true for brokers and agents who are distributing more than one product and working with more than one insurer as they may be remunerated differently by each insurer. Therefore, while the fairness and conflicts obligations (principles 3 and 5 of our suggested general insurance principles in

---

[423] *ASIC Report 415: Review of the sale of home insurance,* October 2014, p 10, Table 1.
[424] *ASIC Report 632: Disclosure: Why it shouldn't be the default*, October 2019, p 24.
[425] Insurance Council of Australia, *Consumer Research on General Insurance Product Disclosures* (Research Findings Report, February 2017), p 19.
[426] Senate Economics References Committee, *Australia's general insurance industry: sapping consumers of the will to compare* (Report. August 2017), p 2.
[427] Corporations Regulations, reg 7.7A.12G.
[428] Corporations Act, s 961B(4), 961B(5) and Corporations Regulations, reg 7.7A.06.
[429] Corporations Act, s 961J(3).

section 6.2(a)(iv) of this Report) should ensure that these providers act fairly by prioritising their client's needs, it may be appropriate for the Conduct Regulator to make Rules to ensure that this occurs.

ALRC proposals and the Quality of Advice Review

The ALRC has proposed to distinguish the concepts of personal advice and financial service as well as convey more clearly the subject of regulation by renaming the concepts of general advice and personal advice.[430] Making these concepts as well as their distinctions clearer should assist insurers in determining when advice is general or personal. However, there is a question whether general insurance products should be subject to the advice regime in the first place.

In addition, Treasury commissioned the Quality of Advice Review (**QOA Review**) in March 2022 to address recommendations 2.3, 2.5 and 2.6 of the Financial Services Royal Commission.[431] The Review recognises that costs of compliance '*are ultimately borne by consumers and serve as an impediment to consumers' access to quality advice*'.[432]

The QOA Review has made a number of significant proposals, including to de-regulate general advice as a financial service while adjusting the definition of personal advice.[433] The definition of personal advice is proposed to be changed to *'a recommendation or opinion provided to a client about a financial product (or class of financial product) and, at the time the advice is provided, the provider has or holds information about the client's objectives, needs or any aspect of the client's financial situation'.*[434] Further, when a person provides personal advice, the QOA Review proposes to impose an obligation to provide 'good advice' which is *'advice that would be reasonably likely to benefit the client, having regard to the information that is available to the provider at the time the advice is provided'.* This obligation would replace the current best interests duty, the appropriate advice duty, the duty to warn the client and the duty of priority in Chapter 7 of the Corporations Act.[435]

While we generally support the QOA Review's proposals to replace the 'best interests' duty' with an obligation to provide 'good advice' and to remove prescriptive disclosure requirements for personal advice,[436] we believe our proposed regime is more suitable for general insurance. The Review only makes passing reference to general insurance products and advice[437] and its proposals are more focused on investment advice. We have the following concerns about the application of the QOA Review proposals for general insurance:

- the proposed changes to the definition of personal advice will turn any opinion given by an insurer into personal advice; and
- we do not believe that the 'good advice' duty is an appropriate standard for general insurance. Reasonably likely to benefit the client having regard to available information imposes a high duty to make inquiries to determine information about the client's circumstances and potentially the availability and terms of the products in the market.[438].

The recommendations and proposals in this Report are focused specifically on general insurance. Our recommendations involve removing general insurance products from the financial product advice regime entirely and replacing it with a 'product recommendation' regime. The product recommendation regime will help consumers by permitting insurers and intermediaries to make recommendations to consumers

---

[430] *Quality of Advice Review Consultation Paper – Proposals for Reform*, August 2022, p 8.
[431] Treasury, *Quality of Advice Review Terms of Reference*, 11 March 2022.
[432] As above, [2.1].
[433] *Quality of Advice Review Consultation Paper – Proposals for Reform*, August 2022, proposals 1 and 2.
[434] *Quality of Advice Review Consultation Paper – Proposals for Reform*, August 2022, p 12.
[435] *Quality of Advice Review Consultation Paper – Proposals for Reform*, August 2022, p 8.
[436] MinterEllison, *Submission to the Quality of Advice Review*, 23 September 2022.
[437] The consultation paper notes that it does not cover general insurance commission because this will be addressed later (p 4), notes general insurance advice could continue to be given by persons who are not relevant providers if the proposals are implemented (p 19) and provides a general insurance cameo which acknowledges that general insurance advice would be subject to the 'good advice' duty (p 42).
[438] The Insurance Council of Australia also questions the kind of information an insurer should rely on to meet the good advice duty in its submission to the QOA Review. The Council notes that unlike other types of financial services, '*not all information held by an insurer would be accessible or relevant at the time the advice is provided*'. The Council provides examples where a call centre operator may not have reasonable access to a claims database at the time advice is provided and where an insurer may already have information about a non-customer in their systems because a customer was a party (claimant or defendant) in a previous insurance incident. Therefore, the Council states that consideration should be given so that only relevant information and information that is reasonable for the advisor to hold is required in considering whether the good advice duty has been met: Insurance Council of Australia, *Submission to Quality of Advice Review – Proposals Paper*, 23 September 2022, p 2.

and still protect consumers by requiring insurers to have a reasonable basis for their recommendations. We believe that this is a more appropriate standard for general insurance recommendations.

Our recommendations also distinguish advice provided by:

- insurers and their agents on the one hand, and
- on the other hand, brokers (whether acting under binder or on behalf of their clients) and insurance agents who act on behalf of more than one insurer.

In order to address potential conflicts of interest, we recommend requiring the provision of a FSG where recommendation is made by a broker or a person who acts on behalf of more than one insurer. This is a targeted recommendation recognising the limited usefulness of an FSG in the context of general insurance. However, we agree with the QOA Review proposal that provision of FSG information on the adviser's website in one easily accessible and navigable place would be sufficient.[439] Section 5.12 of this Report discusses the QOA Review proposal for the existing exemptions to the ban on conflicted remuneration to continue in relation to general insurance products.

(d) Recommendations

The following recommendations are designed to address the difficulties relation to advice obligations for general insurance products.

Recommendation 23	To improve the ability of consumers to receive assistance with their insurance needs, remove general insurance from the financial product advice regime applying to other financial products and instead impose a 'product recommendation' regime for general insurance products. The product recommendation regime should simply require insurers and intermediaries to have a reasonable basis to recommend a particular insurance product or a particular choice within a product. The Conduct Regulator could be given the power to impose additional requirements to have a reasonable basis for the recommendation, but we do not advocate for any particular requirements at this point in time. It should simply be incumbent on the provider to establish that they had a reasonable basis for the recommendation and it should be open to a consumer to challenge that recommendation on the basis that there was no reasonable basis for the recommendation.
Recommendation 24	Remove the requirement to provide a FSG in relation to a product recommendation (or other financial services) provided by the insurer or a person identifiably acting on behalf of the insurer for a general insurance product (where that occurs). However, the information contained in an FSG should be required to be provided if the product recommendation is provided by a broker or a person acting on behalf of more than one insurer (for example, multi-line insurance agents and comparator websites). Insurers and people identifiably acting only on their behalf (for example, where a person is using the name or brand of the insurer or the relevant product) should be exempt as it will be clear who they are acting for and their interest in making the product recommendation.
Recommendation 25	Codify in the statute all duties and obligations (including common law duties) applying to the provision of financial product advice so that the legislation becomes a complete statement of the law on this topic.

We recommend codification of the advice regime as there are numerous obligations relating to advice found in statute and the common law that make it difficult to navigate. Codification in its most general sense can be described as the *'systematic collection or formulation of the law, reducing it from a disparate mass into an accessible statement which is given legislative rather than merely judicial or*

[439] *Quality of Advice Review Consultation Paper – Proposals for Reform*, August 2022, proposal 10; MinterEllison, *Submission to the Quality of Advice Review*, 23 September 2022, p 8.

academic authority'.[440] It has long been argued that Australia would benefit from the codification of a range of areas of the law.[441]

While there are pros and cons to codification,[442] we believe that a principles-based statement of the standard that general insurance recommendations are required to meet can be legislated and that this will benefit both consumers and industry. If that standard is set at an appropriate level, there should not be any need to retain general law remedies such as negligence. It is our view that requiring a person to have a reasonable basis for any general insurance recommendation they make is an appropriate and complete statement of the specific duty that should apply to such recommendations.

Design solution

A principle-based regulatory system should ensure that general insurance is subject to appropriate requirements. We have proposed a number of principles that would be relevant to the provision of general insurance recommendations in section 6.2(a)(iv) of this Report. The most relevant is the recommendations principle:

8. A provider must have a reasonable basis for any express or implied recommendation they make to a consumer about a financial product or service.

However, we have proposed other principles which would also be relevant to the provision of advice relating to general insurance, including principles requiring service providers to:

- act fairly (general insurance principle 3);
- manage conflicts of interest fairly (general insurance principle 5);
- ensure the suitability of advice (general insurance principle 6); and
- prioritise consumer interests (general insurance principle 7).

These principles set an appropriate standard for general insurance recommendations. If the Conduct Regulator identifies any market failure in connection with general insurance product recommendations, it can address any concerns by making targeted or more specific Rules following appropriate consultation.

5.6 Overlapping regulatory responsibilities

As identified in section 3 of Appendix 1, there are a number of regulators that have regulatory responsibility for the general insurance sector. Most of these regulators ultimately have a consumer protection objective and, as a result, there are areas of regulatory overlap.

This regulatory overlap is particularly apparent in the roles of ASIC and APRA. Although the primary function of APRA is prudential regulation, *'the conduct and governance of an institution are relevant to the prudential supervision of that institution.'*[443] As ASIC is primarily concerned with conduct regulation in the financial services sector and oversees governance of companies generally and licensees specifically, there is significant scope for their roles to overlap.

The Financial Services Royal Commission identified that coordination and cooperation between these two agencies needs to be enhanced, particularly in areas of joint responsibility.

The Financial Services Royal Commission concluded that:

> *Formalised co-ordination and co-operation between the regulators can no longer be an aspiration. It must become a reality*.[444]

Reforms have since been made to ensure this occurs, including:

- legislative reform of the roles of ASIC and APRA in superannuation;[445]
- joint administration of FAR;[446]

---

[440] Donald B, 'Codification in Common Law Systems' (1973) 47 *The Australian Law Journal* 160, p 161.
[441] Svantesson D, 'Codifying Australia's Contract Law - Time for a Stocktake in the Common Law Factory' (2008) 20(2) *Bond Law Review* 5, p 2.
[442] As above p 5 and 11-15.
[443] Final FSRC Report, vol 1, p 448.
[444] As above, p 459.
[445] Hayne Response Act, sch 9.
[446] *Financial Accountability Regime Bill 2022* and *Financial Sector Reform Bill 2022*.

- an updated MOU between ASIC and APRA which outlines a framework for engagement, including coordination, cooperation and information sharing between the two regulators;[447] and
- a new statutory obligation between ASIC and APRA to cooperate and share information.[448]

APRA recognises that FAR requires it to coordinate and cooperate with ASIC *'to ensure the FAR's objectives are achieved efficiently and without imposing unnecessary regulatory burden.'*[449] To this end, APRA and ASIC have been working together to develop the joint administration and framework for the implementation of FAR which includes a public Joint Administration Agreement setting out the high level principles of cooperation and arrangements for this joint administration. The Joint Administration Agreement will also cover areas such as oversight of the arrangements, exercising of powers, industry communication, information sharing and enforcement and investigations.[450]

We support this reform and approach. It is important for cooperation and coordination between ASIC and APRA to continue in the long-term. As noted in section 4.3(a) of this Report, this should extend to ensuring regulatory consultation periods are coordinated to minimise the burden on industry participants and consumer groups of responding to regulatory proposals. Our design principles therefore propose that the FRAA's role would include assessing whether the regulators are effectively cooperating with each other and making recommendations to improve such cooperation (see design principle 8 in section 6.2(f) of this Report).

Cooperation and coordination between all regulators will remain and grow in importance, particularly in relation to requests for data and other regulatory requests. ASIC and APRA have acknowledged that information sharing – *'ranging from sharing insights from supervision activities to formal exchanges of relevant information (including in relation to enforcement matters) – continues to be central to engagement between the agencies'.*[451] We support the regulators in collaborating on data requests from industry and exploring opportunities to improve collaboration.[452]

Problems of regulatory overlap also extend to other areas of conduct engaged in by financial service providers.

For example, general economy-wide regulation of privacy, discrimination, and communications and media is relevant to the general insurance sector and are enforced by different regulators, i.e. the OAIC, various Federal, State and Territory discrimination regulators and the Australian Communications and Media Authority, respectively (see section 3 of Appendix 1 of this Report for more detail about these bodies).

There is potential for overlap between the roles of these regulators and ASIC, given the latter is responsible for enforcing the obligation of AFSL holders to comply with financial services laws[453] which is relevantly defined as including *'any … Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services'.*[454] This can be viewed as extending to privacy, discrimination and marketing legislation where it relates to conduct engaged in by a licensee relating to the provision of a financial service.

(a) Case study – Consumer Data Right (CDR)

The CDR regime is an example of regulatory overlap that will emerge for general insurance. This is because 'Open Finance' has been identified by Treasury as the next priority area to expand the CDR regime and will include targeted datasets from across general insurance, superannuation, merchant acquiring and non-bank lending service providers.[455] Treasury leads CDR by developing the policy for

[447] MOU between APRA and ASIC, 28 November 2019.
[448] Hayne Response Act, sch 12.
[449] Carmody S, Executive Director, APRA, 'Opening Statement to Senate Economics Legislation Committee - January 2022', Senate Economics Legislation Committee Inquiry into the Financial Accountability Regime Bill.
[450] As above.
[451] APRA and ASIC, *Annual update on APRA-ASIC engagement – December 2021:* https://www.apra.gov.au/annual-update-on-apra-asic-engagement-december-2021 (accessed on 1 April 2022) (**APRA-ASIC 2021 update**).
[452] APRA and ASIC have stated that '*[c]ollaboration on industry data collections continues to provide opportunities for both agencies to effectively and efficiently collate insights to inform their respective work'*: APRA-ASIC 2021 update).
[453] Corporations Act, s 912A(1)(c).
[454] Corporations Act, s 761A, definition of 'financial services law', para (d).
[455] The Treasury, *Consumer Data Right (CDR) Strategic Assessment: Outcomes*, January 2022.

CDR which includes the rules and advising Government on which sectors CDR should apply to.[456] CDR is implemented and enforced by the ACCC and OAIC under a co-regulatory model.[457]

As the ACCC is responsible for the accreditation process that entities must go through to participate in the CDR regime, as well as making and enforcing the *Competition and Consumer (Consumer Data Right) Rules 2020* (Cth),[458] the ACCC will have an additional role for the sectors that CDR regime applies to – the banking, energy and telecommunications sectors currently and in future Open Finance. OAIC will also have an additional role for those sectors as it is responsible for the privacy aspects of CDR.[459] The regime will therefore significantly extend the ACCC's responsibilities in the financial sector. For participants in this sector, it introduces a 'new' regulator[460] with its own objectives and priorities for a specific regulatory scheme which they must deal with.

CDR gives control over consumer data to consumers and is essentially conduct regulation. It would therefore make sense where a sector has a conduct regulator for that regulator to be involved in enforcing and monitoring the CDR regime. This would be ASIC for general insurance. We call this the lead regulator model.

A lead regulator model for CDR would involve:

- the ACCC coordinating the approach it takes to CDR with other relevant regulators responsible for regulation across all industries in areas related to the CDR such as the OAIC and the Data Standards Body; and
- at the same time, relying on ASIC as the specialist conduct regulator for the financial sector to be responsible for undertaking and coordinating enforcement action in relation to participants in the sector in cooperation with the ACCC.

The 'lead regulator' in this model would be the ACCC for the CDR regime. However, each regulator could be viewed as a lead regulator:

- The ACCC is lead regulator in relation to the CDR regime by setting the regulatory policy for that regime and coordinating enforcement action and approaches across regulators responsible for conduct regulation in sectors subject to the CDR regime.
- ASIC is the lead conduct regulator of the financial services sector by being responsible for taking enforcement action in respect of financial services firms for all conduct regimes they are subject to, including in this example the CDR regime.

There is no doubt there are potential downsides for a lead regulator model, including risks of the lead and sub-regulator duplicating mandates or responsibilities or taking diverging views;[461] fragmentation in the regulatory regime; and competition between regulators.[462] However, the benefit of a lead regulator model could be the enforcement of different but intersecting obligations in a consistent and coordinated manner across the sector. It may be possible to address the issues resulting from a lead regulator model by setting clear mandates for the roles of different regulators and formal requirements to co-ordinate.

The lead regulator model may also have application for other areas of conduct regulation such as privacy and discrimination where the respective regulators can continue as lead regulators while working through the Conduct Regulator to enforce the specific regulatory regime in a coordinated manner in the general insurance industry.

(b) Recommendations

The regulatory model for the financial sector is described as a twin peaks model regulatory model which refers to ASIC and APRA. However, the financial sector has more than two regulators. As discussed in

---

[456] Australian Government, *About Consumer Data Right*: https://www.cdr.gov.au/about (accessed on 22 November 2022).
[457] ACCC, *Consumer data right (CDR)*: https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0 (accessed on 25 January 2022).
[458] OAIC, *CDR Regulatory Action Policy*: https://www.oaic.gov.au/consumer-data-right/cdr-regulatory-action-policy (accessed on 22 November 2022).
[459] As above.
[460] Of course, the ACCC is not a new regulator of the financial sector as it has had responsibility for administering competition law in the sector since the enactment of Federal competition law in the *Trade Practices Act 1974* (Cth). However, the CDR does significantly expand its role.
[461] The Treasury, *Payments system review: From system to ecosystem*, June 2021, p 32.
[462] Cooper, J, ASIC Deputy Chair, *'The integration of financial regulatory authorities – the Australian experience'*, Paper presented to Comissão de Valores Mobiliários, 4-5 September 2006, Brazil, p 3.

section 3.1 of Appendix 1, there are effectively six Federal regulators of general insurance conduct if AFCA is included. In addition, insurance is subject to State and Territory regulation of certain insurance classes. We discuss State and Territory regulation in section 5.8 of this Report.

The multiplicity of Federal regulators with responsibility for insurance relates primarily to conduct issues, such as privacy and marketing. Consideration should be given to whether the current regulatory structure is the most effective one for the sector. A case could be made for all conduct related regulation being made the responsibility of the Conduct Regulator. On the other hand, an alternative approach could be to adopt a lead regulator model where a lead regulator sets the policy direction in the area of their responsibility but is not responsible for enforcement in sectors which are subject to sector regulation. In that case, the sector regulator (the Conduct Regulator in the case of financial services) would be able to take a coordinated and consistent approach to enforcement of all conduct regulation but otherwise follow the lead of the lead regulator in their area of specialisation.

Recommendation 26 Cooperation and coordination between all regulators should be mandated, particularly in relation to requests for data and other regulatory requests.

Recommendation 27 MOUs between regulators with responsibility for financial service activities should not only require regulators to coordinate their activities in relation to regulated entities but the effectiveness of those arrangements should also be subject to review and oversight by the FRAA.

Recommendation 28 Review the allocation of responsibilities for related conduct obligations between different regulators to determine whether they could be streamlined, e.g. by adopting a lead regulator model where enforcement and surveillance activities are centralised under one regulator.

Design solution

Our design principles seek to address the issue of overlapping regulatory responsibilities by extending the role of the FRAA to overseeing all regulators with responsibility for the financial sector to assess whether regulators in the financial services industry are coordinating and collaborating effectively with each other (see section 6.2(f) of this Report).

5.7 Responsible managers and persons

Insurers are subject to multiple, overlapping requirements relating to corporate governance and regulation of key people. At an overarching level, the requirements aim to achieve the same purpose: to ensure that key people in an organisation who hold a position of responsibility (whether over governance matters or the organisation's provision of financial services) are competent and accountable in performing their duties.

ASIC and APRA impose separate requirements on providers under different regimes to achieve this same goal. For example, there are different requirements to appoint responsible people and different requirements to demonstrate that they are 'fit and proper' to perform their duties. Further, the layers of additional requirements such as the introduction of the fit and proper person requirements for AFS licensees,[463] while good in theory, have caused practical issues such as the overburdensome requirement for AFSL applicants and holders seeking licence variations to provide fit and proper character documentation for their officers[464] which is particularly difficult for overseas institutions.

[463] Corporations Act, s 913B(1)(c) & 913BA-913BB.
[464] We note that to address these overburdensome requirements following the introduction the *Financial Sector Reform (Hayne Royal Commission Response - Stronger Regulators (2019 Measures)) Act 2020* (Cth), ASIC released further guidance in early 2021 indicating that it would accept a certification template, as opposed to formal supporting character documentation, to help applicants (see ASIC INFO 240). Further, the Treasury is currently consulting on introducing an exemption for foreign financial service providers from the fit and proper person assessment to fast track the licensing process for FFSPs authorised to provide financial services in a comparable regulatory regime.

(a) Multiple terms for responsible people

There are four main categories of responsible people under the current regimes:

- Fit and proper person (ASIC must be satisfied that certain people including 'officers' and 'senior managers' satisfy the fit and proper person test);
- Accountable person;
- Responsible manager;
- Responsible person or a person in a 'specified role' (such as a 'material risk-taker').

At a base level, the Corporations Act broadly recognises 'officers' of an entity.[465] The requirement to notify ASIC of officers of an entity only applies when an entity varies or applies for an AFSL. There is however no requirement to notify ASIC when an 'officer' of an entity is appointed or changes unless they are a director or company secretary.[466]

The table in Appendix 5 of this Report summarises the key differences of these terms and definitions.

(b) Case study – comparing fit and proper requirements

There are different requirements to demonstrate that responsible people are 'fit and proper'. The regimes imposed by ASIC and APRA can be broadly summarised in two categories:

- competency – the requirement for key, responsible people to have a certain level of appropriate skills, experience and knowledge;
- character – certain matters relating to the character of key, responsible people are taken into account, such as compliance with regulatory requirements, previous disqualifications, bankruptcy and banning orders.

As an example of the overlapping requirements, the table in Appendix 6 of this Report compares the competency, character and accountability requirements under CPS 520/510, RG 105 and FAR.

(c) Recommendations

The requirements under each regime differ because the duties of the responsible people are not identical in each context – for example:

- APRA responsible persons are responsible for the financial soundness and stability of the institution;
- Responsible managers of AFS licensees are responsible for the ongoing provision of the licensee's financial services;
- Accountable persons are accountable for preventing adverse impact to the entity's prudential standing.

However, these concepts are not fundamentally different. We believe that it should be possible to have a single regime which address the different requirements.

Recommendation 29	Establish a single 'fit and proper' regime with a single set of requirements to govern responsible persons and appoint one lead regulator (either APRA or the Conduct Regulator) to oversee the regime and enforce the relevant requirements. Where additional requirements need to be imposed given the nature of the responsible person's responsibility (e.g. the specific knowledge requirements for responsible managers), the regulators should co-ordinate and consult among themselves. In our view, it would be appropriate for APRA to be the lead regulator given prudential regulation is significantly about governance arrangements and this forms a large part of what APRA currently does.
Recommendation 30	Introduce a consolidated, overarching definition for responsible persons and anyone who should be subject to character requirements.

[465] Corporations Act, s 9.
[466] See for example the Corporations Act, Pts 2D.3 and 2D.4.

Recommendation 31	Establish a single online portal administered jointly by APRA and the Conduct Regulator for entities to provide responsible person information (as opposed to having separate fit and proper person policies, accountability maps, statements of personal information and organisational competence tables).
Recommendation 32	Replace existing responsible manager and key person requirements with a requirement to nominate a 'back-up responsible person' for each responsible person.

Recommendation 31 would ensure that any additional requirements (such as the additional supporting documentation required of AFSL applicants to demonstrate the knowledge and skills component of the responsible manager) can still be provided. It also improves efficiency to notify one regulator where there has been a change in a responsible person. While this may involve additional cross co-ordination between regulators, we do not foresee this would be a significant administrative hurdle given the proposed joint administrative requirements under FAR. We also believe this would give both regulators clearer oversight of the key, responsible persons of regulated entities.

The purpose of Recommendation 32 is to limit the need to require responsible managers to meet specific knowledge and skill requirements (e.g. the different years of experience required under Option 1 to 5 in RG 105) or to impose a key person condition. Introducing a 'back-up responsible person' for each responsible person would give the regulator more confidence in the capability of the organisation and the relevant responsible person, including by ensuring that the competency requirements of responsible persons are able to be met in the event that the responsible person changes or there has been a change to the business. This is consistent with the flexibility for accountable persons proposed under FAR for temporary and unforeseen vacancies, directors appointed at general meetings and new entities entering the industry.[467]

Design solution

One of the general insurance principles we have proposed as part of our design principles is that financial services providers must provide services and conduct their business competently and ensure their representatives are trained and competent (principle 1 in section 6.2(a)(iv) of this Report). This principle would replace s 912A(1)(e) of the Corporations Act which requires financial services licensees to maintain competence to provide financial services and which forms the basis for ASIC's responsible manager regime.[468]

However, one of design principles is that there should be appropriate allocation of responsibilities between the Conduct Regulator and APRA and effective consultation and cooperation where responsibilities overlap (design principle 6). While in general we would expect the Conduct Regulator to be responsible for the general insurance principles we have proposed, there are areas of potential overlap and the competence principle is one such area. Consistently with our design principles and Recommendation 29, we therefore believe that:

- APRA should be the lead regulator for our proposed general insurance principle 7 relating to competence;
- APRA would be responsible for administering and enforcing the application of this principle for APRA-regulated bodies and the Conduct Regulator would be responsible for other financial services providers;
- APRA should be required to consult and work with the Conduct Regulator in developing the details of the competency regime to make it as consistent as possible across all financial service providers; and
- the FRAA would be responsible for overseeing the development and enforcement of the competency regime by APRA and the Conduct Regulator.

[467] FAR Bill, s 24(2)-24(7).
[468] *ASIC Regulatory Guide 105: AFS licensing: Organisational competence,* June 2022, [RG 105.5].

5.8 Federal, State and Territory regulation

The general insurance sector is regulated by not only by Federal laws but also by State and Territory laws, in particular those relating compulsory insurance i.e. workers' compensation, motor accident injuries (**MAI**) and home warranty insurance. These laws impose overlapping and sometimes conflicting conduct and prudential requirements and navigating these different requirements is a significantly complex task for all participants in the insurance sector. Each State and Territory sets its own regulatory requirements and this creates further complexity and uncertainty when participants operate across jurisdictions.

Consequently, insurers and service providers are required to duplicate processes, resources and systems and then customise them for a single jurisdiction which is both costly and time consuming.

We acknowledge that there may be a role for State and Territory based regulation of certain insurance classes. However, we believe there is a significant opportunity to rationalise and harmonise laws in relation to general insurance across States, Territories and the Commonwealth and, in particular, to ensure that additional requirements are only imposed at State or Territory level where essential and where no similar regulation exists at the Federal level. Harmonising the requirements would facilitate greater efficiency and consistency in the regulatory framework. This would also lead to positive outcomes for consumers in the form of cost reductions and improvements in service delivery. Therefore, reducing legislative complexity is beneficial for both insurers and consumers.

Harmonising the legislative framework and requirements would provide greater certainty and consistency across the nation, reduce costs and, if done properly, ensure Australians have the same type and level of insurance wherever they live in Australia. It is not obvious why the State or Territory a person lives in should affect whether they have the benefit of or the level of workers compensation insurance, MAI insurance or home warranty insurance. Developing a national legislative framework would result in a greater pooling of risk and expenses in a scheme underwritten by insurers on a national scale which in turn has the potential to drive better outcomes and efficiencies as well as ensuring more consistent outcomes for all Australians.

(a) Case study – workers' compensation

Workers' compensation is *'compensation payable to a worker who suffers an injury or disease arising from, or during, his or her employment'*[469] and is compulsory in every State and Territory. There are currently 11 workers' compensation schemes in Australia as each State and Territory operates its own scheme and the Federal Government operates three schemes: Comcare which covers employees of the Commonwealth and the ACT governments, statutory authorities and private corporations that self-insure their workers' compensation liabilities; Seacare which covers seafaring employees; and lastly a scheme which covers members of the Australian Defence Force.

Each scheme is administered differently with WA, Tasmania, ACT and NT operating privately underwritten schemes and NSW, Victoria, Queensland and SA operating publicly underwritten schemes. In NSW, Victoria and SA, the claims administration function is outsourced to third parties[470] so that insurers operate as scheme agents on behalf of the relevant Government authority.[471] The Commonwealth schemes, excluding the Seacare scheme, are underwritten by the Commonwealth.[472]

While the differences amongst States and Territories may have been driven by the need to tailor the schemes for the specific industries and population comprising each State or Territory,[473] there are opportunities to streamline the scheme requirements. This is because all the workers' compensation

---

[469] ALRC, *Grey Areas – Age Barriers to Work in Commonwealth Laws (DP 78)*, 26 September 2012, [3.41].
[470] Institute of Actuaries of Australia, *Public vs. Private underwriting and administration of personal injury statutory insurance schemes*, prepared by Dr Andrew Fronsko and Alan Woodroffe, 2017, p 16.
[471] Insurance Council of Australia: Understand Insurance, *Workers compensation*, https://understandinsurance.com.au/types-of-insurance/workers-compensation.
[472] Institute of Actuaries of Australia, *Public vs. Private underwriting and administration of personal injury statutory insurance schemes*, prepared by Dr Andrew Fronsko and Alan Woodroffe, 2017, p 16.
[473] Institute of Actuaries of Australia, *Opportunities for Harmonisation in State Workers Compensation Schemes*, prepared by Elaine Collins, John Meacock and Christian Mignot, 2007, p 5.

schemes have the same objective of ensuring that workers receive adequate compensation for injuries caused 'on the job'.

Collins, Meacock and Mignot categorise the points of difference amongst the schemes into the following three broad areas:

- premium processes and regulations;
- claims processes and regulations; and
- submissions and communications related to both areas.[474]

Within each of these areas, the authors highlight opportunities to harmonise the requirements amongst States and Territories as they concern the same task and/or are mainly administrative in nature. For example, in relation to premium processes and regulations, the authors point out that each jurisdiction's main activities in relation to premiums are firstly gathering information about the employer; then using this information to calculate premiums payable; and then collecting payment from each employer. Although these tasks are common across the States, each workers' compensation scheme has developed its own set of regulations and processes. Accordingly, the authors highlight the numerous challenges faced by employers in navigating and complying with the different requirements across the States, despite these requirements relating to the same task (for example, the form and design of wage declaration forms). These challenges equally apply to insurers and other participants in the workers' compensation sector.

Further, in relation to claims related processes, each jurisdiction has a different definition of 'wage' and most prescribe different maximum and/or minimum benefits. Therefore, even fundamental concepts differ across the jurisdictions and this makes it difficult for insurers and employers to understand basic requirements and to identify and comply with subtle differences across jurisdictions. Standardising the meaning of common terms such as this is an example of how harmonisation would benefit all participants in the industry.

Inconsistency between jurisdictions directly impacts workers as they may receive, *'substantially different levels of compensation, even though they incurred precisely the same injury, simply by virtue of whether or not their employer is in the national scheme or a state or territory scheme'.*[475] This clearly raises concerns of inequity and fairness as payouts are based on jurisdiction. It also *'creates an uneven playing field for businesses as marked variations can be expected in premiums faced by employers with identical risk profiles, operating in the same jurisdiction, depending on which scheme is covering an employer'*.[476]

Inconsistency across workers' compensation schemes also means that insurers must develop separate policies, premium projections, compliance processes and systems for each jurisdiction they underwrite in. Given that this duplicates processes, systems and technology for the same product, which must then be customised for the jurisdictional requirements, this creates many inefficiencies for insurers that could be avoided to the extent they relate to administrative matters. Further, inefficiencies do not lead to good consumer outcomes as they ultimately delay processes and increase costs.

(b) Case study – compulsory Motor Accident Injury (MAI) Insurance

Each State and Territory in Australia has its own laws establishing compulsory insurance to provide compensation for people injured in motor vehicle accidents. MAI insurance cover varies with some States and Territories providing benefits on a no-fault basis, that is cover is provided to the policy holder or other persons considered to be at-fault causing the accident. In those States in which benefits are provided on a more limited basis to those who are not at-fault in the accident, MAI insurance is also known as compulsory third party (CTP) insurance.

In New South Wales, Queensland, South Australia and the Australian Capital Territory, compulsory MAI insurance is privately underwritten by a small number of authorised insurers that are licensed by the relevant State or Territory regulator. In the other States and Territories (Victoria, Western Australia, Tasmania and the Northern Territory), compulsory MAI Insurance is publicly underwritten and offered by a Government owned or licensed insurer which also administers the scheme, other than NT which

---

474 Institute of Actuaries of Australia, *Opportunities for Harmonisation in State Workers Compensation Schemes*, prepared by Elaine Collins, John Meacock and Christian Mignot, 2007: https://actuaries.asn.au/Library/p.6_ACS07_paper_Collins_Opportunities%20for%20Harmonisation.pdf.
475 Joanna Howe, 'Possibilities and Pitfalls Involved in Expanding Australia's National Workers' Compensation Scheme' (2015) 39(2) *Melbourne University Law Review* 472, p 475.
476 As above.

outsources administration of the NT scheme to Allianz.[477] A diagram of the different State and Territory schemes along with a table of the key features of each of the schemes is set out in Appendix 7 which has been provided by IAG.

While dealing with the same subject, each State and Territory law sets out different requirements in relation to MAI insurance. This creates significant complexity for insurers that underwrite MAI insurance in more than one jurisdiction. Even where the fundamental requirements are the same across the States and Territories, the detailed requirements differ significantly, including the disclosure and wording of statutory policies, the range of benefits available (statutory and/or common law based), eligibility tests and mechanisms for resolving disputes. Practically, this translates into multiple processes and systems that must be developed by insurers for the various regulatory frameworks, compliance, data collection and reporting requirements that are set by each State and Territory. This in turn results in the duplication of many processes that could be streamlined.

For example, IAG has told us that it currently provides compulsory MAI insurance in NSW, SA and the ACT and each jurisdiction requires the insurer to prepare and submit a business plan detailing the insurer's business strategy, structure and operations on an annual basis. In addition, the business plan must be updated when there is a material departure from a previously submitted plan or the implementation of a business wide improvement or change. As the requirements and compositions of the business plan differ across each jurisdiction, it means that insurers must prepare a separate business plan for each jurisdiction they underwrite in. For IAG, this means preparing three separate plans, which duplicates processes and effort, despite these plans containing much of the same substantive material. This is in addition to the prudential requirement of insurers to maintain a business plan on a three year rolling basis that covers the entirety of the institution and is approved by the Board.[478]

This is an example where the compulsory MAI insurance regulatory requirements could be harmonised as the fundamental obligation to develop a business plan that is submitted to the regulator, as well as comply with prudential requirements, is the same across all States and Territories in which private underwriting takes place and also replicated at the entity level under APRA prudential standards.

Further, reporting requirements could be harmonised as some private underwriting jurisdictions require insurers to duplicate reporting requirements as part of their licence conditions.

Not only is there inconsistency between regulators across jurisdictions for MAI insurance, in some jurisdictions, there are overlaps and inconsistencies even within the local regime. This is in part because the obligations are set out in several legislative sources of varying status in the legislative hierarchy.

It is difficult and complex for insurers to identify and navigate through all the claims conduct requirements that are spread across different instruments. It increases complexity for regulators and also results in duplicated effort and costs for insurers that are ultimately passed on to consumers through higher premiums.

Therefore, there is a strong case for harmonising compulsory MAI insurance regulation to the extent that it concerns the same substantive requirement. In our view, private underwriters should be involved in the provision of this insurance so that the associated underwriting and financial risks are borne by the industry rather than being a risk to taxpayers. This will also result in better outcomes for consumers as they will be treated more consistently across different locations. Consumers should not be treated differently purely based on where they are located.

Further, it is questionable why States and Territories must have their own schemes and regulators when APRA is the lead regulator and primary licensing authority for participants in the general insurance industry. Transferring the enforcement and monitoring of compulsory MAI insurance from States to APRA would streamline processes, reduce significant costs in operating separate State based schemes and be more consistent with the twin peaks model.

It would also lead to more consistent outcomes for the industry and eliminate duplicated effort and processes for insurers.

---

[477] Institute of Actuaries of Australia, *Public vs. Private underwriting and administration of personal injury statutory insurance schemes*, prepared by Dr Andrew Fronsko and Alan Woodroffe, 2017, p 9.
[478] APRA, *Prudential Standard CPS 220 Risk Management*, July 2017, [31]-[34].

(c) Case study – home warranty insurance

Home warranty insurance, also known as home building compensation, home indemnity insurance and domestic building insurance, is insurance designed to protect homeowners against incomplete building work and defects in residential building jobs.

Home warranty insurance is mandatory in all States and Territories, other than Tasmania[479] and NT, and requires licensed builders to purchase this insurance before working on residential building jobs valued above a certain threshold. Each State prescribes a different threshold and terms and conditions for cover. However, homeowners are generally only able to claim in very limited circumstances, usually where the builder has had their licence suspended or they have died, disappeared or become insolvent (excluding Queensland).

The table in Appendix 8 of this Report summarises some key features of home warranty insurance and how it is regulated in different jurisdictions.

The adequacy of consumer protection for home warranty insurance has long been questioned as highlighted by the inquiry undertaken by the Senate Standing Committee on Economics in 2008.[480] Issues have been raised by consumers and builders, with many consumers raising concerns about the *'lack of information and misunderstanding about the coverage of the insurance'*.[481] This problem is further exacerbated due to the inconsistency across States in how the insurance operates.

The Senate Standing Committee recognised in its inquiry that there needs to be better information to consumers about the insurance and recommended that the Council of Australian Governments (now replaced by National Cabinet) and the Ministerial Council on Consumer Affairs pursue a nationally harmonised 'best practice' scheme of consumer protection in domestic building, which includes but is not limited to, clear definitions of defective work, better information for consumers and disciplinary procedures and penalties.[482] Despite the recommendation made by the Committee, it appears to have dropped off the Government's policy agenda as harmonisation reforms have yet to be made to the regime.

(d) Options for addressing State and Territory insurance issues

As discussed above, the current State and Territory insurance regimes are inconsistent and this results in the level and type of cover and the cost of cover varying depending not on the cover a person needs but rather the State or Territory they live, work or carry on business in. It also increases costs for insurers which are ultimately borne by consumers and businesses.

Therefore, there is a strong case for harmonising regulation of compulsory forms of insurance and ensuring coordination of reporting obligations and enforcement. This could be achieved by a number of means:

- The Commonwealth could exercise its constitutional authority over insurance[483] to harmonise the regulatory requirements for workers compensation, compulsory MAI insurance and home warranty insurance, while facilitating opportunities for private underwriting, and override State and Territory laws in this area. If this approach was adopted, the role of States and Territories would be limited to providing supplementary State (or Territory) insurance (i.e. insurance provided by the relevant State or Territory) where the relevant State or Territory identifies instances of market failure.
- Federal, State and Territory governments could establish a cooperative scheme to harmonise compulsory insurance schemes across the country. A cooperative scheme involves participating jurisdictions promulgating legislation *'to facilitate the application of a standard set of legislative*

---

[479] In December 2021, the Tasmanian Government announced the future reintroduction of Home Warranty Insurance for Tasmania. Consultation on the *Home Warranty Insurance for Tasmania Consultation Paper*, 6 May 2022, closed on 6 June 2022: https://www.justice.tas.gov.au/community-consultation/closed-community-consultations2/home-warranty-insurance (accessed on 30 November 2022).
[480] The Senate Committee on Economics, *Australia's mandatory Last Resort Warranty Insurance scheme*, November 2008, p 2.
[481] As above, p 3.
[482] As above, p 64, recommendation 2.
[483] The Commonwealth power to make laws with respect to insurance (other than State insurance): Constitution, s 51(xiv). If it exercises this power, it can oust State and Territory jurisdiction in relation to insurance: Constitution, s 109.

provisions in that jurisdiction to regulate a matter of common concern'.[484] The ALRC notes that there are four main types of Commonwealth-state cooperative schemes: referral of power to the Commonwealth, mirror legislation, complementary law regimes; and a combined scheme.[485]

- Reporting obligations and enforcement could be harmonised and cooperative arrangements could be established so that insurers are primarily accountable to APRA in relation to prudential matters and to ensure State and Territory regulators coordinate enforcement activities and regulatory requirements with APRA.

While a Federal takeover of State and Territory insurance schemes has an attractive simplicity from a public policy point of view, political and economic considerations make it an unlikely solution. We therefore make the following recommendations.

Recommendation 33 A cooperative scheme should be implemented by Federal, State and Territory governments to harmonise requirements of compulsory classes of insurance and as far as possible bring all of the schemes up to the same standard.

Recommendation 34 The cooperative scheme should include the following elements:

34.1 States and Territories should be required to:

- use consistent terminology and to take into account existing Federal requirements when imposing additional obligations on insurance companies; and
- consult with APRA before imposing any additional obligations on insurance companies;

34.2 APRA should have the power to reject or modify any such proposed requirement;

34.3 the Federal Treasurer should have the ability to override any such decision by APRA on application by the relevant State or Territory;

34.4 State and Territory regulators and APRA should be required to cooperate with each other and comply with reasonable information requests.

(e) Effective use of Memoranda of Understanding (MOUs)

If our recommendations to implement a cooperative scheme are not adopted, there is also scope to increase reliance on coordination amongst regulators for other regulatory regimes. The foundations for such reliance is in place to some extent, but do not seem to be fully leveraged. For example, APRA has MOUs with the regulators of the motor accident injury schemes in NSW,[486] SA,[487] ACT[488] and QLD.[489] The MOUs all provide that APRA and the relevant State regulator will *'co-operate where it is within their administrative powers to achieve effective enforcement and compliance outcomes'.* This includes:

- mutual assistance in relation to the exchange of information, referral of matters and co-operation in regulation, compliance and enforcement;
- information sharing;
- advising of insurance risk reviews of insurers underwriting CTP insurance;
- standing requests for information;
- using best endeavours to notify of information that is likely to assist the other agency; and

---

[484] ALRC, *National Classification Scheme Review Issues Paper*, May 2011, [123], footnote 86, citing Farnan M, 'Commonwealth–State Cooperative Schemes—Issues for Drafters' (Paper presented at 4th Australasian Drafting Conference, Sydney, 3–5 August 2005), 3.
[485] As above, [126].
[486] *Memorandum of Understanding between the Australian Prudential Regulation Authority (APRA) and the Motor Accidents Authority of New South Wales (MAA)*, signed 18 May 2012 (**MOU between APRA and MAA**). SIRA took over from the MAA in 2015.
[487] *Memorandum of Understanding between the Australian Prudential Regulation Authority (APRA) and the CTP Insurance Regulator (South Australia) (SA CTP Regulator)*, signed 11 August 2017.
[488] *Memorandum of Understanding between the Australian Prudential Regulation Authority (APRA) and the Australian Capital Territory Compulsory Third-Party Insurance Regulator (ACT CTP Regulator)*, signed 11 August 2017.
[489] *Memorandum of Understanding between the Australian Prudential Regulation Authority (APRA) and the Motor Accident Insurance Commission of Queensland (MAIC)*, signed 20 November 2012.

- co-operation on matters of mutual interest such as emerging issues in the insurance industry, the commercial and regulatory implications of new policy and administration proposals and the exchange of expertise.

While information sharing is already provided for within the MOUs, each regulator is only expected to share information relevant to its responsibilities to the other regulator on a 'best endeavours basis' subject to legislative provisions.[490] A better approach would be for the regulators to cooperate and obtain copies of relevant information from each other when they require it rather than adding to the compliance burden of insurers.

Introduction of a cooperative scheme as proposed in Recommendation 33 and Recommendation 34 should ensure more effective cooperation and coordination between State and Territory regulators and between them and APRA, in particular Recommendation 34.4.

5.9 'One size fits all' regulation

The general insurance sector is regulated through both general financial services legislation as well as insurance specific legislation. Regulating financial services through general financial services legislation is important as it harmonises regulatory requirements across the various sectors where there is little benefit in taking a diverging approach (for example, there is no reason why fit and proper requirements should not be sector agnostic).

However, there is a risk when regulating through a general financial services legislative regime that regulatory concepts relevant to one sector of the industry are transferred to another without considering the differences between them. Regulatory concepts relevant to banking, superannuation and investments should not be transposed on the insurance sector and vice versa without careful consideration and appropriate adjustment.

As a general rule, APRA has done a good job of recognising the key differences between the sectors it regulates within the financial services market by setting common prudential standards where common standards are appropriate across its regulated entities and separate prudential standards where appropriate and necessary for particular sectors. For example, APRA has made common standards covering:

- Risk Management: CPS 220;
- Outsourcing: CPS 231;
- Business Continuity Management: CPS 232;
- Information Security: CPS 234;
- Actuarial and Related Matters: CPS 320; and
- Governance, remuneration and fit and proper: CPS 510 – 520.

APRA has set separate requirements where appropriate for:

- Capital standards: GPS 110 – 120;
- Reinsurance Management: GPS 230;
- Financial Statements: GRS 300 – 460;
- Audit and Related Matters: GPS 310;
- Insurance Liability Valuation: GPS 340; and
- Transfer and Amalgamation of Insurance Business: GPS 410.

Of course, the process of identifying what is appropriately common between different types of regulated entities and what needs to be dealt with separately is an iterative process. For example, APRA has recently consulted on strengthening the preparedness of banks, insurers and superannuation trustees to respond to future financial crises and has made *Prudential Standard CPS 190 Recovery and Exit Planning*, which requires all regulated entities to develop and maintain a recovery and exit plan, and capabilities to be able to anticipate, manage and respond to periods of stress. It has also released *Draft Prudential Standard CPS 900 Resolution Planning* which proposes to require large or complex entities, or those that provide critical functions to the economy, to support APRA in the development and implementation of a resolution plan. The approach adopted by APRA in this case has been criticised by the Australian Banking Association and the Insurance Council of Australia which have stated that this

[490] For example: MOU between APRA and MAA, clause 5.4.

process *'implements an untested single one-size fits all approach for all financial services industries, which has not been implemented globally and is arguably not international best practice'*.[491] This demonstrates the need for effective consultation as was and continues to be undertaken to ensure appropriate outcomes for different parts of the financial services sector.

These concerns apply not only to prudential regulation but also to other forms of conduct regulation as discussed below.

(a) Case study – DDO

The DDO regime in the Corporations Act is designed to ensure product issuers and distributors deliver good consumer outcomes by requiring issuers and distributors to take a consumer-centric approach to designing, marketing and distributing financial products.[492] The regime was introduced following recommendations made by the Financial System Inquiry in 2014 to introduce a targeted and principles-based product design and distribution obligation for financial products.[493] While the Inquiry did consider limiting this obligation to complex products, it ultimately did not recommend this, opting for requirements that are *'scalable, depending on the nature of the product'.*[494] Accordingly, the Inquiry envisioned that simple products likely to be suitable for most consumers would not require extensive consideration and could be treated as a class, with a standard approach to their design and distribution.[495] Presumably, this would extend to most general insurance products, including home building and contents and motor vehicle insurance, given that their purpose is generally well-understood by consumers.

The Revised Explanatory Memorandum for the Bill which introduced the DDO regime notes the Financial System Inquiry's views and states that as such, *'the obligations are broad in nature and scalable in line with the nature of the product'*.[496]

However, while there is some element of scalability in the DDO regime through the various reasonableness requirements,[497] it is quite limited. There is no explicit objective for the obligations to apply in a scalable and proportionate manner which results in prescriptive requirements being imposed on products that are in-scope.

The DDO regime does not therefore take into account the relatively straightforward need for most general insurance products that are offered to retail clients and the low likelihood of consumer detriment resulting from the purchase of these products. The regime fails to recognise the different qualities of general insurance products compared to other financial products, particularly investment products. The primary forms of consumer general insurance products, such as home and contents, motor, personal effects and travel insurance, are generally required by anyone who has property to insure with the possible exception of the very wealthy. The detailed and prescriptive nature of the DDO regime is therefore unnecessary and imposes onerous obligations on insurers and distributors of general insurance products that are not proportionate to the risks associated with the product. It is unclear whether there is any real consumer benefit associated with these requirements for general insurance products.

There are also some serious difficulties with the application of the DDO regime to general insurance. For example, it is difficult to apply the DDO regime to renewals of general insurance policies. The DDO regime applies to the renewal of general insurance policies as renewals constitute the issue of a financial product. However, unlike the issue of most financial products, general insurance policies are generally

---

[491] Australian Banking Association and Insurance Council of Australia, *Crisis resolution – Policy development*, 29 April 2022, p 1.
[492] Revised Explanatory Memorandum to *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019* (Cth), p 65, at [1.7].
[493] *Financial System Inquiry Final Report,* November 2014, Recommendation 21.
[494] As above, p 199.
[495] As above.
[496] Revised Explanatory Memorandum to *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019* (Cth), [3.20].
[497] For example:

- the requirement for reasonable reporting periods: Corporations Act, s 994B(6) and (7);
- the requirement for a TMD to be such that it would be reasonable to conclude that a it is likely that a client would be in the target market if the distribution conditions are met and that the product would be suitable for the client: Corporations Act, s 994B(8);
- a product issuer must take all reasonable steps to ensure that distributors are aware that the TMD is under review and distribution conduct must cease: Corporations Act, s 994C(5);
- a product issuer must take reasonable steps to ensure that distribution conduct is consistent with the TMD: Corporations Act, s 994E.

offered for renewal on an annual basis (for example, home building and contents and motor vehicle insurance). Accordingly, the DDO regime requires insurers and distributors to take reasonable steps each year so that the general insurance product is distributed in accordance with the TMD.

As the Insurance Council of Australia notes, this obligation potentially requires insurers to confirm that the personal circumstances of each policyholder have not changed prior to renewal of the policy each year.[498] ASIC also indicates that this may be required in its *Regulatory Guide 274: Product design and distribution obligations* (**ASIC RG 274**) by including 'obtaining further information' as a possible appropriate further step when renewing an insurance policy.[499] As stated by the Insurance Council of Australia, this would then require the insurer to re-ask the underwriting questions and re-collect information, imposing an additional administrative burden on both the insurer and the consumer.[500] It can also lead to significant consumer detriment as policyholders may not be contactable during the renewal period. Therefore, these policyholders may inadvertently lose cover because they cannot be confirmed to be suitable for a product. This interpretation would effectively preclude automatic renewal arrangements and cause consumers to lose cover which is of particular concern where policyholders are in emergency situations (e.g. policyholder is caught up in a natural disaster).[501]

It is our experience that the above doomsday scenario is not being applied by general insurers in their compliance with the DDO regime, based on a view being taken on what is required by the reasonable steps requirement. However, there is nothing in the DDO regime or ASIC guidance that provides clear guidance on how the suitability requirement applies to general insurance renewals.[502] The DDO regime therefore creates unnecessary risk and uncertainty for general insurers, increasing costs and reducing opportunities for product innovation.

The Insurance Council of Australia has estimated that requiring insurers to receive active acknowledgement from policyholders that their personal circumstances have not changed would require significant costs and business model and systems changes. The Council notes it is difficult to extrapolate across the general insurance industry but provides the following examples:

- *Large insurers have estimated that the recollection of information would cost up to $80 million each annually – with one off system set up changes of approximately $14 million each.*
- *A mid-tier insurer has estimated $18 million in annual costs – with one off systems changes of approximately $20 million each.*
- *A smaller specialist insurer has estimated $5.5 million in annual costs – this would represent a 1200% increase in customer service costs associated with the renewal process.*[503]

These costs are ultimately borne by consumers through higher premiums which inevitably reduces the affordability of insurance. Therefore, consumers may be left in a worse position as the DDO regime does not taken into account the unique attributes of general insurance products or explicitly set out how these requirements can be managed in a scalable manner for these attributes.

Section 5.10 of this Report also explores how the existing product suitability requirements for general insurance products overlap with the requirements of the DDO regime.

Target Market Determinations (TMDs)

Similar comments about the broad-brush approach to regulation may be made about the requirement to produce a TMD.[504] While the TMD is a useful document for more complex financial products, the TMD does not provide significant additional value for general insurance products like home building and contents and motor vehicle insurance. This is because these products are only available for property owned or leased by a consumer and therefore, each consumer is likely to have a similar objective of insuring their asset for damage and loss. Financial situation is also not relevant given insurance

---

[498] Insurance Council of Australia, Submission on the Exposure Draft of *the Corporations Amendment (Design and Distribution Obligations and Product Intervention Powers) Regulations 2019* (14 October 2019) (**ICA Submission on DDO Regulations**), p 2.
[499] Example 15 of ASIC RG 274.
[500] ICA Submission on DDO Regulations.
[501] As above.
[502] ASIC merely observes that a distributor may already have enough information about a consumer in the case of a renewal and goes on to note that insurers need to assess what information they hold to decide whether the product is likely to remain suitable for the consumer. While ASIC does acknowledge that the insurer may not need to decline to renew the policy, they should redirect the customer to a more appropriate policy: ASIC RG 274.179 and Example 15. ASIC's guidance therefore simply maintains the risk for insurers whenever they permit automatic renewal.
[503] ICA Submission on DDO Regulations.
[504] See section 5.3(a) of this Report for a description of the TMD.

premiums will almost invariably be a very small proportion of the loss that the customer would suffer if one of the main insured events covered by the policy occurs.

Although consumers may have different needs in relation to the insurance product (for example, consumers in flood-prone areas have a greater need for flood cover), setting suitability requirements in a TMD based on the exclusions in an insurance policy becomes little more than a reciting of the exclusions in a different form and is therefore an unnecessary compliance burden.

The TMD therefore simply adds to the numerous disclosures that must be made available to consumers[505] (such as the PDS, any Supplementary PDS and the Key Facts Sheet for home and contents insurance). It is therefore adding to an already excessive disclosure burden for insurers and consumers.

Recommendation 35	Consistent with Recommendation 9, a post-implementation review of the Royal Commission reforms should consider whether the DDO regime is performing a useful role in relation to general insurance or whether it should only apply to particular general insurance products after appropriate consultation.

(b) Design solution

The design principles facilitate a legislative framework which takes into account the specific requirements and needs of different sectors by setting general principles that can apply generally to all financial products and applying specific requirements for particular products or types of products through separate chapters in the primary legislative for sector specific requirements and through the ability for the regulator to set specific Rules where required after appropriate consultation. This recognises that not all obligations are equally applicable and relevant across the financial services industry as different risks arise in different parts of the industry.

The Rules would also be subject to review by the FRAA, meaning that they can be challenged if they are not appropriate for a sector.

5.10 Product suitability

Product suitability is a key aspect of the DDO regime introduced under Part 7.8A of the Corporations Act (section 5.9(a) of this Report discusses the background of the DDO regime).

The DDO regime has the following elements:

- *Product design:* issuers must design financial products that are likely to be consistent with the likely objectives, financial situation and needs of the consumers for whom they are intended.
- *Product distribution:* issuers and distributors must take 'reasonable steps' that are reasonably likely to result in financial products reaching consumers in the target market defined by the issuer.
- *Monitoring and review:* issuers must monitor consumer outcomes and review products to ensure that consumers are receiving products that are likely to be consistent with their objectives, financial situation and needs.[506]

However, ASIC confirms that the DDO regime does not *'equate to an individualised product suitability test that requires assessment of each individual's personal circumstances at point-of-sale'.*[507]

These obligations co-exist alongside requirements in other regimes focused on general insurance products. This can, without further guidance and clarification, lead to unnecessary repetition, confusion and potentially inefficient and ineffective compliance frameworks.

---

[505] Noting that ASIC does not consider the TMD to be a consumer-facing disclosure document: *ASIC Regulatory Guide 274: Product design and distribution obligations*, December 2020, [RG 274.138].
[506] *ASIC Regulatory Guide 274: Product design and distribution obligations* (**RG 274**), December 2020, Section A.
[507] RG 274.6.

APRA product suitability requirement

APRA *Prudential Practice Guide GPG 240 Insurance Risk* (**GPG 240**) outlines how general insurers should comply with APRA *Prudential Standard CPS 220 Risk Management* (**CPS 220**) requirements, and outlines prudent practices in relation to insurance risk management.

Insurance risk in GPG 240 is defined as *'the risk that inadequate or inappropriate underwriting, claims management, product design and pricing will expose an insurer to financial loss and the consequent inability to meet its liabilities.'*[508] CPS 220 requires general insurers and a Head of group (as defined in CPS 220) to maintain a risk management framework that enables the institution to appropriately develop and implement strategies, policies, procedures and controls to manage different types of material risks, and provides the Board with a comprehensive institution-wide view of material risks.[509]

GPG 240 examines how product design should be integrated in an insurer's risk management framework. It would 'typically cover':

- setting a business case for new or enhanced products;
- market testing and analysis;
- cost/benefit analysis;
- risk identification and assessment;
- requirements for limiting risk through, for example, diversification, exclusions and reinsurance (including confirmation that either the existing reinsurance will provide protection or new reinsurance protection is being provided);
- processes to ensure that policy documentation is adequately drafted to give legal effect to the proposed level of coverage under the product;
- an implementation plan for the product, including milestones;
- clearly defined and appropriate levels of delegation for approval of all material aspects of product design;
- post-implementation review; and
- methods for monitoring compliance with product design policies and procedures.[510]

At least some of these areas overlap with the DDO regime, causing duplication of effort and potential confusion. As GPG 240 does not explicitly refer to the introduction of the DDO regime, it is unclear how the product design elements within the risk management framework align with the DDO regime, and how much it differs.

Table 6 Overlap between DDO regime and product design elements in risk management framework (GPG 240)

Risk Management Framework requirement	DDO regime requirement
Setting a business case for new or enhanced products	Part of product governance arrangements (see Section C, RG 274.42 - 44)
Market testing and analysis	Part of record keeping obligation under s 994F as well as product design stage (see e.g., RG 274.42, RG 274.44)
Cost/benefit analysis	Part of record keeping obligation under s 994F as well as product design stage (see e.g., RG 274.42, RG 274.44)
An implementation plan for the product, including milestones	Part of product design stage (see e.g., RG 274.42(b) and 274.43(b)) product distribution stage (see e.g., RG 274.48 - 49). Implementation of product governance arrangements is also discussed at RG 274.55 - 56.
Post-implementation review	Part of review obligation under s 994C as well as part of review of product governance arrangements (see RG 274.57 - 58).

[508] GPG 240, p 4.
[509] CPS 220, [19].
[510] GPG 240, p 4.

Risk Management Framework requirement	DDO regime requirement
Methods for monitoring compliance with product design policies and procedures	Part of reasonable steps requirement under s 994E and record-keeping obligations under s 994F. Also part of monitoring and review stage (see e.g., RG 274.50 - 51). See also RG 274.56 which discusses compliance for AFS licensees and credit licensees.

Without clearer guidance from either (or both) of APRA and ASIC in GPG 240 and/or RG 274, it is unclear how much of the risk management framework in relation to product design can be subsumed by the DDO regime, and how much must be stand-alone. Clarity on this point would facilitate more efficient and effective compliance for insurers to prevent consumer harm. Relevantly, APRA has announced plans to review and refresh guidance for general insurers on product design, underwriting and risk management in GPG 240 to ensure a consistent risk standard in insurance risk management.[511] This is scheduled to take place in 2023.

The PIP – ASIC's product intervention power

Another example of potential double-handling is ASIC's product intervention power. RG 274.242 notes that the product intervention power complements the DDO regime. *ASIC Regulatory Guide 272: Product intervention power* refers to the DDO regime explicitly, explaining that if effective processes are in place, it would be less likely that ASIC would need to exercise the power,[512] which is found under 7.9A of the Corporations Act.

However, RG 272.4 and RG 272.49 state that even where the DDO regime is complied with, if ASIC is satisfied there is a risk of significant consumer detriment, the power can still be exercised.[513] Further, RG 272.60 states that where ASIC has intervened due to significant consumer detriment, the detriment will have stemmed from the financial product being inappropriately distributed to consumers due to a beach of the DDO regime. In these cases, ASIC will intervene using the power, as well as take enforcement action for the breach of the DDO regime. The benefit of this two-limbed approach is not specified.

While the product intervention power may be exercised in circumstances which are beyond the scope of the DDO regime, RG 272 provides little practical guidance as to how specifically there could be a situation where the DDO regime has been complied with, yet ASIC would need to intervene using the product intervention power, even though this may be conceptually possible. This naturally leads to questions about the design of a model which permits intervention despite an issuer making best endeavours to comply with the DDO regime.

As the delineation between the DDO and PIP frameworks is not as clear as it could be, an issuer may ultimately need to take into account what could likely cause 'significant consumer detriment' under s 1023E of the Corporations Act in designing a product, even though this is not strictly part of the DDO regime requirements (noting that consumer harm is a relevant factor in the DDO regime[514]). There is an argument that the DDO and PIP regimes should be clearer as to when they defer to each other and when they do not.

Conclusion

We note that GICOP is fairly general in its discussion of product suitability. For example, it states that *'we will provide value, transparency and fairness of products and services by…designing and selling insurance products and services that are of value to the community they are sold to'*[515] and *'we will have a publicly available policy on our approach to the development and distribution of our products for the appropriate target markets. This policy will be published on our website'.*[516]

[511] APRA, *Information Paper: APRA's Policy Priorities*, 1 February 2022, p 13.
[512] *ASIC Regulatory Guide 272: Product intervention power*, June 2020, [RG 272.4].
[513] This is reiterated in s 1023E(3) of the Corporations Act.
[514] *ASIC Regulatory Guide 274: Product design and distribution obligations,* December 2020, [RG 274.110], [RG 274.113], [RG 274.152], [RG 274.159], [RG 274.173], [RG 274.188] & [RG 274.197].
[515] GICOP, p 4.
[516] GICOP, [43].

Ultimately, principles-based requirements for insurance product suitability should be developed. High-level principles are easier for both consumers and issuers to understand, provide more regulatory flexibility for a dynamic and constantly changing market, and allow for less overlap and inconsistency between requirements.

Furthermore, the various product suitability regimes, such as the APRA prudential guidance and standards, the product intervention power and the DDO regime should ideally be consolidated into one regime. At the minimum, they should be harmonised and 'speak to each other'. This could be done by cross-referring between them or deferring to each other for particular issues or principles. This is important, as it enables more effective compliance mechanisms that in turn strengthen consumer protection as it clearly establishes products are being provided to the appropriate end-users. Inconsistencies between insurance product suitability regimes can cause compliance frameworks to be less rigorous, piecemeal and challenging to implement.

Recommendation 36	The Conduct Regulator and APRA should be expressly required to coordinate and cooperate with each other when developing policies and regulatory requirements that have both conduct and prudential implications.

While there is a statutory obligation for ASIC and APRA to cooperate with each other in the performance of their functions and powers, so far as is practicable,[517] there should also be an explicit requirement for cooperation when the regulators are making policy. This means placing a greater emphasis on the policy area of engagement outlined in the MOU between the Conduct Regulator and APRA. Accordingly, the Conduct Regulator and APRA should endeavour to develop a single set of requirements on topics that have both conduct and prudential aspects, provided that it is appropriate to do so and it reduces unnecessary complexity and costs. For the avoidance of doubt, the Conduct Regulator and APRA should not be required to agree at all times as each regulator should have its own discretion to set relevant requirements. The purpose of Recommendation 36 is to encourage the development of a single set of obligations where appropriate.

Design solution

Our design principles address product suitability by recommending a principle to require providers to provide suitable services and prioritise the interests of consumers (principles 6 and 7 in section 6.2(a)(iv) of this Report). Therefore, providers must ensure that the interests of the consumer are at the forefront when designing and distributing products. Design principle 4 contemplates the Conduct Regulator having the power to make Rules to prescribe specific requirements where appropriate after consultation.

In addition, adoption of our design principles would involve mandating consultation and consultation between the Conduct Regulator and APRA (design principle 7). Expanding the role of the FRAA to review the Rules made by the Conduct Regulator and monitor collaboration between the Conduct Regulator and APRA is also key to ensuring oversight of the rule-making process by both the Conduct Regulator and APRA (design principle 8). This gives the FRAA the opportunity to ensure that each regulator does not develop overlapping requirements without regard to similar requirements imposed by the other regulator.

5.11 Distribution

The distribution of general insurance is now more complex than ever with the raft of regulatory changes in the financial services sector applying not just to insurers but also to the parties involved in the sales and distribution process, including intermediaries, agents, brokers, distributors and authorised representatives. While these changes reflect the shift towards a product design and distribution model to help ensure that consumers are protected during all stages of the purchasing process, the lack of structure in the regulatory framework makes it difficult to identify and navigate through the requirements. This ultimately impedes the ability of insurers and parties involved in the distribution process to actually deliver the consumer protection sought by these requirements.

[517] APRA Act, s 10B(2); ASIC Act s 12AA(2).

(a) Terminology

Immediate issues of complexity for parties involved in distribution are apparent from the variety of terms used to describe them across different legislative sources. As explored in section 5.2, the use of different terms to capture similar concepts is complex and confusing for all stakeholders in the financial services sector and this equally applies to the distribution of general insurance products. Terms that may apply to the parties range from:

- 'licensee', 'authorised representative' and 'representative' – in Chapter 7 of the Corporations Act;
- 'regulated person' – in Parts 7.8A (DDO) and 7.9 (product disclosure) of the Corporations Act;
- 'product distributor' – in regulation 7.7.02 of the Corporations Regulations;
- 'insurance intermediary' and 'insurance broker' – in the Insurance Contracts Act;
- 'distributor' – in ASIC Instruments and the General Insurance Code introduced by the Insurance Council of Australia;
- 'broker' – in the Insurance Brokers Code introduced by NIBA; and
- 'financial firm' – referred to by AFCA.

Not only is this confusing for these parties, it increases the risk of misunderstanding a term and the application of a requirement. This could result in inadvertent breaches resulting in consumers being deprived of relevant protections.

Further, the volume of legislative requirements and regimes makes it more difficult to identify the impact of any regulatory reform on parties involved in the distribution process. This raises issues where it results in a regulatory requirement being applied inconsistently or its intent is not preserved.

For example, under *ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682* (**Distributor Instrument**), insurers are authorised to appoint distributors to deal in general insurance products on their behalf without appointing them as authorised representatives and needing to notify ASIC of their appointment. Distributors are also exempt from the requirement to provide retail clients with a FSG. The Explanatory Statement to the Distributor Instrument provides that a simpler regime is 'more appropriate' for general insurance products because general insurance products are 'simple products that are well understood by consumers'. It is not clear, however, why this regime should be limited to dealing activities and does not extend to any conduct which may fall within the very wide definition of advice.[518] The same can be said for the newly introduced financial service of claims handling and settling, which ASIC has only recently provided relief for in relation to the requirement for authorised representatives to notify ASIC of the sub-authorisation of employees who provide a claims handling and settling service for general or consumer credit insurance products.[519] ASIC has also recently provided relief for authorised representatives that are authorised to deal in a general insurance product or a bundled consumer credit insurance product and provide a claims handling and settling service from the requirement to provide a FSG (subject to conditions).[520]

The effect of this inconsistent approach to the regulation of insurance distributors is that different approaches need to be taken depending on whether a distributor:

- merely refers clients to the insurer or another distributor and/or material relating to insurance products[521] – in which case they do not need to be appointed as a distributor or authorised representative and do not need to disclose any commission or other remuneration they receive, unless they are **not** a representative of the insurer or distributor;[522]
- arranges for a consumer to acquire an insurance product or issues the product to the client as the insurer's agent – the Distributor Instrument will then apply;
- promotes insurance products to consumers or gives any advice about insurance products – they must then be appointed as an authorised representative and provide a FSG;
- provides any claims handling or settling services in relation to insurance products – they must also be appointed as an authorised representative but are not required to provide a FSG.[523]

---

[518] The difficulties associated with the definition of 'financial product advice' are discussed in section 5.5 of this report.
[519] *ASIC Corporations (Notification of Authorised Representatives) Instrument 2022/301*.
[520] *ASIC Corporations (Financial Services Guides) Instrument 2022/910*.
[521] There is an exemption for passing on documents prepared by others: Corporations Regulations, reg 7.1.31.
[522] This is the effect of the licensing exemptions in reg 7.6.01(1)(e) and (ea) of the Corporations Regulations. The regulation of commissions is discussed in section 5.12 of this report.
[523] This is the case where the intermediary is not representing the consumer in connection with the claim: Corporations Act, s 941C(7A) or an authorised representative that is only authorised to deal in a general insurance product or a bundled consumer

This example illustrates the complex nature of the regulation of insurance distributors and the potentially inconsistent outcomes for both distributors and consumers.

(b) Case study – regulatory requirements for brokers

Brokers like insurers are confronted with numerous challenges when navigating the fragmented legislative framework. This results from the scattering of requirements across legislation and 'soft' law that address the same conduct being the distribution of general insurance products.

These requirements include the following regulatory regimes:

- the AFSL regime in the Corporations Act, Corporations Regulations and ASIC Regulatory Guides;
- the DDO regime in the Corporations Act, Corporations Regulations and *ASIC Regulatory Guide 274 Product design and distribution obligations*;
- Insurance Brokers Code; and
- GICOP.

Many brokers acting under a binder are unaware that they have obligations under the GICOP. Therefore, insurers have been required to undertake a range of additional activities to strengthen the governance of brokers' compliance with their regulations, including:

- proposing revisions of the standard broker Terms of Trade Agreements;
- revising and reissuing Binder Agreements for each broker operating under a binder;
- creating a register of General Insurance Code Awareness Training Completion for brokers operating under a binder, complete with names of employees, copies of certificates and attestations of completeness;
- receiving annual attestations for brokers which have been updated for regulatory changes (like taking reasonable steps in relation to distribution that is consistent with the TMD as per the DDO regime) and additional attestations for brokers operating under binding authority;
- updating new broker onboarding processes to include evidence to support brokers' claims that they can comply with the DDO regime and other regulatory obligations;
- strengthening governance and oversight of brokers to ensure they are meeting their obligations; and
- updating governance frameworks and procedures to reflect increased governance and oversight requirements.

This results in a significant number of additional processes and overlapping responsibilities between brokers and insurers that leads to higher compliance costs which are ultimately passed on to consumers through higher premiums. This is in addition to the obligations brokers have as holders of their own AFSLs. Further, where obligations are imposed by an industry code, it is important to ensure that they are not inconsistent with the law or add unnecessary layers by restating the law.

While the regulatory regimes noted above are important in protecting consumers during the distribution of general insurance products, they all address the same conduct i.e. distribution – by applying specific and prescriptive requirements (e.g. reporting of complaints and significant dealings). This especially affects smaller brokers who may be challenged by the ongoing compliance obligations compared to larger national and multinational firms. This may result in a reduction in the number of brokers who are unable to meet the new compliance obligations or could even see brokers exiting the industry altogether. For example, IAG has told us that while rolling out the latest version of the GICOP during 2021, it saw a reduction in the number of brokers who wanted to continue to have binding authority for liability products that fell within the scope of the GICOP obligations.

Reducing numbers of brokers results in a detriment to insurance customers as they have less options for meeting their general insurance needs, particularly when it comes to assistance that is more independent of product providers to help insurance customers make the right insurance choices. Brokers play an important role in helping insurance customers meet their insurance needs and find the most competitive price or better value for their premiums. Specifically, brokers can help clients find the best available cover and also facilitate bringing new products to the market, especially in niche areas, where insurance customers have specific insurance needs that are not widely available in the market. In these situations,

credit insurance product and provides a claims handling and settling service (subject to meeting the conditions): *ASIC Corporations (Financial Services Guides) Instrument 2022/910*.

brokers can identify the customer's insurance need and engage with insurers, including specialist insurers, or the Lloyd's market to source or if necessary develop insurance cover. Therefore, brokers play an integral role in ensuring insurance customers receive assistance tailored to their insurance needs which also addresses the risk of underinsurance and to the extent that regulations impose overly excessive requirements, this discourages brokers from entering the market and meeting the needs of insurance customers.

The overlapping regulatory requirements in relation to distribution also translates into increased governance, compliance and reporting processes for insurers. The risks associated with onboarding brokers and ensuring they meet their obligations may also discourage insurers from adding new intermediaries, particularly where they are smaller so the return for effort is less. This is a particular concern where insurers do not have a local corporate presence e.g. in regional and rural communities.

(c) Recommendations

Recommendation 37	Consistent with Recommendation 15, identify one term to describe brokers and ensure this is used consistently throughout the financial services legislation and instruments.
Recommendation 38	Obligations applying to insurance brokers should be reviewed and a single regime should be developed which imposes regulatory requirements where needed to address risks relating to their activities and ensuring that brokers are not subject to overlapping requirements.

Design solution

Principles-based legislation will help address the regulatory issues facing insurance brokers. The general insurance principles we have identified in section 6.2(a)(iv) of this Report are all suitable and relevant for insurance brokers. The Conduct Regulator would have the power to impose additional requirements through the Rules after appropriate consultation. Such an approach will ensure consistent regulation for insurance brokers.

5.12 Commissions

The payment of commissions by insurers to parties involved in the sales process is a long-established practice of the insurance industry. Commissions are paid to insurance brokers and other intermediaries to remunerate them for distributing and selling insurance products, especially in areas where insurers do not have a corporate presence. The subject of commissions in the general insurance industry has been the subject of scrutiny in recent years, with the Financial Services Royal Commission recommending that the general insurance exemption from the ban on conflicted remuneration should be reconsidered[524] and the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**)[525] and the ACCC[526] recommending a ban on conflicted remuneration for insurance brokers.

The 2021 Trowbridge Report on the availability and affordability of commercial insurance commissioned by the Insurance Council of Australia notes that the reduction or abolition of commissions paid to brokers and other intermediaries is *'often promoted because it is assumed that these commissions and charges are unnecessarily high in relation to the services given or else create a conflict of interest for the broker and should be replaced by a fee for service payable by the client.'*[527] Trowbridge suggests that the abolition of commissions is likely to result in brokers withdrawing from the market unless the client pays a fee but observes that many small and medium enterprise clients are not willing to pay fees. Therefore,

---

[524] Final FSRC Report, vol 1, recommendation 2.6.

[525] As part of its inquiry into the practices of the insurance industry that impact small businesses and small business insurance, the Australian Small Business and Family Enterprise Ombudsman recommended banning conflicted remuneration for insurance brokers with a phased transition period: Australian Small Business and Family Enterprise Ombudsman, *Insurance Inquiry Report*, December 2020, Recommendation 4.

[526] As part of its inquiry into the affordability and availability of insurance in northern Australia, the ACCC recommended amending the Corporations Regulations to remove the exemption for general insurance retail products from the conflicted remuneration prohibition as it applies to insurance brokers: ACCC, *Northern Australia Insurance Inquiry Final Report*, p 483.

[527] J Trowbridge, *Role of the Private Insurance Market – Independent Strategic Review: Commercial Insurance Consultation Paper – Final Report*¸ commissioned by the Insurance Council of Australia, September 2021, p 49.

while it may in some cases lead to lower prices, Trowbridge notes that this may not necessarily translate to lower total costs to the client and *'it would almost certainly adversely affect access and availability of advice and insurer choice for some'.*[528]

Without concluding whether commissions should be replaced by fees paid by the client, Trowbridge does acknowledge that:

> *To the extent that broker remuneration is not transparent and that there may be conflicts associated with volume bonuses, commission overrides, profit shares, undisclosed fees that are additional to commissions and any other payments that are not fully disclosed, there is a strong case for rectification and elimination of conflicts. Full and clear disclosure of broker commissions and charges is an important starting point.*[529]

The Quality of Advice Review which is currently being undertaken includes an examination of the remaining exemptions on the ban on conflicted remuneration in life and general insurance.[530] The Review has proposed retaining the existing exemptions to the ban on conflicted remuneration for general insurance products and consumer credit insurance, but requiring financial advisers, insurance brokers and other intermediaries who provide personal advice to retail clients to obtain their client's written informed consent to receive a commission or other benefit in connection with the issue of the general insurance product or consumer credit insurance. The Review has also proposed that this requirement *'would not apply to other distributors of general insurance or consumer credit insurance products (such as white label providers or retailers) that distribute these products on behalf of the insurer'.*[531] However, the focus of this Report is not on the appropriateness or otherwise of commissions. Rather, this section focuses on how commissions are regulated in a fragmented manner and the complexity this generates for participants in the general insurance industry.

Commissions are captured under various regulatory regimes, including the AFSL general obligations, the disclosure regime and caps on commissions. There is also a layer of self-regulation on the payment of commissions under NIBA's Insurance Brokers Code. The various forms of regulation are illustrated by the table below.

Table 7

Legislative source	Requirement
Corporations Act: AFSL obligations	AFSL holders, including insurance brokers are required to: • ensure that financial services are provided efficiently, honestly and fairly;[532] and • have adequate arrangements to manage conflicts of interest that may arise in relation to the provision of financial services.[533] In order to comply with these requirements, insurers and brokers may be required to disclose commission payments and set up procedures to manage conflicts of interest in relation to commission. Further, ASIC views remuneration practices that place the interests of the insurer or broker in 'direct and significant conflict' with those of the client should be 'avoided (and not merely disclosed)'.[534]
Corporations Act: disclosure	Commissions must be disclosed in disclosure documents given to retail clients. Where a FSG is required, the FSG must contain, and draw the client's attention to,[535] information about remuneration, including commission.[536]

[528] As above, p 50.
[529] As above.
[530] Treasury, *Quality of advice review terms of reference*, 11 March 2022, [3.1.6].
[531] Treasury, *Quality of Advice Review - Conflicted Remuneration*, 31 October 2022, proposal 1.
[532] Corporations Act, s 912A(1)(a).
[533] Corporations Act, s 912A(1)(aa).
[534] *ASIC Regulatory Guide 181: Licensing: Managing conflicts of interest*, [RG 181.39].
[535] Corporations Regulations, reg 7.7.03(2)(b).
[536] Corporations Act, s 942B(2)(e).

<table>
<tr><th>Legislative source</th><th>Requirement</th></tr>
<tr><td></td><td>Commission disclosure is also typically required where an FSG is not required, e.g. distributors who are not appointed as representatives and where general advice is given in advertising material and seminars.[537]

If a SOA is required, the SOA must include information about remuneration (including commission) like the FSG.[538]</td></tr>
<tr><td>Corporations Act: restriction on use of terms</td><td>Insurers and brokers cannot describe themselves or their services as 'independent', 'impartial' or 'unbiased' if they receive any of the following:
commissions (unless they are rebated in full to clients);
forms of remuneration calculated on the basis of the volume of business referred to insurers; or
other gifts or benefits from insurers that may reasonably be expected to influence them.[539]</td></tr>
<tr><td>Caps on commissions</td><td>Commissions are capped on certain types of general insurance products as below:
ASIC can set a cap on commissions that are paid for add-on risk products sold in connection with the sale or long-term lease of a motor vehicle;[540]
the National Credit Code applies a 20% cap on commissions provided in connection with a consumer credit insurance product.[541]
Given that ASIC has not made a determination so far on the commission cap for add-on risk products, the 20% cap set out by the National Credit Code continues to apply for commissions provided in connection with consumer credit insurance.</td></tr>
<tr><td>ASIC product intervention power</td><td>ASIC may use its product intervention power to address any concerns of ongoing significant consumer detriment.[542] Accordingly, ASIC may consider commissions when investigating for unfair sales practices and make this the subject of a product intervention order when the commissions for an insurance product are excessive.

For example, ASIC recently consulted on using its product intervention power for add-on insurance and warranty products sold with motor vehicles. This was in response to investigations of unfair sales practices in this area, in part due to the high commissions insurers paid to car yard intermediaries.[543] Although ASIC did not go through with this order (as an industry-wide deferred sales model was imposed by the Hayne Response Act), it demonstrates how ASIC may use its product intervention powers to respond to concerns about excessive commissions.</td></tr>
<tr><td>NIBA's Insurance Brokers Code</td><td>Brokers are required to tell consumers before or at the time they enter into an insurance policy of:
any commission or brokerage they receive from the relevant insurer; and
any remuneration they receive (e.g. fees payable by consumers).[544]</td></tr>
</table>

[537] For example, see: *ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682*, s 5(2)(c)(ii)(B); Corporations Act, s 941C(5); Corporations Regulations, reg 7.7.02(5).
[538] Corporations Act, s 947B(2)(d).
[539] Corporations Act, s 923A.
[540] ASIC Act, s 12DMC.
[541] National Credit Code, s 145.
[542] Corporations Act, Pt 7.9A.
[543] *ASIC Media Release 20-179MR: ASIC consults on proposed product intervention order for the sale of add-on motor vehicle financial risk products*, 5 August 2020: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-179mr-asic-consults-on-proposed-product-intervention-order-for-the-sale-of-add-on-motor-vehicle-financial-risk-products/ (accessed on 18 January 2022).
[544] Service standard 6 of NIBA Code (2014).

Legislative source	Requirement
Secret commissions	Insurers and brokers are potentially prohibited from giving and receiving benefits intended to be secret commissions (i.e. commissions that are not disclosed to consumers) under State based criminal legislation.[545]

The table demonstrates how fragmented the regulatory framework is for commissions with the requirements being spread across multiple legislative sources. An important area such as commissions should be regulated in a way that is navigable and easy to interpret and apply as the payment of commissions can lead to unfair sales practices where they are excessive. There is no reason for there to be extra complexity in identifying and understanding the regulatory requirements as they are ultimately in force to protect consumers. The current framework makes it difficult for participants in the insurance industry to understand how to comply with the regulatory requirements for commissions and this is to the detriment of the consumer (who is the beneficiary of these requirements).

Recommendation 39 Streamline the regulation of commissions so that it is set out in a single regime and not regulated in a fragmented manner.

Design solution

Our regulatory design principles are consistent with the above recommendation. The principles which we have proposed should apply to general insurance include the requirements for providers to act fairly, to meet the information needs of consumers and ensure that communication is clear, fair and not misleading and to manage conflicts of interest (see principles 3, 4 and 5 in section 6.2(a)(iv) of this Report). These requirements would be relevant to the receipt of commission and at a minimum would be likely to require appropriate disclosure of commissions by insurers and brokers.

However, to the extent that appropriate commission disclosure does not occur or there are circumstances in which commissions should be further regulated (e.g. through a cap or ban), the Conduct Regulator would have the power to make Rules to regulate commissions received by insurance intermediaries if our design recommendations are implemented.

5.13 Insurance Contracts Act and UCT

The Insurance Contracts Act was introduced with the objective of striking a fair balance between the interests of insurers, insureds and members of the public in relation to contracts of insurance.[546] It contains a raft of consumer protection provisions that regulate the content and operation of insurance contracts. On 5 April 2021, most categories of insurance contracts became subject to another regime regulating fairness in insurance contracts – the UCT regime under the ASIC Act. Previously, the UCT regime did not apply to contracts regulated under the Insurance Contracts Act.

The expansion of the UCT regime introduced additional duties and restrictions relating to insurance contracts that were, like the Insurance Contracts Act, also aimed at addressing consumer protection and fairness. Under s 12BF(1) of the ASIC Act, a term of a consumer contract or small business contract is void if:

- the term is unfair; and
- the contract is a standard form contract; and
- the contract is a financial product or a contract for the supply, or possible supply, of financial services.

A term is considered unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

---

[545] For example: *Crimes Act 1958* (Vic), s 179; *Crimes Act 1900* (NSW), s 249D.
[546] See long title, Insurance Contracts Act.

- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.[547]

Section 12BH of the ASIC Act further provides examples of terms that may be unfair, including:

- a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract; and
- a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of, or the financial services to be supplied under, the contract.

The extension of the UCT regime to insurance contracts regulated under the Insurance Contracts Act effectively introduced a number of duplications and inconsistencies between it and the Insurance Contracts Act. As demonstrated in the case studies below, the simultaneous application of the Insurance Contracts Act and the UCT regime is particularly problematic where the same concept is addressed under the two regimes in different ways.

Such difficulties are likely to increase with the expansion of the scope of and enforcement powers under the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* which received Royal Assent on 9 November 2022. This legislation creates a suite of tougher consequences for breach of the UCT regime, including the introduction of civil penalties for corporations of up to the greater of $10 million, three times the value of the benefit derived from the contravention, or 10% of annual turnover.

(a) Case study – terms contemplated by the ICA which may breach the UCT regime

The difficulty of rationalising insurers' obligations under the Insurance Contracts Act and the UCT regime is compounded by the fact that, under the UCT regime, a term is not void to the extent that it is required, or expressly permitted, by a law of the Commonwealth or a State or Territory.[548] On its face, this provision might seem to resolve any contradiction between the UCT regime and Insurance Contracts Act, by deferring to the Insurance Contracts Act in the case of inconsistency. However, s 12BI(1)(c) can be viewed as further complicating the regulatory environment, as there are instances where the Insurance Contracts Act *'does not prohibit'* a term, but despite contemplating the existence of such a term, falls short of *'expressly permitting'* that term.

By way of example, the Insurance Contracts Act contemplates a number of terms in an insurance contract that, upon breach by the insured, would automatically empower the insurer to either refuse to pay a claim and/or cancel the policy. These include:

- terms relating to delays in instalment payments by the insured;
- general cancellation rights of the insurer; and
- consequences relating to fraudulent claims made by third party beneficiaries.

However, such terms may be considered unfair under the UCT regime to the extent that they are not reasonably necessary to protect an insurer's legitimate interests. This means, in effect, that insurers cannot be certain that a term contemplated under one regime would not breach another.

Below we illustrate three examples that have caused considerable issues for insurers in their efforts to achieve compliance with both the Insurance Contracts Act and the UCT regime.

(i) Consequences of delayed payment of instalment premiums

Section 39 of the Insurance Contracts Act provides that where a term limits an insurer's liability by reference to non-payment of an instalment of premium, the insurer *'may not refuse'* to pay a claim by reason only of the operation of that provision unless at least one instalment of premium has remained unpaid for at least 14 days, and the insurer had clearly informed the insured in writing of the effect of the provision before the contract was entered into. This provision contemplates the *existence* of a term that purports to allow the insurer not to pay a claim where a premium instalment is overdue, however prohibits insurers from acting on such a term until 14 days have elapsed since the payment due date. Under the UCT regime, however, the mere existence of the same term could potentially be void. In most

---

[547] ASIC Act, s 12BG(1).
[548] ASIC Act, s 12BI(1)(c).

circumstances, it is unlikely that an insurer could substantiate a term on the basis of legitimate interest, where that term allowed it to refuse a claim purely due to a minor delay in payment.

Furthermore, if the provision were to alternatively provide that an insurer could refuse a claim if the insured is more than 14 days late in paying a premium instalment, such a provision could still potentially breach the UCT regime. For instance, where an insured has paid significant amounts to maintain cover over a number of years, but is 15 days late in paying one instalment, it would likely be unfair to allow an insurer to refuse paying a claim despite the policy still being on foot and the insured still being liable to pay premiums under its policy.

(ii) Cancellation rights

A similar issue arises in the context of cancellation rights under the Insurance Contracts Act. Relevantly, s 60(1)-(3) of the Insurance Contracts Act provides:

> *(1) Where, in relation to a contract of general insurance:*
>
> > *(a) a person who is or was at any time the insured failed to comply with the duty of the utmost good faith; or*
> >
> > *(b) there was a relevant failure; or*
> >
> > *(d) a person who is or was at any time the insured failed to comply with a provision of the contract, including a provision with respect to payment of the premium; or*
> >
> > *(e) the insured has made a fraudulent claim under the contract or under some other contract of insurance (whether with the insurer concerned or with some other insurer) that provides insurance cover during any part of the period during which the first-mentioned contract provides insurance cover;*
>
> *the insurer may cancel the contract.*
>
> *(2) Where:*
>
> > *(a) a contract of general insurance includes a provision that requires the insured to notify the insurer of a specified act or omission of the insured; or*
> >
> > *(b) the effect of the contract is to authorize the insurer to refuse to pay a claim, either in whole or in part, by reason of an act or omission of the insured or of some other person;*
>
> *and, after the contract was entered into, such an act or omission has occurred, the insurer may cancel the contract.*
>
> *(3) A reference in subsection (2) to an act or omission of the insured includes a reference to an act or omission of the insured that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.*

It is common for contracts of general insurance to restate s 60(1) of the Insurance Contracts Act as grounds upon which the insurer may cancel a policy. Yet, ironically, such a term could potentially be inconsistent with the UCT regime. Taken on its face, the term would allow the insurer to cancel a policy for any breach by the insured, without reference to the magnitude of the breach or its relevance to risk being borne under the policy (and including *'any'* delay in the payment of premium).

Similarly, it is arguable that permitting cancellation for breach of *'any'* contractual term as contemplated under s 60(2) of the Insurance Contracts Act would be considered unfair under the UCT regime. Such a provision would effectively allow an insurer to cancel the policy by virtue of s 60(2) and therefore refuse to pay a claim where the insured has failed to notify the insurer of a specific act or omission, without reference to any link between the act or omission and the claim being made. In the absence of correlation or proximity requirements to 'trigger' the term, it would probably not be considered reasonably necessary to protect the insurer's legitimate interests.

(iii) Fraudulent claims

Further inconsistencies arise in relation to insurers' rights to refuse a claim on the basis of fraud by a third party beneficiary under the relevant policy.

Section 56 of the Insurance Contracts Act provides that, where a person has made a fraudulent claim under a policy but is not the insured, then the insurer may not avoid the contract but may refuse payment of the claim. However, if a court finds that:

- only a minimal or insignificant part of the claim was made fraudulently; and
- non-payment of the remainder of the claim would be harsh and unfair,

the court may order the insurer to pay such amount (if any) as is just and equitable in the circumstances. This provision therefore contemplates a term within a contract of insurance that empowers the insurer to reject a third party's claim where *'any'* fraud by that third party is involved. A court may, in later proceedings, find that to do so would be harsh and unfair in a particular circumstance (where fraud was minimal or insignificant) and order the insurer to pay part of the claim. However, the term itself would remain valid under the Insurance Contracts Act.

Conversely, the same term is at risk of being void under the UCT regime. This is because, in some circumstances, the term could arguably cause a significant imbalance between the parties and cause detriment to the insured if relied on (depending on the relationship between the insured and the third party beneficiary). It would also be arguable that the ability to reject a claim on the basis of fraud affecting only a minimal part of the claim is not reasonably necessary to protect an insurer's legitimate interests, as it could potentially be considered a penalty. Such regulatory risks are not insignificant to insurers striving to comply with their obligations, particularly in light of the proposed penalties for breach of the UCT regime.

(b) Case study – duty of utmost good faith

Insurers are already subject to the principal obligation to act in the utmost good faith under s 13 of the Insurance Contracts Act. As further elaborated in section 5.1(b) of this Report, the duty of utmost good faith generally requires the parties to act with *'scrupulous fairness and honesty*'.[549] It may also require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured.[550]

As observed by Commissioner Hayne in the Final FSRC Report, there are overlaps between the duty of utmost good faith and the UCT regime.[551] Indeed, the Final FSRC Report recognises that: *'[t]he third issue is said to be some uncertainty about how the UCT regime is to interact with the duty of utmost good faith contained in section 13 of the Insurance Contracts Act'*[552] and concludes *'I endorse Treasury's suggestion that the two obligations should operate independently of each other.'*[553] The Report then details the consequences arising from a breach of the duty of utmost good faith, observing *'[b]ut that duty is enforceable by ASIC against the insurer principally through provisions permitting action in respect of the insurer's licence to operate – a very blunt instrument of enforcement. The ASIC Enforcement Review Taskforce recommended that breach of section 13(1) attract a civil penalty. The recommended change should be made.'*[554] It therefore seems that the primary reason for there being an independent and simultaneous operation of the duty of utmost good faith and the UCT regime is less to do with deficiencies with the scope of the duty of utmost good faith itself, but rather the limited enforcement options available to ASIC for breach of the duty. In substance, they continue to address the same concern which is also explained in section 5.1 of this Report above.

(c) Case study – unilateral rights to vary

The treatment of insurers' unilateral rights to vary a contract of insurance also differs under the Insurance Contracts Act and the UCT regime.

---

[549] Sutton K, *Insurance Law in Australia* (1991), 101.
[550] See *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1, 12 [15] (Gleeson CJ and Crennan J).
[551] Final FSRC Report, vol 1, p 32, 273, 276-7, 307.
[552] As above, p 307.
[553] As above.
[554] As above, p 276-7.

The default position under s 53 of the Insurance Contracts Act is that a contractual provision is void if it authorises or permits the insurer to vary the contract to the prejudice of another person. However, the Insurance Contracts Regulations may provide for certain classes of contracts that are excluded from the application of s 53. Under reg 37 of the Insurance Contracts Regulations, these include contracts of products liability insurance and industrial special risks insurance. This is relevant because the UCT regime applies to small business contracts which may therefore include product liability or industrial special risks policies issued to small businesses.

As previously noted, s 12BH of the ASIC Act provides examples of terms that may be unfair as including a term that permits one party to unilaterally vary the terms of the contract. Although, of course, s 12BH does not deem any terms to be automatically unfair under the UCT regime, it indicates that there is a high likelihood that unilateral variation rights would be considered a contravention of the regime. Therefore, to the extent that a policy listed under reg 37 of the Insurance Contracts Regulations falls within the ambit of the UCT regime, there is significant risk that it would be nonetheless found void. Such an outcome could essentially nullify the effect of reg 37 for all insurance contracts captured under the UCT regime – in other words, it would create an exclusion to what is already an exclusion from s 53 of the Insurance Contracts Act.

(d) Recommendations

As stated in Recommendation 11.3, the UCT regime should not apply to insurance contracts.

If this recommendation is not implemented, the following should be implemented:

Recommendation 40 If Recommendation 11.3 is not adopted and the UCT regime continues to apply to insurance contracts:

40.1 Amend the application of the UCT regime so that it does not apply to terms or matters that are 'expressly permitted or addressed' by the Insurance Contracts Act.

40.2 Remove the right of subrogation from review under the UCT regime as it is already regulated under the Insurance Contracts Act.

Design solution

Our design recommendations in section 6.2 of this Report contemplate principles-based regulation, including a principle that insurers would be required to act fairly in dealings with consumers having regard to interests of both consumers and insurers and to take special care for vulnerable consumers (principle 3 in section 6.2(a)(iv) of this Report). As we have proposed that these principles would be enforceable by consumers, a UCT regime may not be required. However, as we have proposed design principle 4, the Conduct Regulator would have the power to make Rules after appropriate consultation to address specific issues relating to unfair terms in insurance contracts not addressed by the Insurance Contracts Act provision incorporated in in the Financial Services Act as proposed in section 6.2(b) of this Report.

5.14 Data

Data requirements are spread across multiple legislative sources and their requirements differ according to the nature of the data. Additionally, for areas such as compulsory MAI and workers compensation, the data requirements are highly restrictive and complex because these areas are subject to both regulatory and contractual requirements. This complexity is also exacerbated by the varied requirements across the different States and Territories.

Examples include:

- Data retention and disposal laws are difficult for insurers to interpret and comply with as they are not found in a central legislative source. This increases the costs of data governance and restricts opportunities for insurers to manage data efficiently and to use data to develop more innovative products.
- There can also be a problem where different regimes impose overlapping requirements for reporting. For example, for workers' compensation data, WA, ACT and Tasmania use the

Australian and New Zealand Standard Industrial Classification (**ANZSIC**) 2006 code to classify and rate occupations whereas NT uses the ANZSIC 1993 code. As a result, systems must be configured for different codes and additional mapping is required across the data sets to ensure like for like portfolio, pricing and reserve analysis.

- This duplication extends to regulation impacting the use of data, including privacy regulation. General insurers are regulated under both the Commonwealth Privacy Act and State and Territory-based privacy regimes for data collected under statutory classes of insurance (like workers compensation insurance). Navigating and complying with these different regulatory requirements consumes a significant amount of time and effort. Given the policy objectives should be consistent across these regimes, the additional costs to manage this complexity cannot be justified.[555]

Recommendation 41 Data and privacy requirements should be aligned across the state-based compulsory MAI and workers compensation regimes and with the Federal privacy regime to reduce complexity and duplication.

In section 5.8 of this Report, we discuss issues arising from overlapping and conflicting Federal and State and Territory regulation of insurance. In Recommendation 33 and Recommendation 34, we recommend the development and establishment of a cooperative scheme between Commonwealth, State and Territories in this area which would provide an opportunity to ensure that data requirements for insurance currently regulated at State and Territory level, including MAI and workers compensation, are consistent with data requirements applying to other classes of insurance.

5.15 Claims

Claims handling and settling is the core of an insurer's business activities and is the value-delivering process for a consumer who purchases an insurance product. As articulated by ASIC and referenced in the Final FSRC Report, *'for consumers, the intrinsic value of an insurance product lies in the ability to make a successful claim where an insured event occurs'.*[556]

Despite the centrality of claims handling and settling to insurance, claims-related activities are regulated in an unstructured and fragmented manner. This creates significant complexity for participants in the insurance industry as the claims requirements are difficult to navigate and identify.

The fragmentation of claims regulation is demonstrated in the table below.

Table 8

Legislative source	Regulation
Corporations Act	'Claims handling and settling' is prescribed as a financial service and therefore subject to the regulatory regime in Chapter 7 of the Corporations Act.[557] Therefore, insurers and other people who provide a claims handling service are required to obtain an AFSL covering the provision of this service and comply with the AFS licensee obligations.
C12 proof: Insurance Claims Handling and Settling Service Statement (**C12 Proof**)	The requirements for the licensing proof which must be sent to ASIC as part of the AFSL application to provide a claims handling and settling service amount to a form of de facto regulation.
ASIC Information Sheet 253 Claims handling and settling: How to comply with your AFS licence obligations (**ASIC INFO 253**)	Information released by ASIC about what a 'claims handling and settling service' is and the associated AFS licensing obligations for claims handling.

555 This issue was raised in Insurance Council of Australia, *Submission to the Productivity Commission Inquiry into Data Availability and Use: Draft Report*, 20 December 2016, p 3-4.
556 Final FSRC Report, vol 1, p 309.
557 Corporations Act, s 766A(1)(eb).

Legislative source	Regulation
Insurance Contracts Act	Parties to a contract of insurance must act towards each other with the utmost good faith.[558] If an insurer fails to comply with this duty of utmost good faith when handling or settling of a claim, ASIC may exercise its powers against the insurer as if it breached a financial services law.[559] In addition, there are specific obligations relating to claims, including: • limiting the ability of an insurer to refuse to pay a claim or reduce the amount paid by reason of some act of the insured or other person which occurs after the contract is entered into except to the extent that the insurer's interests were prejudiced as a result of that act;[560] • restricting the ability of an insurer to exercise subrogation rights;[561] • enabling a person to make a claim directly against an insurer if the insured or any third party beneficiary under a contract has died or cannot be found;[562] • requiring an insurer to inform the insured or third party beneficiary whether a contract of liability insurance applies to a claim and if the insurer proposes to conduct negotiations and any legal proceedings in respect of the claim on behalf of the insured;[563] • limiting an insurer's ability to rely on a limitation or exclusion for a claim relating to a pre-existing defect or imperfection;[564] • allowing an insurer to refuse payment of a fraudulent claim but not avoid the contract;[565] • requiring an insurer to pay interest on claims.[566]
General Insurance Code	Sets standards in relation to claims for 'retail insurance' products, including standards on how consumers can make a claim and how a claim is assessed and decided.[567]
State and Territory legislation	Depending on the claim and the insurance regime, State or Territory legislation may also apply. For example, claims for workers' compensation, compulsory motor accident injury and home warranty insurance are regulated under various State and Territory-based legislation (see section 5.8 of this Report). Also, some States may have specific insurance regulation (for example, the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) enables third parties to bring proceedings directly against insurers in respect of claims for damages, compensation or costs against an insured person (rather than proceeding to enforce a specially created statutory charge)).

As illustrated above, the claims handling and settling requirements are found in different legislative sources and each source approaches regulation of insurance claims in a different manner. For example,

[558] Insurance Contracts Act, s 13.
[559] Insurance Contracts Act, s 14A.
[560] Insurance Contracts Act, s 54.
[561] Insurance Contracts Act, Part VIII.
[562] Insurance Contracts Act, s 51.
[563] Insurance Contracts Act, s 41.
[564] Insurance Contracts Act, s 46.
[565] Insurance Contracts Act, s 56.
[566] Insurance Contracts Act, s 57.
[567] General Insurance Code, Part 8.

the Corporations Act regulates claims broadly as part of the AFS licensing regime. This follows the conclusion of Commissioner Hayne in the Financial Services Royal Commission that there was *'no basis in principle for continuing to exclude claims handling from the definition of 'financial service'*, supported by case studies in both the general and life insurance contexts.[568] The Insurance Contract Act separately regulates claims handling and settling through the duty of utmost good faith and specific claims obligations.

In addition, the C12 Proof that must be submitted to ASIC when applying for an AFSL authorisation to provide claims handling and settling services requires insurers to provide information about claims handling policies and procedures. The information requested by ASIC goes beyond the specific requirements of the Corporations Act. For example, ASIC asks insurers and other applicants to describe their arrangements, systems and written policies and procedures around timeframes for finalising a claim and how this will be complied with by both the insurer and any outsourced third parties under the category of 'timeliness'. However, this information is not prescribed in the Corporations Act or Regulations, meaning that insurers are required to make representations to ASIC about matters that are not specifically required by law. The status of the information provided to ASIC is unclear and risks creating a de facto self-imposed regulatory regime for claims based on the information in the C12 proof even though the circumstances of each claim are different.

On top of this, insurers must consider the information in ASIC INFO 253 as it outlines ASIC's views on claims handling and settling as a financial service.

There is therefore significant complexity in navigating the requirements for claims, even just from an AFS licensing perspective.

The regulation of claims handling and settling as a financial service also overlaps with the requirements for insurers to uphold their duty of utmost good faith and adhere to the GICOP as part of the claims handling process.

GICOP requirements for claims are extensive and represent a commitment by the industry to deliver better outcomes for consumers. It is critical that the Code aligns with the requirements in the Corporations Act to minimise overlaps and avoid any conflicting or incompatible requirements.

In summary, the regulation of claims is fragmented and confusing because not only are there a number of different regimes which are relevant but also because it is subject to informal regulation by ASIC through the C12 Proof requirements and ASIC INFO 253. This makes it difficult for insurers to identify and comply with the relevant standards for dealing with claims and this equally extends to other parties like insurance claims managers and brokers who provide claims handling and settling services on behalf of an insurer.

Recommendation 42 The requirements for claims handling should be set out in one place and any guidance should be clearly identified so that participants understand what is expected of them. This will also ensure that any requirements are subject to the proper rule-making process and scrutiny.

Design principles

Recommendation 42 is consistent with the design principles in this Report which propose principles-based regulation of insurance, including the obligation to act fairly (see proposed general insurance principle 3 in section 6.2(a) of this Report). This would apply to the fair, proper and appropriate handling and settling of claims.

The proposed rule-making power for the Conduct Regulator would also ensure that the Conduct Regulator is able, after appropriate consultation, to set specific rules for claims handling and settling where appropriate and not have to rely on de facto regulation through licensing proof requirements and information sheets.

[568] Final FSRC Report, vol 1, p 309.

5.16 Dual licensing

In order to conduct an insurance business in Australia, general insurers are required to be licensed or authorised under a number of different regimes.

As discussed in section 5.8 of this Report, insurers are subject to regulation at both the Federal level and the State and Territory level for certain classes of insurance. This requires insurers to hold separate authorisations at State and Territory level in some cases.

Insurers are also subject to dual regulation at the Federal level. Firstly, general insurers are required to obtain an AFSL for carrying on a financial services business in Australia under the Corporations Act unless they are exempt.[569]

The AFS licensing regime was introduced by the Financial Services Reform Act to harmonise the regulatory regime for financial services as this was previously institutionally based. General and life insurers were not separately licensed under the previous regime – insurance intermediaries were regulated under the *Insurance (Agents and Brokers) Act 1984* (Cth). Due to the inconsistency in the various regulatory frameworks, the Financial System Inquiry (Wallis Inquiry) recommended establishing a single licensing regime for the provision of financial services, resulting in the AFS licensing regime under the Corporations Act.[570] This required insurers with retail clients to obtain an AFSL.[571]

General insurers are also required to be authorised by APRA to carry on an insurance business in Australia under the Insurance Act.[572]

The objects of the Insurance Act include restricting those seeking to carry on a general insurance business to protect the interests of policyholders and prospective policyholders in a way that is consistent with a viable, competitive and innovative insurance industry.[573] Insurers authorised under the Insurance Act are required to comply with a number of prudential regulations set out in the Insurance Act and APRA prudential standards.[574]

The separate licensing regimes and associated requirements are intended to reflect the distinct responsibilities of ASIC and APRA as *'APRA is concerned with issues such as capital adequacy, whereas ASIC's focus is on whether the consumer is adequately protected such that she or he can make informed product choice and investment decisions'.*[575]

However, for insurers, the two licensing regimes are essentially doing the same job – ensuring that only those who are capable of engaging in the relevant activity are permitted to do so. While the AFS licensing regime exempts general insurers from having to comply with certain requirements which would otherwise overlap with obligations arising under the prudential regime,[576] it is questionable why separate licensing regimes are required at all.

Licensing is distinct from imposing obligations on insurers. Where a general insurer has already been authorised by APRA to carry on an insurance business in Australia, there is no reason why it should be required to hold a separate ‘conduct licence’. Any obligations that should be imposed on insurers can be done without requiring them to hold a separate licence.

There are parts in the Corporations Act that are not predicated on holding an AFSL. For example, Part 7.9 of the Corporations Act which concerns financial product disclosure imposes obligations on 'regulated persons' which includes product issuers whether or not they hold an AFSL. Other parts of the Corporations Act only apply to AFSL holders such as the general obligations of financial services licensees, but even in those cases there are exemptions for insurers as APRA-regulated bodies.[577] There is therefore no need for insurers to hold an AFSL if the relevant obligations in Chapter 7 of the Corporations Act are reframed to also apply to general insurers authorised by APRA.

---

[569] Corporations Act, s 911A.
[570] As above.
[571] Insurers which only have wholesale clients for the insurance they underwrite are exempt from the licence requirement: Corporations Act, s 911A(2)(g).
[572] Insurance Act, Pt 3.
[573] Insurance Act, s 2A(1)(a).
[574] APRA, *Guidelines on Authorisation of General Insurers* (Guidelines, December 2007), p 6.
[575] Pearson G, *Financial Services Law and Compliance in Australia* (Cambridge University Press, 2009) p 107.
[576] General insurers are exempt from the requirements of AFSL holders to have adequate resources, risk management systems and compensation arrangements: Corporations Act, s 912A(1)((d) and (h); Corporations Regulations, reg 7.6.02AAA.
[577] Corporations Act, s 912A.

Of course, the power to grant a licence has a number of purposes:

- it enables the licence grantor, in this case ASIC, to assess whether the applicant has the relevant capability to engage in the regulated conduct before the licence is granted;
- it enables ASIC to impose licence conditions; and
- it is accompanied by a power to suspend or cancel it and thereby prevent the licensee engaging in the relevant conduct.

However, the power to suspend or cancel an AFSL is significantly limited in relation to AFSLs held by insurers because ASIC is required to consult with APRA if suspension or cancellation would prevent the insurer from being able to carry on its usual activities which would almost certainly be the case. It is therefore very unlikely that ASIC would suspend or cancel an insurer's AFSL in circumstances where APRA was not suspending or cancelling the insurer's right to enter into new business. If that is the case, then the power to suspend or cancel an insurer's AFSL is effectively redundant.

In theory of course, ASIC could decide not to issue an AFSL to an insurer even if the insurer has been authorised by APRA to carry on insurance business. Such an insurer could still engage in insurance activities by relying on one of the 'product manufacturer' licensing exemptions.[578] In practice, it is hard to imagine ASIC refusing to issue a AFSL to an APRA authorised insurer.

We also acknowledge that in removing the AFSL requirement for APRA authorised general insurers, ASIC would lose its powers to impose and vary licence conditions as an enforcement tool.[579] However, the introduction of the product intervention power which empowers ASIC to intervene where there is a significant risk of consumer detriment means that it is not essential for ASIC to have this power anymore. Consumers are also protected through the multiple obligations that are imposed on insurers, including obligations relating to the design and distribution of its financial products. We do not therefore believe that removing the AFSL requirement for APRA authorised general insurers would be a significant reduction in ASIC's enforcement powers.

If APRA-regulated insurers are not required to hold an AFSL, it would be appropriate for ASIC to have the ability to request that APRA suspend or cancel an insurer's authorisation to underwrite retail insurance where ASIC is satisfied the insurer has persistently breached relevant conduct obligations and APRA should have the ability to suspend or cancel an authorisation in those circumstances. Such an approach would remove dual licensing requirements, reducing administrative overlaps and costs for insurers.

Recommendation 43 Remove the requirement for general insurers that are authorised by APRA to obtain an AFSL. General insurers should only require authorisation by APRA to carry on an insurance business in Australia. This would require the following changes:

43.1 apply the conduct requirements in the financial services regime (whether in Chapter 7 of the Corporations Act or the FSA if our design principles are implemented) to general insurers that are authorised by APRA where appropriate;

43.2 enable the Conduct Regulator to request APRA to suspend or cancel an insurer's authorisation where the insurer has persistently breached relevant conduct obligations;

43.3 give APRA the power to suspend or cancel an authorisation where requested by ASIC.

5.17 Remuneration

Remuneration of insurance senior executives and managers is primarily regulated through APRA *Prudential Standard CPS 511 Remuneration* (**CPS 511**) but will also be regulated under the proposed FAR. Although FAR has yet to be implemented, there is a concern that the two regimes will overlap and be inconsistent.

---

[578] Corporations Act, s 911A(2)(b) and (c); Corporations Regulations, reg 7.6.01(1)(n) and (q).
[579] *ASIC INFO Sheet 151: ASIC's approach to enforcement*, 2021.

(a) Prudential Standard CPS 511

APRA released the final CPS 511 on 27 August 2021 after two years of consultation. CPS 511 overhauled the regulation of remuneration and accountability for APRA-regulated entities. APRA has stated that CPS 511 is intended to create more balanced incentive structures, promote financial resilience and support better outcomes for customers.[580] In doing so, it fulfils three recommendations of the Financial Services Royal Commission directed towards APRA.[581] The standard will come into effect from 1 January 2023, with a phased implementation that impacts general insurers who are 'significant financial institutions' from 1 July 2023.[582]

(b) FAR

The *Financial Accountability Regime Bill 2022* (Cth) (**FAR Bill**) and the *Financial Sector Reform Bill 2022* (Cth) were reintroduced into Parliament on 8 September 2022. This Report comments on the latest version of the Bill, noting that changes may be made to the Bill as it progresses through Parliament.

The FAR Bill proposes to implement a further five recommendations of the Financial Services Royal Commission.[583]

FAR extends the Banking Executive Accountability Regime (BEAR) to all APRA-regulated entities and provides for joint administration of the regime by APRA and ASIC (**FAR Regulators**). It aims to increase accountability across the banking, insurance and superannuation sectors and improve the governance of these entities by imposing a strengthened responsibility and accountability framework for directors and senior executives.

The Senate Economics Legislation Committee has recommended that the FAR Bill should be passed,[584] although amendments proposed by the Greens has delayed its passage.[585]

(c) Overlapping and inconsistent requirements

FAR and CPS 511 cover a similar population and set out a number of overlapping requirements that have the potential to drive significant complexity and confusion for APRA-regulated entities, including insurers.

While APRA and Treasury have stated their intention to work closely together to ensure there are no inconsistencies in definitions and terminology across FAR and CPS 511, particularly relating to deferral and variable remuneration,[586] the overlapping nature of the obligations make it difficult for insurers to interpret and apply them in practice. Given that APRA has flagged it may make additional consequential amendments to CPS 511 and *Prudential Practice Guide CPG 511 Remuneration* (**CPG 511**) should it be considered necessary to achieve appropriate alignment with FAR,[587] there is an opportunity to address any inconsistences between the two regimes either in the FAR Bill itself or by making changes to CPS 511.

Table 9

Obligations	Proposed FAR	CPS 511
Regulated persons	The directors and senior executives who are regulated under FAR are referred to as 'accountable persons'. An accountable person is a person who holds a position in an accountable entity,	The Board, or relevant oversight function, must approve the variable remuneration outcomes for persons in specified roles as follows:

---

[580] APRA, Media release: *APRA releases final remuneration prudential standard*, 27 August 2021.
[581] Final FSRC Report, vol 1, recommendations 5.1, 5.2 and 5.3.
[582] CPS 511, [9].
[583] Final FSRC Report, vol 1, recommendations 3.9, 4.12, 6.6, 6.7 and 6.8.
[584] The Senate Economics Legislation Committee, *Financial Accountability Regime Bill 2022 [Provisions] and Financial Sector Reform Bill 2022 [Provisions] and Financial Services Compensation Scheme of Last Resort Levy Bill 2022 [Provisions] and Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2022 [Provisions]*, October 2022, [2.78].
[585] The Greens have proposed to include civil penalties for regulated individuals: Amendments to be moved by Senator McKim, on behalf of the Australian Greens, 24 November 2022, Sheet 1659 revised.
[586] APRA, *APRA response to submissions and final standard for CPS 511*, 27 August 2021, [3.3].
[587] As above.

Obligations	Proposed FAR	CPS 511
	and because of that position, has actual or effective senior executive responsibility for: • management or control of the accountable entity; or • management or control of a significant or substantial part or aspect of the operations of the accountable entity or the accountable entity's relevant group.[588] An accountable person also includes any person who holds a position or has a prescribed responsibility in relation to an accountable entity that is of a kind prescribed in the rules made by the Minister.[589] The FAR Regulators can exclude persons from being accountable persons.[590] In practice, accountable persons will typically include the directors and senior executives of an entity, such as the Chief Executive Officer and officers reporting directly to the Chief Executive Officer. Lower-level executives are generally not expected to be accountable persons under the FAR.[591]	• individually for senior managers and executive directors; and • on a cohort basis for 'highly-paid material risk-takers', other material risk-takers and risk and financial control personnel.[592] 'Material risk-taker' means a person whose activities have a material potential impact on the entity's risk profile, performance and long-term soundness.[593] 'Highly paid material risk-taker' means a material risk-taker whose total fixed remuneration (which includes salary, superannuation, allowances and benefits) plus actual variable remuneration is equal to or greater than 1 million AUD in a financial year of the entity.[594]
Variable and deferred remuneration obligations	Requires accountable entities in the insurance sector to defer at least *40 per cent* of the variable remuneration (for example, bonuses and incentive payments) of their directors and most senior and influential executives for a *minimum of four years*, and to reduce their variable remuneration for non-compliance with their accountability obligations.[595]	For a CEO, at least *60 per cent* of their total variable remuneration must be deferred over a *minimum deferral period of six years*, vesting no faster than on a pro-rata basis and only after four years. For a senior manager and executive director other than a CEO, at least *40 per cent* of that person's total variable remuneration must be deferred over a *minimum deferral period of five years*, vesting no faster than on a pro-rata basis and only after four years. For a highly-paid 'material risk-taker' who is not a senior manager, at least *40 per cent* of that person's total variable remuneration must be deferred over a *minimum deferral period of four years*,

588 FAR Bill, s 10(1).
589 FAR Bill, s 10(3).
590 FAR Bill, s 11.
591 Explanatory Memorandum to FAR Bill, [1.53].
592 CPS 511, [50].
593 CPS 511, [18(j)].
594 CPS 511, [18(f)].
595 Explanatory Memorandum to FAR Bill, [1.95].

Obligations	Proposed FAR	CPS 511
		vesting no faster than on a pro-rata basis and only after two years.[596]
Deferral period	The deferral period starts on the later of: • the day after the day on which the decision was first made for the accountable person to be able to earn the amount of variable remuneration; or • the first day of the performance period if the variable remuneration is measured by reference to that period.[597] If the variable remuneration is remuneration of a kind determined by the FAR Regulators or prescribed in the rules made by the FAR Regulators, then the deferral period may start on the day determined by the FAR Regulators.[598]	The deferral period must include the period over which the performance is assessed.[599] APRA expects the deferral period to start from the beginning of the performance period for which the variable remuneration is being assessed.[600]
Notification and reporting obligations	Requires accountable entities in the insurance sector to provide the FAR Regulators with certain information about their business, directors and most senior and influential executives. For entities above a certain threshold, which will be determined by rules made by the Minister, those entities will also need to prepare and submit accountability statements and accountability maps.[601]	APRA has recently undertaken consultation on its disclosure and reporting proposals to support the implementation of CPS 511. APRA proposes to require all APRA-regulated entities to publicly disclose information on remuneration design, governance and consequence management. In particular, CPS 511 disclosures will require entities to set out: • how remuneration is aligned with performance and risk; • consequence management for poor outcomes; and • for variable remuneration, how non-financial measures have been incorporated in remuneration outcomes.[602]

In its previous inquiry, the Senate Economics Legislation Committee also referred to some of this inconsistency by referring to submissions that outline the misalignment between the deferred remuneration obligations of FAR and CPS 511.[603] APRA responded by stating that overall FAR and CPS 511 are consistent.[604]

Table 8 demonstrates how FAR and CPS 511 contain various overlapping provisions and although they intend to achieve similar outcomes, the different manner in which they are phrased has the potential to

[596] CPS 511, [39].
[597] FAR Bill, s 28(2).
[598] FAR Bill, s 28(3).
[599] CPS 511, [40].
[600] CPG 511, [66].
[601] Explanatory Memorandum to FAR Bill, [1.8].
[602] APRA, *Discussion Paper Remuneration disclosure and reporting requirements*, 6 July 2022, p 4 – 5.
[603] Senate Economics Legislation Committee, *Report on Financial Accountability Regime Bill 2021 [Provisions], Financial Sector Reform (Hayne Royal Commission Response No.3) Bill 2021 [Provisions], Financial Services Compensation Scheme of Last Resort Levy Bill 2021 [Provisions], and Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2021 [Provisions]*, February 2022, [2.38]-[2.41].
[604] As above, [2.44].

create unnecessary complexity. This complexity will be exacerbated where these regimes set out inconsistent requirements as insurers may inadvertently breach one regime despite complying with the other (for example, the minimum deferral periods for variable remuneration is longer under CPS 511 compared to FAR).

There is also a concern that FAR duplicates compliance obligations. Sections 20 and 21 of the FAR Bill will require an accountable entity and an accountable person, respectively, to meet the standards of conduct outlined in the Bill and take reasonable steps to ensure compliance with applicable laws. In its previous inquiry, the Senate Economics Legislation Committee referred to concerns that the proposed accountability obligations *'will have the effect of duplicating compliance obligations on individuals with existing financial services laws'.*[605] While ASIC clarifies its expectations for an accountable person in evidence to the Committee, it is worth highlighting the Inquiry's reference to the Law Council of Australia's submission:

> *The most onerous new aspect of FAR is the individual accountability obligation to take reasonable steps, in conducting the responsibilities of their position as an accountable person, to comply with a long list of laws, including all the financial services laws and any regulations, other instruments, directions or orders made under each of them. Regulated entities are already obliged to comply with those laws and regulations.*
>
> *This new obligation will increase complexity and compliance costs by also requiring each accountable person to demonstrate that they took reasonable steps, leading to potential duplication and inefficiencies without necessarily enhancing actual compliance outcomes. It also represents an increased barrier to new industry entrants. The Law Council submits that should not be included in the bill.*[606]

(d) Recommendations

We therefore make the following recommendation relating to remuneration.

Recommendation 44	The language and terminology used in FAR and CPS 511 should be aligned as far as possible. Consideration should be given to establishing a single regime to regulate executive and Board-level remuneration for insurance companies.

Design solution

The design recommendations we have made in section 6.2 of this Report would facilitate a single regime being developed for the regulation of remuneration. Two of the principles we have proposed in section 6.2(a)(iv) of this Report are broadly relevant to executive remuneration: the requirement to manage conflicts of interests fairly including conflicts of interests of its officers and representatives (principle 5) and the requirement to ensure compliance and manage risks (principle 11).

APRA already has broad powers to make prudential standards relating to prudential matters, which includes matters relating to the conduct, structuring and organising of insurers.[607] It therefore has the rule-making power proposed in design recommendation 4 and the power to impose the FAR regime in CPS 511 in a manner that is consistent with the CPS 511 regime. If necessary, the Insurance Act should be amended to make it clear that associates of insurers are also required to comply with the Insurance Act and prudential standards and to impose an appropriate penalty regime for failing to do so. There is therefore no need to make detailed prescriptive rules to implement FAR in the relevant statute.

5.18 Level playing field

It is important for legislative or regulatory initiatives to protect the competitive process rather than a specific market structure or individual competitors. Therefore, insurance and insurance-like products should be subject to uniform regulatory, prudential and capital requirements, to the extent this is

[605] As above, [2.25].
[606] As above, [2.28].
[607] Insurance Act, s 32 and definition of 'prudential matter' in s 3.

necessary and appropriate, to maintain a level playing field and reduce opportunities for regulatory arbitrage. This also ensures that consumers receive the same level of protection when purchasing a product no matter how the product is structured.

In the context of insurance, there is disparity in how prudential regulation is applied. Insurers are required to be authorised and subject to prudential regulation by APRA, however, some insurers are exempt. For example, direct offshore foreign insurers are exempt from the requirement to be authorised in limited circumstances because of the *'insurance capacity'* they provide in the Australian market.[608]

Concerns arise when this disparity means that insurance-like products are not subject to prudential regulation and therefore, their providers have fewer restrictions and consumer protections imposed on the offer of their products. A particular issue arises in relation to discretionary mutual funds (**DMFs**) which have an advantage over insurers as they are exempt from prudential regulation.

DMFs *'provide an alternative means of risk management'*[609] and *'operate to provide risk cover on a discretionary basis to a group of individuals or organisations.'*[610] DMFs are similar to insurance products but a critical difference is the discretionary element: while a policy holder under an insurance product has a contractual right to have their claim paid if they meet the policy's terms and conditions, DMF members are only entitled to submit a claim for consideration by the operator of the fund who may or may not approve the claim, at its discretion.[611]

Therefore, DMFs may sometimes be developed as a substitute for commercial insurance that is not available or affordable.[612] The Australian Small Business and Family Enterprise Ombudsman observes that:

> *DMFs are particularly effective in thin or hard markets, where the sector:*
>
> - *seeks to address a lack of insurance availability or affordability*
> - *is easily defined*
> - *is cohesive*
> - *has sufficient capital to establish the DMF and manage the first few years' of claims*.[613]

The concern arises when DMFs are marketed to consumers outside of these circumstances and their differences to insurance products are not properly communicated to consumers. A particular concern is whether the implications of the discretionary element of DMFs is understood by consumers.

DMFs also are subject to less regulation than insurance products. Although DMF managers are required to hold an AFSL, DMFs are not subject to prudential regulation. This was queried by the HIH Royal Commission and the Commissioner recommended that prudential regulation be extended to all discretionary insurance-like products.[614] In response, the Government commissioned Mr Gary Potts to undertake an independent study of DMFs and direct offshore insurers in 2003 (**Potts Review**). The Potts Review recommended that APRA should regulate discretionary mutual cover as a contract of insurance under the Insurance Act unless no contingent risk would need to be met by additional undefined member contributions.[615] The Potts Review preferred this option as it would target prudential supervision where it was justified and would not unnecessarily penalise DMFs filling market gaps.[616] This was also considered appropriate as the withdrawal of DMF services could limit specialised insurance cover and the small size of the market (less than half of one per cent of the insurance market at the time of the Review).[617]

While the recommendations of the Potts Review were accepted by the Government, the Act implementing the approach to the regulation of DMFs did not subject DMFs to prudential regulation. Instead, APRA was provided with the power to monitor to monitor DMFs and gather information about the nature and

---

608 The Treasury, *Discussion paper: Regulation of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, December 2005 (**DMF Paper**), [30].
609 As above, [117].
610 Australian Small Business and Family Enterprise Ombudsman, *The Show Must Go On*, 6 December 2021 (**ASBFEO Paper**), [5.1.7].
611 As above, [5.1.7].
612 DMF Paper, [117].
613 ASBFEO Paper, [5.1.13].
614 The HIH Royal Commission, *The failure of HIH Insurance*, Volume I, April 2003, p 244.
615 Potts, G, *Key findings of the review of discretionary mutual funds and direct offshore foreign insurers*, May 2004, [4].
616 As above, p 9.
617 As above, [18].

scope of their operations.[618] The Revised Explanatory Memorandum stated that since the Potts Review, structural and cyclical changes to the Australian general insurance market, including tort law reforms, a softening of the insurance market and a greater understanding of the impact of the Financial Services Reform Act, had changed the impetus for regulation. As a result, and after further industry consultation, the Government decided that DMFs did not need to be subject to prudential regulation.[619]

While APRA subsequently made reporting standards to collect certain information from DMFs, it later revoked these reporting requirements in 2016 after considering that the benefits obtained from the use of data collection no longer outweighed the reporting costs to DMFs.[620]

There is therefore currently no prudential supervision of DMFs. Given the length of time since the original Potts review and the Government's decision not to subject DMFs to prudential regulation, we believe it is appropriate to revisit the question of appropriate regulation for DMFs. It is important to have a regulatory system that does not only deal with current market conditions but also has the capacity to anticipate and deal with potential future developments. As it stands, the current regulatory system would not be able to deal with an uptick in the use of DMFs if that were to occur.

Recommendation 45	Conduct a review of the current and potential future role and risks for consumers of DMFs to determine whether they should be subject to additional regulation, in particular in relation to the discretionary nature of the 'cover' provided by DMFs.

[618] *Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Act 2007* (Cth), Sch 1.
[619] Revised Explanatory Memorandum to *Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007* (Cth), [8.10] – [8.11].
[620] APRA, *Letter re Response letter to APRA's proposal to cease data collection – discretionary mutual funds*, 28 October 2016.

Chapter 6 – Designing a better regulatory landscape for general insurance

6.1 Jurisprudence of regulation

Earlier sections of this Report discuss the problems caused by the current regulatory design and system. Before contemplating how it could be redesigned, it is important to consider the function and purpose of legislation and regulation.

(a) What is regulation?

The concept of 'regulation' has been studied by many commentators. Koop and Lodge bring together three key thinkers:

- Baldwin, Scott and Hood argue that there are three main concepts to regulation being:

  (i) regulation as "the promulgation of an authoritative set of rules, accompanied by some mechanism [. . .] for monitoring and promoting compliance with these rules," (ii) regulation as "all the efforts of state agencies to steer the economy," and (iii) regulation as "all mechanisms of social control – including unintentional and non-state processes

- Selznick refers to regulation as *'sustained and focused control exercised by a public agency over activities that are valued by the community';*
- Black describes regulation as *'the sustained and focused attempt to alter the behaviour of others according to defined standards and purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification'.*[621]

The common element of these definitions is that regulation is about intervening in the behaviour or activities of individuals and/or corporate actors.[622]

Legislation therefore *'reflects policy choices about the fundamental norms of conduct that are expected of those members of society that are the subject of regulation'.*[623] Accordingly, Godwin, Brand and Teele Langford conclude that at its basic level, *'legislation is the end result of the process by which policy is converted into law' and it 'then operates as the baseline for permitted conduct and becomes a significant catalyst for future policy choices'.*[624]

The question then is how and where the policy objectives and the outcomes sought to be achieved by regulation should be set out in the law as the extent of detail in the law affects its clarity, certainty and effectiveness in implementing policy.[625] As Godwin, Brand and Teele Langford note, the question of what goes where (for example, the allocation of the law between primary legislation and delegated legislation, regulations or regulatory instruments) is not always amendable to an easy answer.[626]

The key distinction between primary and delegated legislation is whether it is made by Parliament or whether it is made by the executive government under an authority provided by Parliament in statute.[627]

The Department of the Prime Minister and Cabinet outlines in its Legislation Handbook 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'* but provides the following examples of matters that are generally implemented through Acts of Parliament:

(a) appropriations of money;

---

[621] Koop C and Lodge M, 'What is regulation? An interdisciplinary concept analysis' (2015) 11(1) *Regulation & Governance* 95, p 95.
[622] As above, p 96.
[623] Godwin A, Brand V and Teele Langford R, 'Legislative Design - Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280, p 281.
[624] As above.
[625] As above.
[626] As above, p 283.
[627] Meagher D and Grovers M, 'The Common Law Principle of Legality and Secondary Legislation' (2016) 39(2) *UNSW Law Journal* 450, p 452 - 453.

(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 (e.g. 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 (e.g. 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).[628]

These matters may inform the division of content between the Act and subordinate legislation, including delegated legislation. Further, it generally appears to be accepted that *'Parliament should retain control over broad policy decisions in legislation, and the Executive should only add detail that supports the operation and efficiency of the primary legislation'.*[629]

Accordingly, determining the matters to be addressed in delegated legislation is often based on the need for regulation to be *'adaptable and responsive to changing circumstances'.*[630] However, using delegated legislation also raises risks of lack of accountability and navigability in the law. Van Geelen therefore argues that laws made by the executive branch of government should *'improve the clarity and accessibility of the law, rather than detracting from it, and these laws should be subject to careful scrutiny to ensure that accountability is maintained'.*[631]

(b) Regulatory theories

In considering how financial services should be regulated, it is worth noting previous criticism directed at ASIC due to its approach of asking *'How can this be resolved by agreement?*'. This was seen as amounting to a 'negotiated outcomes approach' to regulation[632] and it attracted strong criticism in both the Interim and Final Report of the Financial Services Royal Commission as it was often seen to mean that proceedings to penalise breaches did not commence, even where it was in the public interest to do so.[633] As a result, it is important to consider alternative models of regulation and enforcement. Various theories can be found in the literature of regulation as discussed below.

*(i) Explicit government regulation (**EGR**)*

According to the Victorian Commissioner for Better Regulation, EGR – sometimes referred to as 'black letter law' – is a form of regulation that attempts to change the behaviour of regulated parties by detailing how they must act under the law and imposing punitive sanctions for non-compliance. It comprises primary legislation and subordinate legislation, which includes regulations and ministerial orders and determinations.[634] EGR is often used because it offers certainty and effectiveness due to the availability

[628] Department of the Prime Minister and Cabinet, *Legislation Handbook*, February 2017, [1.10].
[629] Van Geelen T, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, p 297.
[630] Godwin A, Brand V and Teele Langford R, As above, p 283.
[631] Van Geelen, T, As above.
[632] Comino V, 'Life after the Banking Royal Commission: Is the Royal Commission a 'game-changer' for the financial services sector in Australia?' (2020) 35 *Australian Journal of Corporate Law* 381, p 385.
[633] Interim FSRC Report, vol 1 , p 277.
[634] Commissioner for Better Regulation, *Victorian Guide to Regulation Toolkit: Requirements and processes for making subordinate legislation*, November 2016, p 1.

of legal sanctions.[635] According to the Federal Government, it should be considered where the problem is high risk, impact or significance, the community requires the certainty provided by legal sanctions, universal application is required, there is a systemic compliance problem and/or existing industry bodies lack adequate coverage of industry participants or do not have a strong regulatory commitment.[636]

However, this explicit approach also has drawbacks, including inflexibility as it adopts a standardised approach to legislation, takes a significant time to make or amend, involves higher compliance costs and may not be suitable for regulating complex services. In particular, it may over time generate more regulation, especially to adapt the legislation to new situations or close compliance gaps, given its inherently prescriptive approach.[637]

(ii) Responsive regulation

Responsive regulation is regulating in a manner that is responsive to industry structure and conduct as different structures will be conducive to different degrees and forms of regulation.[638] Therefore, it requires regulators to be responsive to the culture, conduct and context of regulated parties which affects the regulatory response and means that the regulator can escalate or de-escalate their intervention depending on the response.

The principles of responsive regulation can be illustrated through regulatory pyramids such as the diagram on the right prepared by Ayres and Braithwaite.[639]

Accordingly, persuasion and advisory measures are pursued first and depending on the response of the regulated party, the regulator may escalate to administrative or more severe punitive sanctions. The risk of escalation by the regulator makes this method more effective in affecting the behaviour of regulated parties and highlights the need to resort to severe punishments in some circumstances. In the context of Australia's corporate law, it has been argues that this *'must be balanced against the potential for severe penalties to have a "freezing effect" on responsible risk taking and commercial decision making'.*[640]

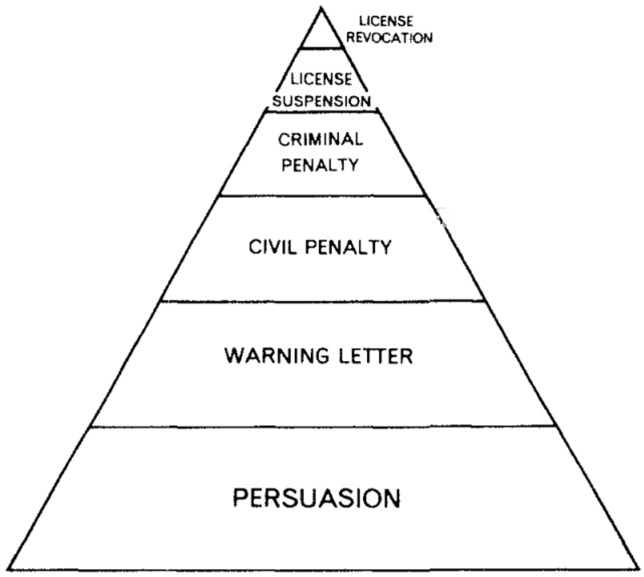


Figure 2.1. Example of an enforcement pyramid. The proportion of space at each layer represents the proportion of enforcement activity at that level.

*(iii) Tit-for-tat enforcement strategy (**TFT**)*

TFT is a strategy in responsive regulation which assumes that the motivation of a firm is to minimise regulatory costs whereas the motivation of the regulator is to maximise compliance outcomes. This means that the *'regulator refrains from a deterrent response as long as the firm is cooperating; but when the firm yields to the temptation to exploit the cooperative posture of the regulator and cheats on compliance, then the regulator shifts from a cooperative to a deterrent response'.*[641]

---

[635] Australian Government, *Best Practice Regulation Handbook*, August 2007, p 67.
[636] As above.
[637] As above.
[638] Ayres I and Braithwaite J, *Responsive Regulation: Transcending the Deregulation Debate*, 1992, p 4.
[639] As above.
[640] The Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p 28 - 30.
[641] Ayres I and Braithwaite J, As above, p 21.

Therefore, TFT suggests that the regulator should start at the bottom of the regulatory pyramid with the least formal and coercive method of enforcement and then escalate up the pyramid if the regulated party fails to cooperate.[642] Cooperation between the two parties is mutually beneficial under TFT.

(iv) Risk-based regulation

Risk-based regulation focuses on the potential risks posed by regulated parties as it recognises that not all contraventions can be detected and addressed.[643] Therefore, after identifying and assessing potential risks, the regulator prioritises its resources and response to areas of high risk that may conflict with the regulator's objectives. This form of regulation results in a risk-based framework for decision-making which inherently focuses on risks as opposed to rules.[644]

However, as outlined in ALRC Interim Report A, Black and Baldwin have *'argued that risk-based regulation is 'becoming increasingly adopted by a number of financial regulators' despite its 'mixed success'.'*[645] Specifically, Black and Baldwin have identified drawbacks of risk-based regulation being a focus by regulators on known risks over new or developing risks and neglecting areas of lower risk which may involve considerable cumulative dangers. Further, it may also result in regulators focusing on the individual firm rather than the *'more strategic issue of how to raise compliance within the regulatory community as a whole'.*[646]

(v) Smart regulation

Smart regulation is *'a form of regulatory pluralism that embraces flexible, imaginative and innovative forms of social control'.*[647] It is based on the understanding that in most circumstances, multiple policy instruments, rather than single policy instruments, and a broader range of regulatory actors will produce better regulation. Therefore, smart regulation involves using complementary combinations of instruments and participants (for example, international standards organisations, commercial institutions and financial markets and industry associations) to meet regulatory objectives.[648]

At the heart of smart regulation is a series of regulatory design principles as below:

- *the desirability of preferring complementary instrument mixes over single instrument approaches while avoiding the dangers of smorgasbordism (ie wrongly assuming that all instruments should be used rather than the minimum number necessary to achieve the desired result);*
- *the virtues of parsimony: why less interventionist measures should be preferred and how to achieve such outcomes;*
- *the benefits of an escalating response up an instrument pyramid (utilising not only government but also business and third parties) so as to build in regulatory responsiveness, to increase dependability of outcomes through instrument sequencing, and to provide early warning of instrument failure through the use of triggers;*
- *empowering third parties (both commercial and non-commercial) to act as surrogate regulators, thereby achieving not only better environmental outcomes at less cost but also freeing up scarce regulatory resources which can be redeployed in circumstances where no alternatives to direct government intervention are available; and*
- *maximising opportunities for win-win outcomes, by expanding the boundaries within which such opportunities are available and encouraging business to go "beyond compliance" with existing legal requirements*.[649]

The preference for combinations of instruments and institutional responses reflects the view that a single regulatory approach is unlikely to be the most efficient or effective means of addressing a problem. For

---

[642] Nielsen V and Parker C, 'Testing responsive regulation in regulatory enforcement' (2009) 3(4) *Regulation & Governance* 376, p 381.
[643] The Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, [4.14].
[644] Black J and Baldwin R, 'Really Responsive Risk-Based Regulation' (2010) 32(2) *Law & Policy* 181, p 184.
[645] ALRC Interim Report A, [2.131]. Black notes that '*The evidence is mixed regarding the culpabilities of risk-based regulation, as banks in Australia and Canada, whose regulators have well-developed systems of risk-based regulation, fared far better than those in other Western countries, suggesting that the causes of regulatory failure were more complex than are accounted for by the existence of a risk-based system of supervision*': Black J and Baldwin R, As above, p 210.
[646] Black J and Baldwin R, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59, p 66 - 67.
[647] Gunningham N and Sinclair N, 'Smart regulation' in Drahos, P (Ed.), *Regulatory Theory: Foundations and applications*, 2017, p 133.
[648] As above.
[649] As above, p 134 - 135.

example, while a ban on certain activity may be highly effective in preventing the activity without the need for additional instruments, this is unlikely to be the case in most scenarios as each instrument has its strengths and weaknesses and its effectiveness is dependent on the context in which it is used. Therefore, different approaches, such as like economic approaches (such as permits, taxes, incentives and legal lability), self-regulation (where an organised group regulates the behaviour of its members), voluntarism (voluntary action by individual firms) and information strategies (such as education, training, disclosure and reporting) should be used to complement each other to target specific problems.[650]

(c) Rules-based v principle-based regulation

Rules-based and principles-based regulation are the two primary methods or styles of legislation. Rules-based regulation involves *'specific provisions and detailed rules'* and often results in highly prescriptive legislation whereas principles-based regulation involves setting broad, general and purposive rules which may be elaborated in further rules or guidance.[651]

In terms of the regulatory theories discussed above, the rules-based approach is clearly consistent with the EGR theory of regulation. Responsive regulation would typically require a more principles-based approach to provide the regulator with the ability to engage in the responsiveness contemplated by that theory. The same may be said for TFT regulation, although moving up the pyramid may ultimately require a more prescriptive set of rules to be applied. The same may be said for risk-based regulation, where high risk activities may require more detailed rules. Smart regulation of course explicitly recognises the need for 'horses for courses'.

A rules-based approach can been said to provide greater clarity and certainty as it sets out what is expected of regulated entities and the minimum standards of compliance.[652] However, the prescriptive nature of rules-based regulation ultimately means it is less flexible which affects a regulator's ability to engage in risk-based regulation.[653] Further, the level of detail in the law can also lead to parties 'gaming' the system through creative compliance. For example, many aspects of the Corporations Act currently takes a highly prescriptive rules-based approach and there are instances where industry has engaged in regulatory arbitrage. The ALRC Interim Report A provides an example where *'a service provider may leverage the highly prescriptive definition of a 'retail client' to structure a transaction in such a way that the client can instead be classified as a 'wholesale client', in order to reduce the compliance burden on the service provider'.*[654]

The concerns regarding a rules-based approach have a long history. As long ago as the HIH Royal Commission, the Commissioner, Owen J, raised concerns about *'an overly prescriptive approach to systems and structures is that it may unwittingly encourage a superficial or 'tick the box' approach to the achievement of governance objectives.'*[655] He went on to say that he *'place[d] much more store on an understanding of and fidelity to underlying principles than I do on adherence to the form of recommended corporate governance structures and processes.'*[656] Although these comments are made in the context of internal prescriptive controls and measures, they are equally relevant to the form of regulation.

In contrast, principles-based regulation does not prescribe mandated steps that must be followed but rather an overall objective that must be achieved. While principles-based regulation provides greater flexibility and focus on the values underlying the law, it is also criticised for its lack of certainty and creating an unpredictable regulatory regime. It may therefore be combined with other forms of regulation such as regulatory guidance and rules.[657]

---

[650] As above, p 140 - 141.
[651] The Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, 2014, [4.7].
[652] Godwin A, Brand V and Teele Langford R, 'Legislative Design - Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280, p 287.
[653] As above, p 285.
[654] ALRC Interim Report A, [2.81].
[655] HIH Royal Commission, *The failure of HIH Insurance,* April 2003, Vol 1, [6.1.2].
[656] As above, [6.1.3].
[657] Godwin A, Brand V and Teele Langford R, 'Legislative Design - Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280, p 287.

The most flexible and responsive approach to regulation is therefore a mixture of both rules-based and principles-based regulation which can be used to complement each other, recognising that it is likely that no legal system or Acts is purely rules-based or principles-based.[658]

In a report on privacy law, the ALRC has made the following comments about principles-based regulation:

- Principles-based legislation can be distinguished from rules-based regulation in that it does not necessarily prescribe mandated steps that is required, but rather sets an overall objective that must be achieved.[659]
- *'A key advantage of principles-based regulation is its facilitation of regulatory flexibility through the statement of general principles that can be applied to new and changing situations.'*[660]
- Principles-based regulation can resolve uncertainty when it is combined with other forms of regulation, such as official guidance, and when dialogue between the regulator and the regulated entities is facilitated.[661]
- Furthermore, principles-based regulation can minimise the need for enforcement, as it aims to encourage organisations to understand the core values behind the law.[662]
- *'This speaks to the expressive function of the law, namely, the function of law in terms of identifying norms and influencing social action through a legal expression, or statement, about appropriate behaviour.'*[663]

6.2 Design principles

This section sets out our recommendations for restructuring financial services regulation in Australia. We have called them 'design principles' because they are focused on the design of the regulatory system rather than dealing with specific issues. However, we are convinced that implementation of our design principles has the potential to address the issues affecting the regulatory system for general insurance identified in this Report. At the end of each section where we discuss a particular issue in chapters Chapter 4 and Chapter 5 of the Report, we have indicated how particular design principles are relevant to that issue.

While this Report has focused more on conduct regulation, the design principles we have proposed are intended to apply to all forms of regulation of the financial sector where relevant.

In developing the design principles, we have been cognisant of the regulatory theories and approaches discussed in section 6.1.

(a) Design principle 1 – Principles-based legislation

General insurance (and financial services more generally) should be regulated by principles-based legislation with the main statute setting out the norms of conduct or principles that apply to the provision of financial services and the parameters of what is regulated.

As noted in the ALRC Interim Report A,[664] Black and others have described principles-based regulation as *'moving away from reliance on detailed, prescriptive rules and relying more on high-level, broadly stated rules or Principles to set the standards by which regulated firms must conduct business'.*[665]

We believe that the prescriptive requirements currently found in financial services legislation should be removed and replaced with principles-based regulation that articulates clear outcomes and/or objectives that must be complied with. These principles should be fundamental norms of conduct. In other words, they should be the base-line rules and therefore have a broad application.

---

[658] ALRC Interim Report A, [2.80].
[659] ALRC, *For Your Information: Australian Privacy Law and Practice,* Report No 108, 2008, [4.19]-[4,20].
[660] As above, [4.19]-[4,20].
[661] As above, [4.14].
[662] Godwin A, Brand V and Teele Langford R, 'Legislative Design - Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280, p 287.
[663] As above.
[664] ALRC Interim Report A, p 72.
[665] Black J, Hopper M and Band C, 'Making a Success of Principles-Based Regulation' (2007) 1(3) *Law and Financial Markets Review* 191, p 191.

The legislation should also set out the objectives of the financial services regime generally and in respect of each sub-sector of the financial sector.

By definition, this design principle is not rules-based and does not give effect to the EGR model discussed in section 6.1(b)(i). Insurance sector and financial services generally is a high impact sector and plays a significant role in the community and related conduct has the potential to cause significant consumer harm. These are all arguments which could be used to support a more prescriptive approach to regulation. However, our design principles are designed to provide the flexibility necessary to support more responsive or risk-based regulation and are therefore intended to represent 'smart regulation'. This is achieved among other things by proposing that the regulator should have a rule-making power (design principle 4) exercised after appropriate consultation (design principle 5) overseen by the FRAA (design principle 8) and with a recognised role for self-regulation (design principle 9).

As the legislation will be principles-based, it should not be necessary to include any power to make exemptions or modifications to the principles incorporated in the legislation. However, as set out below (see section 6.2(d) of this Report), we do propose that the relevant regulator should have the power to make Rules that prescribe what needs to be done to comply with particular principles in particular circumstances. If used, this power would in effect codify the application of those principles in the specified circumstances, meaning that an organisation which complies with such rules would be treated as complying with the relevant principle.

There are a number of examples of principles in financial services regulation that can usefully inform the development of principles for the Australian financial services regulatory framework.

(i) Financial Services Royal Commission

In his Final Report, Commissioner Hayne identified the following six norms of conduct that are reflected in the existing law (although in a piecemeal manner):

1. obey the law;
2. do not mislead or deceive;
3. act fairly;
4. provide services that are fit for purpose;
5. deliver services with reasonable care and skill; and
6. when acting for another, act in the best interests of that other.[666]

These norms have the benefit of simplicity and do seem to broadly cover the key principles that financial service providers would be expected to observe in the conduct of their business activities. It is not quite clear what role these norms should play given some are either axiomatic (to obey the law) or covered by other existing obligations (the prohibitions on misleading and deceptive conduct and the consumer guarantee regime) while others may arise under general law or be present in other more specific obligations.

(ii) AFCA Fairness Project

AFCA's Fairness Navigation Tool is another potential source for the principles that could be adopted by Parliament for the financial services sector. The Tool was developed by AFCA in the course of undertaking its Fairness Project. The Tool identifies the following 'obligations':[667]

Table 10

Obligations	Framing questions and AFCA Fairness Tests (in italics)
Keep promises made	1. Did the parties obey the law?

[666] Final FSRC Report, vol 1, p 9.
[667] AFCA, *Report on outcomes: Fairness Jurisdiction Project*, 11 May 2022, p 13. We have allocated framing questions to 'obligations' and Fairness Tests (in italics) to framing obligations. AFCA does not specifically link them in the Fairness Navigation Tool.

Obligations	Framing questions and AFCA Fairness Tests (in italics)
	2. Did the parties make promises or representations they did not meet?
Be open and honest	3. Did the parties act honestly, reasonably and in good faith in their dealings with each other?
Do not take unfair advantage	4. Did one party take unfair advantage of another? *Fair dealing* *Ensuring that one party does not take unfair advantage of another:* • *in the nature of the bargain struck* • *in the circumstances of entering that financial arrangement* 5. Were specific circumstances or vulnerabilities considered?
Be ethical and professional	
Demonstrate reasonable care and skill	6. Did the financial firm act with reasonable care and skill and in accordance with industry and professional practice?
Ensure services are fit for purpose	7. Was the product or service fit for purpose and perform as expected? *Fair service* *Delivering quality, professional financial products and services in a manner that:* • *is fit for purpose* • *meets a consumer's legitimate interests and reasonable expectations*
Protect the money of others	
Provide value and benefit	
Serve the interests of others	8. When acting for a consumer, did the financial firm act in the interests of the consumer or group of consumers as a whole? *Fair treatment* *Ensuring that one party is not treated inequitably or in a way that is adverse to their interests*
Consider consequences and impacts of actions	9. How did the parties treat each other during their relationship after concerns were raised? *Fair remediation* *A prompt and proportionate response when things go wrong* 10. What was the impact on the consumer and their experience of the service?

The influence of Commissioner Hayne's norms of conduct can be seen in these principles. AFCA has however elaborated on them and considered obligations arising from general law and equity as well its own experience in dealing with complaints.[668]

If there is a criticism that can be made of AFCA's Fairness Navigation Tool (apart creating yet another source of 'obligations' as discussed in section 5.1(e) of this Report), it is that in some instances it appears to be overly influenced by professional fiduciary duties which do not apply across the board and only have limited application in general insurance (and essentially none for general insurers). Examples of this are:

- the requirement to be 'professional' which risks importing fiduciary standards and principles;
- the requirement to protect money of others which is only relevant in specific circumstances but suggests limits should be applied in financial arrangements where they are not appropriate;
- the requirement to serve the interests of others seems to completely deny the commercial context of the provision of financial services. It is not realistic to expect that an insurer will never act in a way that is adverse to a consumer's interests as suggested by the fair treatment fairness test – denying a claim would be an adverse but normally legitimate decision.

(iii) UK Financial Conduct Authority

The UK Financial Conduct Authority has developed the following more specific 11 principles for financial services businesses:[669]

Table 11 UK Financial Conduct Authority Principles

1.	Integrity	A firm must conduct its business with integrity.
2.	Skill, care and diligence	A firm must conduct its business with due skill, care and diligence.
3.	Management and control	A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
4.	Financial prudence	A firm must maintain adequate financial resources.
5.	Market conduct	A firm must observe proper standards of market conduct.
6.	Customers' interests	A firm must pay due regard to the interests of its customers and treat them fairly.
7.	Communications with clients	A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.
8.	Conflicts of interest	A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.
9.	Customers: relationships of trust	A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.
10.	Clients' assets	A firm must arrange adequate protection for clients' assets when it is responsible for them.

[668] As above, p 10 and 13.
[669] Financial Conduct Authority, *FCA Handbook*, PRIN 2.1: https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html (accessed on 25 April 2022). The principles apply to persons who have a Part 4A permission granted by the FCA or the UK Prudential Regulation Authority (with certain exceptions) and, significantly for general insurance, the Society of Lloyd's: FCA Handbook, PRIN 3.1 and definitions of 'firm' and 'authorised person' in the Glossary to the Handbook.

11.	Relations with regulators	A firm must deal with its regulators in an open and cooperative way, and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.

A similar principles-based approach is proposed in South Africa's *Conduct of Financial Institutions Bill 2020* which is currently in draft form.

These principles seem to work well in the UK and form the basis for the UK rulebook approach in the FCA Handbook. However, unlike the model we are proposing, the UK principles are not legislated by the UK Parliament.

(iv) Proposed general insurance principles

We have developed the following principles which we believe would be appropriate for the general insurance sector. In developing these principles, we have had regard to those identified by Commissioner Hayne, AFCA and the UK Financial Conduct Authority.[670]

Table 12

Proposed principle			Comparison with UK principle
1.	Skill and competence	A financial service provider (**provider**) must provide services and conduct its business competently and with due skill and care and ensure that its representatives are appropriately trained and competent.	Our proposed principle combines existing competence and training obligations in s 912A of the Corporations Act with the UK 'Skill and care' principle. We do not believe diligence is an appropriate standard.
2.	Fit and proper[671]	A provider must ensure that its officers and representatives are fit and proper persons to undertake the roles they perform.	Our proposed principle reflects existing Australian licensing and prudential requirements. There is no exact equivalent in the UK principles, although it is relevant to the 'Integrity' and 'Management and control' principles.
3.	Act fairly	A provider must act fairly in its dealings with consumers, having regard to the interests of both consumers and the provider. Special care must be taken for vulnerable consumers.	The UK 'Customers' interests' principle includes a requirement to treaty customers fairly. Our proposed principle is more specific and requires consideration of the interests of both consumers and providers. It is also intended to address the UK 'Integrity' principle.
4.	Information needs of customers	A provider must ensure that consumers have the information they can reasonably be expected to need to make decisions relating to the services or products provided by the provider and must communicate information to them in a way which is clear, fair and not misleading.	Our proposed principle is consistent with the UK 'Communications with clients' principle, but has a more specific disclosure standard.

[670] These principles are not identical to the principles we suggested in our submission on the ALRC Interim Report A dated 20 March 2022 (which may be accessed at: https://www.alrc.gov.au/wp-content/uploads/2022/03/55.-MinterEllison.pdf). We have refined them further and excluded the market conduct principle which would not have the same relevance for the general insurance sector.
[671] We envisage that this particular obligation would be enforced by APRA for prudentially regulated firms, consistent with the twin peaks model – see design principle 7 in section 6.2(e) of the Report. It would however be important for APRA to coordinate its enforcement of this obligation with ASIC and ensure that conduct related considerations are taken into account along with prudential considerations.

Proposed principle			**Comparison with UK principle**
5.	Conflicts of interest	A provider must manage conflicts of interest fairly, including conflicts between itself and its consumers and wholesale clients (**clients**), between its officers, representatives and service providers and its clients and between a client and another client.	Our proposed principle is consistent with the equivalent UK principle with specific recognition of the conflict of interests of officers, representatives and service providers.
6.	Suitable services	A provider must take reasonable care to ensure the suitability of the information, advice and services it provides to consumers.	Our proposed principle partly reflects the UK principles relating to 'Customers' interests' and 'Customer relationships of trust'. It also reflects Commissioner Hayne's norm of conduct to provide services that are fit for purpose.
7.	Prioritise consumer interests	When acting for a consumer or advising a consumer based on their individual circumstances, a provider must give priority to the consumer's interests.	This principle reflects aspects of the UK principles and also Commissioner Hayne's norm of acting in the best interests of a client when acting for them.
8.	Recommendations	A provider must have a reasonable basis for any express or implied recommendation they make to a consumer about a financial product or service.	While there are elements of this principle in the UK principles, it is specifically designed to reflect our views on the appropriate standard for insurance recommendations discussed in section 5.5 of this Report.
9.	Client assets	A provider must take reasonable care to ensure adequate protection for the assets of clients it is responsible for.	This is identical to the equivalent UK principle.
10.	Complaints	A provider must manage complaints received from consumers fairly and expeditiously.[672]	There is no express equivalent in the UK principles. It reflects existing s 912A obligations.
11.	Compliance and risk management	A provider must take reasonable steps to ensure compliance with its obligations and to manage risks relating to its business and the services it provides appropriately, including cyber security risks.	This principle partly reflects the UK 'Management and control' principle. It focuses more on compliance measures than general corporate governance.
12.	Resources[673]	A provider must have adequate resources to provide the services it provides to clients, including financial, technological and human resources.	This principle reflects an existing s 912A obligation and is consistent with the UK financial prudence principle.

[672] We expect that there would be a separate obligation for providers of financial services to consumers to be a member of a suitable external disputes resolution body (**EDR**), such as AFCA. This is could be in the primary legislation, i.e. the FSA (see section 6.2(b)), along with the core licensing provisions. Alternatively, it could be a matter determined by the Conduct Regulator in the Rules to identify when a provider needs to be a member of an EDR and to prescribe any additional requirements relating to handling complaints such as timelines, etc.

[673] As with general insurance principle 2 – fit and proper – we envisage that this particular obligation would be enforced by APRA for prudentially regulated firms.

We have not included UK principle 11 – relations with regulators – as it does not relate specifically to services provided to clients. However, we expect a similar obligation would be included in the licensing provisions as it is currently in s 912E of the Corporations Act.

The ALRC has proposed to repeal what it describes as *'a number of prescriptive provisions which are redundant in light of the established meaning given to 'efficiently' in the 'efficiently, honestly and fairly' obligation'.*[674] The obligations referred to are:

- the conflicts management obligation in s 912A(1)(aa);
- the competence obligation in s 912A(1)(e);
- the obligation to ensure representatives are adequately trained in s 912A(1)(f); and
- the risk management obligation in s 912A(1)(h).

We do not consider that these obligations are 'prescriptive'. They are principles-based obligations and we believe that they are appropriate standards for financial service providers to be held to.

The principles we have proposed should apply to all financial service providers, whether they hold a licence or authorisation or are exempt and whether they provide financial services as principal or as a representative or employee of another person. This is to ensure that principles are not limited to the financial services covered by an AFSL and extend to all dealings with consumers relating to financial services.

The principles would be incorporated in the primary legislation regulating the provision of financial services and would replace the licensing obligations in s 912A of the Corporations Act, among other things. Breach of the principles would not only give rise to civil liability for loss suffered as a result of the breach, but would also be subject to a civil penalty order as is the case currently for certain obligations in the Corporations Act, such as the general obligations of financial services licensees in s 912A.

(v) Rationale for a principles-based approach

Black has summarised the benefit of a principles-based form of regulation as implemented by the UK Financial Services Authority (as it then was) as follows:

> *The Principles enable supervisors and enforcers to police the spirit of the rules as well as the letter, avoiding "creative compliance" (compliance with the letter not the spirit of the rule) and the need for the rules to anticipate every possible situation.*[675]

Black goes on to say:

> *The potential benefits claimed of using principles are that they provide flexibility, are more likely to produce behaviour which fulfils the regulatory objectives, and are easier to comply with. Detailed rules, it is often claimed, provide certainty, a clear standard of behaviour and are easier to apply consistently and without retrospectivity. However, they can lead to gaps, inconsistencies, rigidity and are prone to "creative compliance", to the need for constant adjustment to new situations and to the ratchet syndrome, as more rules are created to address new problems or close new gaps, creating more gaps and so on. In contrast, principles-based regulation allows for a greater degree of 'future-proofing', enabling the regime to respond to new issues as they arise without having to create new rules.*[676]

The ALRC does not however seem to support the legislation of principles:

> *The [UK] 'Principles for Business' parallel many of the norms that underpin conduct obligations in Australia ... However, the ALRC's view is that there is no need to legislate an additional set of enforceable fundamental norms. This is because reforms in 2019 made the existing, principles-based conduct obligation that AFS Licensees and Credit Licensees undertake their licensed activities 'efficiently, honestly and fairly' enforceable as civil penalty provisions. As discussed later in this chapter, that obligation already has a very broad remit. Arguably, as the Financial Services Royal Commission concluded, it embraces all the fundamental norms underlying Australian financial services conduct regulation.*[677]

---

[674] ALRC Interim Report A, [13.98] and proposal A21.
[675] Black J, 'Principles Based Regulation: Risks, Challenges and Opportunities', Presentation at the Banco Court, Sydney, 27 March 2007, p 4: http://eprints.lse.ac.uk/62814/ (accessed on 10 August 2022).
[676] As above, p 7.
[677] ALRC Interim Report A, [13.29].

The ALRC instead seems to favour incorporating fundamental norms as an objects clause in the legislation to provide greater clarity for regulated entities and consumers as to how regulated entities can be expected to behave and to assist courts to interpret other provisions.[678]

However, we believe that there is merit in the UK approach which sets out in clear and simple language the minimum standards that financial service providers are not only expected, but also required, to comply with in their dealings with consumers. These principles should be used by the courts when interpreting more detailed requirements made by the regulator in the rules. However, we believe there is significant merit in clearly articulating the requirements and expectations that apply to providers rather than trying to rely on a single general duty such as the duty to do all things necessary to ensure that financial services are provided efficiently, honestly and fairly (see section 5.1(a) of this Report for our critique of this duty). Support for principles-based legislation has precedents. A recent example relates to privacy law.

In 2008, the ALRC recommended a principles-based approach to regulation in its report on Privacy Law and Practice in Australia.[679] It noted that principles-based regulation attempts to solve the problems of a rules-based approach, largely by providing greater *'flexibility',* thereby allowing for *'a greater degree of "future-proofing", enabling the regime to respond to new issues as they arise without having to create new rules'.*[680]

The ALRC explains that:

> *Future-proofing can be achieved by drafting purposive principles that both express the rationale for the rule and provide 'overarching requirements that can be applied flexibly to a rapidly changing industry'. Principles-based regulation also makes use of qualitative and often evaluative terms such as fair, reasonable and suitable. This regulatory approach can facilitate compliance as it allows entities to honour the spirit of the law by developing policies or other mechanisms that simultaneously comply with the rule and meet the entity's needs.*[681]

These recommendations were made in relation to complexity and inconsistency in the legislative and regulatory framework of privacy law in Australia in 2010 – a description that applies even more to the current financial services legislative and regulatory framework.

Further, as noted in the ALRC's Review on Australian Privacy Law and Practice, the former Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, comments that rules-based regulation introduces 'unnecessary legal complexity' and encourages 'box-ticking' exercises, rather than complying with the spirit and intent of the law.[682]

The ALRC referred to the Privacy Commissioner, Karen Curtis, in support of the benefits of principles-based regulation:

> *By encouraging organisations to recognise the business advantages of good personal information handling practices and regulating their behaviour accordingly, government regulators can minimise regulatory intervention and red tape. This has been a common theme of our regulatory approach where a legislative framework is balanced by an emphasis on business privacy awareness and self-regulation. The idea is to inculcate the values and objectives of privacy law in business rather than just the superficial rules. When this happens organisations will be better equipped to deal with technological change because they will understand the ideas behind the laws - the principles - and will not become as confused by detailed technology-specific regulations.*[683]

This further highlights the need for principles-based regulation in an industry like financial services which is subject to significant technological development and change.

It also echoes commentary by international organisations such as the International Federation of Accountants that good regulation involves *'starting with clear policy objectives, and then building complementary requirements',* i.e. clarifying the objective and policy aspiration of the law should be the

[678] As above, [13.30] – [13.45].
[679] ALRC, *For Your Information: Australian Privacy Law and Practice,* Report No 108, 2008, [4.4].
[680] As above, [4.9].
[681] As above, [4.9].
[682] As above, [4.12].
[683] As above, [4.16].

starting point rather than detailed requirements that redirect the focus and investment on routine compliance.[684]

In ALRC Interim Report A, the ALRC explores various models for principles-based legislation, which includes referring to Black's tiered approach to principles-based legislation so that principles are underpinned by a set of rules in areas that require it to provide certainty, while the principles themselves *'thwart strategies to exploit gaps and inconsistencies in the detailed rule'.*[685] As set out in section 6.2(d) of this Report, we believe this model is very appropriate for general insurance and the financial services sector generally.

While the ALRC states that the principles it proposes in Interim Report A cannot be implemented *'strictly as rules, and that it may often be necessary to recognise exceptions, or to 'adapt the spirit' of the principles to particular circumstances',*[686] we believe that the rule-making aspect of our design solution addresses these concerns as the Rules will clarify and apply the principles in different contexts.

(b) Design principle 2 – Separate Act

Financial services regulation should be taken out of the Corporations Act and all financial services regulation (including the consumer protection provisions of the ASIC Act) should be contained in separate legislation, e.g. a Financial Services Act (**FSA**).

Implementation of this design principle would involve extracting regulation relating to financial services from relevant Acts, including the Corporations Act and ASIC Act, and collating them to develop the FSA. The Insurance Contracts Act and other insurance specific regulation should be brought into the FSA as a separate chapter. A similar approach can also be applied for other sector specific regulation in the financial services sector.

This will improve the navigability of financial services regulation as common principles, terms and definitions will be found in one document, which will facilitate the consistency in the application of regulatory regimes and avoid needing to refer to multiple pieces of legislation.

Consolidating the legislation could be achieved through a new referral of power by the States to the Commonwealth or an amendment of the existing corporations referral. For the Corporations Act, the States agreed to a referral of certain matters under s 51(xxxvii) of the *Australian Constitution* which grants the Commonwealth power to legislate in relation to those matters.[687] This is also supported by the *Corporations Agreement 2002* between the Commonwealth, States and Northern Territory, which *'provides a framework for cooperation between the parties about the amendment and administration of the corporations and financial services legislation'.*[688]

An additional or amended referral would be required to facilitate the enactment of the FSA as there are limitations when relying on the current referrals which are limited to the 'initial reference' and the 'amendment reference'.

The initial reference is *'the matters to which the referred provisions relate, but only to the extent of making laws with respect to those matters by including the referred provisions in Acts enacted in the terms, or substantially in the terms, of the tabled text (including laws containing provisions that authorise the making of Corporations instruments that affect the operation of the Corporations legislation, otherwise than by express amendment)'.*[689] The 'tabled text' refer to the bills that became the Corporations Act and ASIC Act.

The amendment reference is *'the matters of the formation of corporations, corporate regulation and the regulation of financial products and services, but only to the extent of the making of laws with respect to those matters by making express amendments of the Corporations legislation (including laws inserting or*

---

[684] International Federation of Accountants, *From Crisis to Confidence: The Role of Good Regulation,* 2015, p 13.
[685] ALRC Interim Report A, [2.104].
[686] As above, [4.15].
[687] ALRC, *Background Paper FSL4 Legislative Framework for Corporations and Financial Services Regulation: Historical Legislative Developments,* November 2021, p 17.
[688] As above, p 25.
[689] *Corporations (Commonwealth Powers Act) 2001* (NSW), s 4(1)(a); *Corporations (Commonwealth Powers Act) 2001* (Qld), s 4(1)(a); *Corporations (Commonwealth Powers Act) 2001* (SA), s 4(1)(a); *Corporations (Commonwealth Powers Act) 2001* (Tas), s 5(1)(a); *Corporations (Commonwealth Powers Act) 2001* (Vic), s 4(1)(a); and *Corporations (Commonwealth Powers Act) 2001* (WA), s 4(1)(a).

amending provisions that authorise the making of Corporations instruments that affect the operation of the Corporations legislation, otherwise than by express amendment)'.[690]

The ALRC has observed that it may be possible to integrate Part 2 Division 2 of the ASIC Act with Chapter 7 of the Corporations Act under the current amendment reference given its reference to *' "the matters of the formation of corporations, corporate regulation and the regulation of financial products and services" so long as only the text of the Corporations Act or the ASIC Act was altered by 'express amendment' (as defined in the referral legislation)'.*[691] Therefore, *'repealing part of the ASIC Act, and re-enacting it in substantially the same form within the Corporations Act may satisfy the definition of 'express amendment'.'* However, the ALRC notes that there may be potential issues with this given the extent of the amendments that have been made to the Corporations Act and ASIC Act since 2001.[692]

Further, as the ALRC has noted, Chapter 7 of the Corporations Act and Part 2 Division 2 of the ASIC Act cannot be integrated in a new, standalone piece of legislation, as the qualified definition of 'express amendment' requires *'that any amendment be made only to the text of the Corporations Act and ASIC Act'.*[693]

Therefore, to facilitate the creation of a separate FSA, either the States should make a new referral relating to financial services and products or the existing corporations referral should be amended.

Supporting rationale

Theories of regulation outline the range of different motivations driving compliance (economic, social and normative motives). Within the social motives, the approval and respect of regulators is an important consideration for regulated entities due to the relationship and interactions they have with regulators.[694] It is also argued that the extent to which an individual or business accepts or understands the policy goals and obligations of a specific regulatory regime significantly influences their desire to comply with it.[695] Many objectivist studies of compliance, such as Braithwaite and Gunningham,[696] point out that rule adherence is often supported by commitment to the principles and values behind the rule and a democratic and fair process of regulatory rule-making and enforcement.[697] By extension, if the Act that provides the rules or principles for regulation is not accepted or understood by regulated parties, then compliance falls short.

Incoherency, complexity and duplication aside, the Corporations Act has been significantly expanded and elaborated such that the obligations it imposes are often indigestible and indecipherable[698] and therefore, its capacity as a governing tool for regulation can often fall short of understanding and acceptance by those that it governs and those that interpret it.

By separating the provisions relating to financial services from the Corporations Act, it immediately simplifies the structure of the financial services regulatory framework by removing it from a complex and expansive piece of legislation. In addition, unpacking the Corporations Act into separate statutes and developing a separate FSA should *'promote a more obvious, and conceptually sound, characterisation of principles and issues'*[699] as the various topics of regulation are split apart.

A separated Act will facilitate the establishment of a specialist regulator, with a sole focus on the financial services industry. It will also promote a clean transition into a principles-based legislative and regulatory framework, giving the specialist regulator a clear mandate in line with this approach to ensure clarity and effectiveness of regulation from inception.

---

[690] *Corporations (Commonwealth Powers Act) 2001* (NSW), s 4(1)(b); *Corporations (Commonwealth Powers Act) 2001* (Qld), s 4(1)(b); *Corporations (Commonwealth Powers Act) 2001* (SA), s 4(1)(b); *Corporations (Commonwealth Powers Act) 2001* (Tas), s 5(1)(b); *Corporations (Commonwealth Powers Act) 2001* (Vic), s 4(1)(b); and *Corporations (Commonwealth Powers Act) 2001* (WA), s 4(1)(b).
[691] ALRC, *Background Paper FSL4 Legislative Framework for Corporations and Financial Services Regulation: Historical Legislative Developments,* November 2021, p 34.
[692] As above, p 34.
[693] As above, p 35.
[694] Nielsen V and Parker C, 'Mixed motives: economic, social, and normative motivations in business compliance' (2012) 34(4) *Law & Policy* 428, p 432.
[695] Gunningham N and Sinclair D, *Smart Regulation,* 2017, p 133.
[696] Braithwaite J, Runciman WB, and Merry AF, 'Towards safer, better healthcare: harnessing the natural properties of complex sociotechnical systems' (2009) 18(1) *Qual Saf Health Care* 37 and Gunningham N, and Kagan RA, 'Explaining corporate environmental performance: how does regulation matter?' (2003) 37(1) *Law & Society Review* 59.
[697] Drahos P, *Regulatory Theory: Foundations and Applications*, 2017, p 288.
[698] Jordan C, 'Unlovely and Unloved: Corporate Law Reform's Progeny' (2009) 33(2) *Melbourne University Law Review* 626, p 626.
[699] As above, p 638.

It is also important to recognise that consumer protection legislation is a success, *'when specific regulation is effectively articulated and enforced, everyone wins: consumers, because of the protection of quality and safety of products and services, and business, because of increased consumer trust.'*[700]

(c) Design principle 3 – Regulations

Regulations should only be used for limited and specific purposes, e.g. to adjust the boundaries of financial services regulation.

Chapter 7 of the Corporations Act provides for exemptions or modifications to be made either by regulation or by ASIC in an extraordinarily wide range of cases. This has led to a very significant number of regulations and ASIC instruments which notionally amend or replace provisions of the Act or insert whole new provisions. As is well documented,[701] this has made Chapter 7 of the Corporations Act very difficult to navigate and caused it to expand into a 'legislative porridge'.[702]

It is therefore imperative to avoid this problem in a revamped regulatory scheme for financial services. We therefore propose to limit the power to make regulations to very specific areas where it is more appropriate for the Government in the form of the relevant minister to propose and make regulations, rather than waiting for Parliament to turn its mind to the matter or to leave it to the regulator to formulate appropriate regulatory measures. In our mind, this role should be confined to setting the regulatory boundaries for regulation which may require prompt action to address developments in the market but which should initially at least be a matter for the Government rather than the regulator to take the lead in setting the regulatory policy. The following matters could therefore be established or adjusted in the regulations:

- the types of financial services and products which are regulated by the FSA;
- the definition of retail and wholesale client given that the boundary has a significant impact on the level of regulation; and
- the circumstances in which an AFSL is or is not required.

However, we also recognise that the process of making regulations can become politicised and is subject to resourcing restrictions and competing priorities. We therefore also propose that the relevant regulator should be able to propose regulations which would:

- be tabled in Parliament after consulting with stakeholders (including the Government) in accordance with a mandated timeline for consultation (see Recommendation 5); and
- take effect no earlier than six months after being released in final form unless:
  - either house of Parliament passes a motion or the relevant minister declares that they will not take effect before that time; or
  - the regulator declares that the regulations are urgent to address a market failure or other significant regulatory risk, in which case they will commence on the date set by the regulator but either house of Parliament or the relevant minster will retain the right to disallow or repeal the regulations with immediate effect within six months after they are released by the regulator in final form.

This proposal is designed to overcome political or bureaucratic inertia while ensuring Parliamentary and Government oversight of the boundaries of financial services regulation (i.e. what is subject to financial services regulation and what is not). It is intended to retain the primacy of the Government and the relevant minister in making regulations.

We do not view this proposal as being inconsistent with the Government's Statement of Expectations for ASIC which requires ASIC to ensure its actions are not inconsistent with the policies of the Government

---

[700] Drahos P, *Regulatory Theory: Foundations and Applications*, 2017, p 650.
[701] Godwin A, Brand V and Teele Langford R, 'Legislative Design - Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280.
[702] *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028, per Rares J, [948]. While Rares J was referring to the interplay between different provisions of the Corporations Act and the ASIC Act, the comment seems equally applicable to the challenge of identifying whether a particular provision in the Act has been modified by regulation or ASIC instrument.

and that it consults with the Government and Treasury in exercising its policy-related functions.[703] The requirement to consult before making any such regulations should ensure that Government policy is appropriately reflected in them.

The ALRC also refers to Black who argues that a *' 'tiered approach' should be adopted, such that principles are underpinned by detailed rules in some areas'.*[704] However, for a tiered approach to operate effectively, particularly in as rapidly a changing landscape as the financial services sector, it is important that an appropriately resourced regulator not has only the capacity but also the obligation to respond quickly to market developments. This should be one of the objectives of the regulators. Concerns about empowering a regulator in this way can be addressed by ensuring that it has a clear mandate governing its powers and responsibilities and that it is subject to appropriate oversight and the requirement to undertake appropriate consultation.

The approach recommended in relation to regulations is consistent with the theory of smart regulation that only the minimum number of legislative instruments necessary to achieve the desired result should be used.[705]

(d) Design principles 4 & 5 – Rules

Design principle 4 – Rule-making power

The regulator should be empowered to make rules to impose specific requirements, where appropriate, that must be complied with in relation to particular activities to implement the principles articulated in the legislation.

This recommendation has the following goals:

- Provide certainty to industry and consumers where required.
- Avoid the complex maze of statutory provisions, regulations and instruments which notionally amend and insert provisions into the main legislation.
- Facilitate coherence, clarity and consultation in the making of requirements that apply to particular activities.
- Ensure expertise and independence in making requirements which apply the principles set out in the legislation.

Principles-based regulation is an essential starting point for regulation of the financial sector. It is important to have clear and simple norms of conduct which industry participants are required to meet. This will promote confidence in the sector by consumers and provide clear standards which industry participants and consumers alike can understand.

However, there is no perfect form of regulation. There are also benefits to more detailed rules:

> *There is a danger, however, in thinking that 'one size fits all': that the advantages and disadvantages of certain types of rules will be the same for all actors in the regulatory regime. Instead, different types of rules can help or hinder the supervision and compliance activities of regulators and others in different ways. For example, detailed, precise rules can help regulators (and gatekeepers such as auditors) discourage non-compliant behaviour when the opportunities for creative compliance are not available or clients are unaware of the precise rules. Detailed rules can also be used more effectively than Principles to persuade recalcitrant or sceptical firms (or internal management) that they should change their behaviour. Detailed rules can thus empower supervisors, and indeed internal compliance officers, in certain circumstances, whereas Principles will not, as debates can always be had about their interpretation. One consequence of moving to a more principles-based approach may mean, therefore, that the compliance role will need additional senior management support, particularly when seeking to engage the business in a discussion of whether a proposed behaviour or strategy will be principle-compliant. Similarly, detailed rules are more useful for regulators dealing with ill intentioned and ill informed firms than*

[703] ASIC, *Statement of Expectations: Australian Securities and Investments Commission - August 2021:* https://asic.gov.au/about-asic/what-we-do/how-we-operate/accountability-and-reporting/statements-of-expectations-and-intent/statement-of-expectations-australian-securities-and-investments-commission-august-2021/ (accessed on 16 May 2022).
[704] ALRC Interim Report A, [2.104].
[705] Gunningham N and Sinclair D, Smart *Regulation,* 2017, p 134.

> *more general rules. Finally, detailed rules can be useful for regulators themselves, facilitating quick processing of a high number of cases, and ensuring consistency of interpretation and application by a high number of officials, particularly where they are geographically dispersed.*[706]

There are therefore benefits to prescription and a well-structured regulatory regime will seek to achieve the right balance between principles and prescription. The reality of modern corporate life is that companies also require certainty to efficiently allocate resources and to provide a baseline level of compliance. The challenge is how to resolve these tensions.

Consideration has been given to these issues in the United Kingdom as a result of the opportunity afforded by Brexit to re-structure the financial regulatory framework there. In that context, Sam Woods (who is both the Deputy Governor for Prudential Regulation of the Bank of England and Chief Executive Officer of the UK Prudential Regulation Authority) identified the fundamental principles required for an effective and efficient prudential framework as:

1. robust prudential standards;
2. responsible openness based on international collaboration and standards;
3. proportionality and sensitivity to business models and promoting competition;
4. dynamism and responsiveness;
5. consistency; and
6. accountability.[707]

The Executive Director of Prudential Policy at the Bank of England, Victoria Saporta, elaborated on this by connecting the dots between principles and practice. As set out in the following tables, Saporta notes that the three features required for ideal prudential regulation are:

1. dynamism, incorporating international standards in a timely manner to the changes in regulation;
2. time consistency, providing an equilibrium between the long and short term goals of policy making and regulation. While the long-term policy objective of government is to avoid a financial crisis for which robust prudential standards are required, in the short term, there may be benefits from weakening prudential standards. For instance, a government might benefit electorally from the resulting short-term boost to credit supply. The aim of ideal regulatory structure is to minimise these long and short term goal inconsistencies; and
3. legitimacy, ensuring that regulation and regulatory bodies have clear mandates.[708]

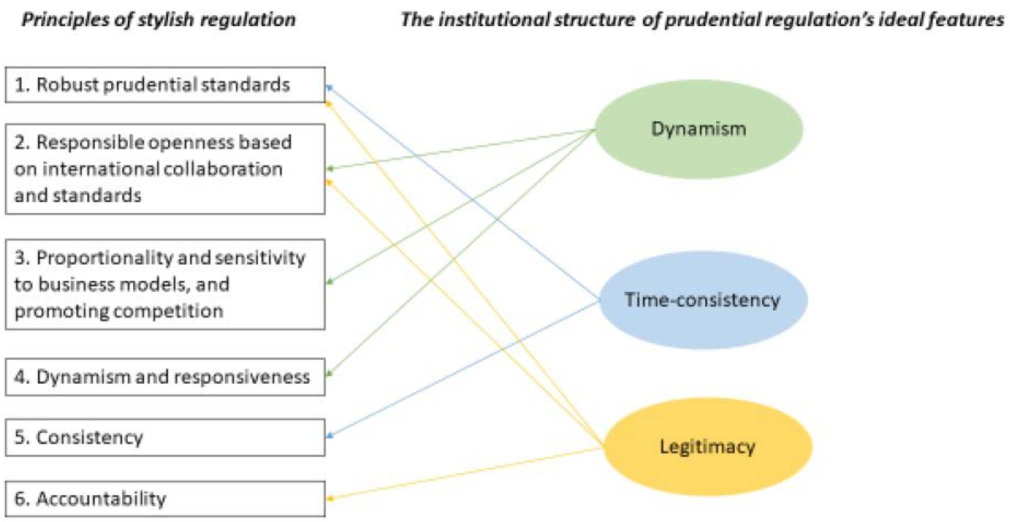
This is summarised in the following table.[709]

Table 1: Comparison of alternative models of the institutional structure of prudential regulation

Model	*Dynamic?*	*Time-consistent?*	*Legitimate?*
Primary legislation	X	√	√
Government	√	X	√
Regulator	√	√	x
Regulator + clear mandate +accountability mechanisms to Parliament	√	√	√

[706] Black J, 'Principles Based Regulation: Risks, Challenges and Opportunities' (2007) *London School of Economics and Political Science,* p 12.
[707] Woods S, *Stylish regulation*, UBS 20th Annual Financial Institutions Conference, Lausanne, 16 May 2019, p 3 - 4.
[708] Saporta V, *The ideal post-EU regulatory framework*, International Business & Diplomatic Exchange 2020 Annual Conference, London, 10 March 2020, p 3.
[709] As above, p 4.

Saporta offers a link between the core principles of regulation as outlined by Woods and goes on to provide the following framework for effective regulatory structure incorporating the ideal features and the stakeholders best suited to deliver them, with a final solution.[710]



In our view, the observations of Wood and Saporta are equally relevant to conduct regulation. (We discuss accountability in section 6.2(f) of this Report below.)

Who should the rule-maker be?

The appropriate role for Parliament is to set the norms of conduct that are expected of industry participants. It is not efficient or effective for Parliament to be involved in the minutiae of the regulation of particular services and products in particular situations. Rather, it should be setting the boundaries within which industry, regulators and consumers can operate.

It is our view that a specialist regulator (see section 6.2(e) below) with an appropriate mandate, expertise and resources is better placed to:

- formulate specific requirements to address areas which require certainty or the imposition of prescriptive requirements; and
- conduct appropriate and timely consultation with affected stakeholders.

As the ALRC notes in its Interim Report A:

> *Rules in thematic legislative instruments could provide a location in the legislative hierarchy for much of the prescriptive detail that is currently spread across legislative sources.*[711]

This is not to say that Parliamentary (and Government) oversight are not important in the formulation of such detailed legislative requirements. However, as we envisage that any Rules made by the regulator would be instruments subject to disallowance by either House of Parliament, there is a well-established means for ensuring that such oversight can occur.

The key distinctions between this recommendation and the current state of play relating to ASIC's powers to make instruments which provide exemptions and modifications to the statutory regime are the following:

- The regulator would be specifically tasked with making Rules to implement the principles in the legislation. It is arguable that ASIC already has the power to make rules for particular activities through its exemption and modification power (noting that there are some important exceptions to this, in particular in relation to the 'FOFA' regime in Part 7.7A of the Corporations Act). However, ASIC does not have a mandate to make rules for regulated entities. Its mandate is limited to enforcing the law and determining whether any exception or modification is required to address specific circumstances. The existing powers are therefore understood to be intended to address anomalies and inconsistencies in the statutory regime and there is a reluctance to be seen to be

[710] As above, p 6.
[711] ALRC Interim Report A, [10.80].

creating new law as that is the purview of Parliament.[712]

In part, the current position is a reflection of the challenging mixture of principles and prescription in the current financial services regime in the Corporations Act and Regulations. We believe that limiting the statutory regime to principles-based requirements and explicitly authorising and requiring the regulator to make Rules to implement the principles after appropriate consultation would address the current perceived limitations on ASIC's power in this regard.

- As the rule-making power we have proposed would be broad and not limited to making exemptions or modifications to the Act, the regulator will have greater freedom to create a body of Rules which is coherent and well organised and indeed the regulator should be explicitly required to ensure that the Rules it makes are 'clear, concise and effective' (or some other appropriate formulation) and should be subject to appropriate review and oversight to ensure that this occurs (see section 6.2(f) below).

Our proposed approach is consistent with that proposed by the ALRC in its Interim Report A, although our approach may be broader:

> *10.83 Removing from the Corporations Act prescriptive detail that is frequently tailored, or in relation to which exemptions are frequently granted, would likely eliminate the need for any powers to notionally amend the Act. The number of exemptions from obligations contained in the Act would also be reduced. This is because rules in legislative instruments could more easily be adapted to particular products, persons, or circumstances than is possible for requirements contained in the Act. This would reduce the need for complete or conditional exemptions.*
>
> *10.84 Obligations could be tailored by textually amending the relevant legislative instrument, for example:*
>
> - *to limit the application of relevant provisions (effectively achieving the same outcome as exemptions currently achieve); or*
> - *to adapt relevant provisions (effectively achieving the same outcome as notional amendments and conditional exemptions currently achieve).*
>
> *10.85 This approach would:*
>
> - *retain the benefits of flexibility and adaptability currently in the regime;*
> - *do away with hundreds of legislative instruments that currently contain alternative regulatory regimes;*
> - *enable easier comparison (within a single legislative instrument) of equivalent rules for different circumstances; and*
> - *provide a more appropriate location for content in navigable, thematically organised legislative instruments ('rules').*
>
> *10.86 As noted above, this approach would work best as part of a principled legislative hierarchy. For example, under a principled legislative hierarchy the Corporations Act may contain the core and generally applicable obligations, a legislative instrument would contain any exemptions (if necessary), and rules would contain the details necessary to adapt the law to particular circumstances. This is essential to ensuring that the text of the primary law would not need to be notionally amended and the applicable rules could be clearly and accessibly tailored to particular circumstances in the rules (as currently done by way of notional amendments to the Act). Given comparable sets of rules for different circumstances would be contained in one legislative instrument focused on a particular theme (disclosure, for example), different rules could be more easily compared than is currently possible under disparate legislative instruments. Parliament could in any event grant notional amendment powers if it was thought necessary during an emergency. However, because notional amendments result in significant complexity and reduced navigability, any such emergency powers, and instruments made under them, should be limited in duration.*

If there is any difference between our design solution and the ALRC's proposal, it is on the emphasis on exemptions in the ALRC commentary. We do not believe that there should be any need to provide for

---

[712] Bottomley S, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-maker' (2011) 39(1) *Federal Law Review* 1, p 15.

exemptions in the rule-making power. We expect that the principles articulated in the relevant Act would be such that they would and should apply to all relevant financial services without exception. We do acknowledge that there may be a need in particular circumstances for the regulator to be able to prescribe what a regulated entity is required to do in particular circumstances to comply with a principle. This would provide regulated entities with certainty about their obligations in those circumstances. By codifying their obligations in those circumstances, this would have a similar effect to providing an exemption. However, we would not view such Rules as making an exemption to the principle. Rather, they would establish a prescriptive regime for complying with it.

We also propose controls on the rule-making process to ensure the power is exercised appropriately and carefully. A key element of our design solution is that the regulator would be given a clear mandate and requirement to make Rules to fill in the details sketched out by the broad principles in the legislation as required to address particular circumstances. The power to make Rules would also require the regulator to undertake appropriate consultation and set out timing requirements for consultation.

The FSA would therefore set out the rule-making power of the Conduct Regulator and specify the parameters of this power (e.g. the subject matters the regulator may prescribe Rules for). Within these parameters, the Conduct Regulator would be empowered to properly develop Rules that benefit consumers and achieve the objectives of the FSA (e.g. efficiency, fairness and competition). The Conduct Regulator would be required to have regard to these objectives and to specifically reference how specific Rules achieve the objectives.

The rule-making power would also authorise the Conduct Regulator to adjust the regulatory approach by setting different requirements depending on the product, service and consumer. This proposal is not novel. Financial services regulators already have rule-making powers in other contexts, i.e. APRA has the power to make prudential standards and AUSTRAC has made the *Anti-Money Laundering and Counter-Terrorism Financing Rules*.

There does of course need to be an appropriate enforcement regime for the Rules. We envisage that the FSA would provide that breach of a Rule would give rise to civil liability for loss suffered as a result of the breach and that intentional or reckless breach of a Rule would give rise to a civil penalty.

Our recommended approach ensures that Parliament is appropriately focused on establishing the norms of conduct and expectations for industry participants and the regulator and establishing consumer remedies while empowering an independent regulator with appropriate expertise and resources to identify where specific requirements are required and to impose those requirements. Giving the Conduct Regulator a rule-making power is really only an extension of the product intervention power that ASIC already holds. The critical difference is that the rule-making power is less focussed on exceptional circumstances and is designed to give the Conduct Regulator the power to make a coherent body of Rules for the provision of financial services which are tailored to the particular circumstances of different activities which occur within the sector.

The Conduct Regulator should have specialist knowledge, resources and authority so that it can develop appropriate Rules, respond quickly to regulatory and market developments as they occur and make adjustments in a timely manner. The Rules may be specific to the insurance sector or apply generally across all financial services. The statutory independence and expertise of the regulator should produce better regulatory outcomes for consumers and the industry.

Explicitly empowering the Conduct Regulator to make Rules should also reduce the need for guidance which becomes a form of de facto law as the Rules will have legislative force. It would enable the Conduct Regulator to set Rules where appropriate and to provide guidance where that is more appropriate. An example where this approach seems to work well is the prudential standards and prudential guidance made by APRA. It is clear that the prudential standards are intended to be legal requirements while the prudential practice guides provide guidance on how to comply with those standards in particular circumstances.

The form of the Rules would be a matter for the Conduct Regulator (e.g. the Rules could incorporate guidance similar to the approach of the Financial Conduct Authority (**FCA**) in the UK with the FCA Handbook).

The following measures can be adopted to ensure that the Rules are drafted in a clear, consistent and navigable manner:

- as suggested by the ALRC, the Rules should be drafted using a consistent structure and can be organised thematically, by industry sector and/or type of service which would enhance the navigability of the Rules;[713]
- the regulator should be required to consider the application of the Rules to particular industry sectors and activities to ensure that appropriate requirements are applied for particular circumstances;
- ensuring consistent terminology is used across the legislation and Rules;
- requiring the Rules to be clear, concise and effective and providing a mechanism to ensure that occurs (see section 6.2(f) of this Report); and
- clearly identifying the purpose and intended operation of the Rules[714] with the goal of ensuring all those applying the Rule (regulator, regulated firm, court/tribunal) agree on what the Rule means.[715]

However, any set of Rules can become unduly complex and prescriptive and the benefit of having a principles-based regime supplemented and complemented by Rules can easily be lost. It is therefore important that there is practical oversight of the way the regulator exercises its rule-making power. By practical oversight, we mean something other than the role performed by Parliament which can be viewed as political or policy-based oversight. There needs to be a body tasked with supervising the manner in which the rule-making power is exercised and holding it to account against the above requirements. We propose that this role could be performed by the FRAA (see section 6.2(f) of this Report).

Design principle 5 – Purpose and consultation

Rules should only be made to further the objectives of the financial services regime and the principles and only after appropriate consultation.

The rule-making power of the Conduct Regulator should be underpinned by the objects of facilitating compliance with, and furthering the objects of, the principles outlined in the legislation. The purpose of giving the Conduct Regulator a rule making power is to ensure that the objects of the FSA and the conduct principles are applied and implemented.

This is will ensure there are clear links to the objects and principles that a Conduct Regulator must set out to achieve if it is to make Rules. This is an important control given the breadth of the rule making power we have proposed and reflects the primacy of the conduct principles determined by Parliament in the FSA.

Giving the Conduct Regulator a rule-making power also has the potential to increase participation in the legislative process for groups particularly affected by a set of Rules. To ensure this occurs, there should be clear requirements for appropriate consultation. The Conduct Regulator should be required to consider the practical operation of the Rules before proposing them and consult with appropriate consumer representatives and industry participants for this purpose. The consultation process should be subject to a mandated process and timeline for consultation (see Recommendation 5 in this Report).

---

[713] ALRC Interim Report A, p 422 - 423.
[714] Office of the Queensland Parliamentary Counsel, *Principles of good legislation: OQPC guide to FLPs*, 2013, p 8.
[715] Black J, Hopper M and Band C, 'Making a Success of Principles-Based Regulation' (2007) 1(3) *Law and Financial Markets Review* 191, p 195.

(e) Design principles 6 & 7 – Regulators

Design principle 6 – Conduct Regulator

ASIC's financial services regulatory functions should be separated from its corporate regulatory functions so that there is a regulator specifically tasked to oversee financial services conduct (i.e. the Conduct Regulator).

ASIC has a very broad role. It is *'Australia's integrated corporate, markets, financial services and consumer credit regulator.'*[716] It oversees company formation, regulation and dissolution, including the insolvency regime for companies. In that role it regulates auditors and financial statements. It also regulates and has oversight of financial markets and securities. Finally, it also plays a key consumer protection role as the conduct regulator of the financial services and consumer credit sectors in Australia. This role involves licensing industry participants and enforcing consumer protection rules.

The Senate Standing Committee on Economics in its 2014 report of the performance of ASIC considered the range of tasks performed by ASIC and concluded that *'ASIC is overburdened and charged with tasks that do not assist its other regulatory roles.'*[717]

In particular, the Committee noted the breadth of responsibilities entrusted to ASIC, which has since only increased with the wave of reforms following the Financial Services Royal Commission, and raised concerns that this has constrained ASIC's ability to effectively fulfil its regulatory functions and meet the expectations of the public and stakeholders.[718]

ASIC's regulatory functions are significantly greater than its international counterparts. The FRAA comments that ASIC's remit *'is now one of the broadest of comparable regulators globally'.*[719] By way of comparison:

- The Financial Conduct Authority in the UK is responsible for regulating financial services and markets.;
- The US Securities and Exchange Commission is responsible for securities and markets regulation, while the US Consumer Financial Protection Bureau is responsible for enforcing Federal consumer financial laws and protecting consumers in the financial marketplace.
- The Financial Consumer Agency of Canada is responsible for ensuring that federally regulated financial entities comply with consumer protection measures.[720]
- The Financial Markets Authority in New Zealand is responsible for regulating capital markets and financial services.

While there are some differences in who is tasked with regulating financial markets, none of the regulators in key global markets have economic-wide responsibility for regulation of companies.

ASIC is tasked with a significant number of functions and responsibilities, all of which involve complex legislation and issues. Furthermore, there are concerns about ASIC's ability to perform its functions effectively:

> *Evidence before the committee strongly indicates that ASIC is unfocused and over-stretched with an evident weakness in consumer/investor protection. ASIC has always had a significant role in the Australian corporate world, however, over many years successive governments have entrusted ASIC with additional important functions. ASIC is now firmly established as one of Australia's key financial regulators. However, one outcome of this is that it is increasingly difficult to identify, articulate and prioritise what ASIC's key regulatory functions and priorities should be. ASIC would have a clearer mandate if it was relieved of some of its functions.*[721]

There is therefore a case for divesting some of ASIC's regulatory functions, particularly in relation to financial services so that the financial services conduct regulator has as its sole focus the conduct of financial service providers.

---

[716] ASIC, *Our Role*: https://asic.gov.au/about-asic/what-we-do/our-role/ (accessed on 12 May 2022).
[717] Senate Standing Committee on Economics, *Performance of the Australian Securities and Investments Commission*, 2014, p xxii.
[718] As above, [25.52].
[719] FRAA, *Effectiveness and Capability Review of the Australian Securities and Investments Commission*, July 2022, p 3.
[720] Senate Standing Committee on Economics, *Performance of the Australian Securities and Investments Commission*, 2014, [25.14] – [25.17].
[721] As above, [25.53].

John Braithwaite as part of his research for Australian National University's Regulatory Institutions Network, observed that specialist regulators are better equipped to negotiate meaningful corporate integrity agreements for regulatory compliance. He stated the reasons for this as having *'superior knowledge of their domain of regulation, because of their networking with compliance professionals and civil society, as well as, with advocacy groups'.*[722] According to Braithwaite, from a responsive regulatory perspective, best practice in design will always involve specialist regulators.[723]

A critical element for the success of the regulatory model proposed in this Report is for the Conduct Regulator to have the capacity and expertise to be across enough detail of specific issues within the financial services sector and each sub-sector, such as the general insurance industry, to provide clear and effective guidance on the principles-based requirements of the FSA and to undertake effective consultation to develop appropriate Rules where required.

We therefore propose that a specialist regulator for financial services conduct regulation should be established. Creating this 'Australian Financial Services Authority' (referred to in this Report as the Conduct Regulator) would be consistent with our proposal for principles-based legislation with a specialist regulator empowered to make Rules after appropriate consultation.

A separate question arises whether the rule maker should also enforce the rules they make. This could be considered to infringe the separation of powers. It is however quite commonly done, at least in the financial sector. APRA and AUSTRAC are examples of regulators which exercise both rule making and enforcement powers. This also appears to be the case for the Financial Conduct Authority in the UK.

While splitting the rule making and enforcement roles may seem attractive, we are concerned that it would diminish each regulator and particularly the rule making regulator. It would make them smaller with fewer resources and therefore potentially a lower level of expertise. It would also mean that the rule maker would not have direct experience of the issues arising in the industry. We therefore believe it is appropriate to combine the roles in one regulator. As set out in design principle 5, it is important to make it clear in the FSA that the rule making power must be exercised to further the objects of the FSA and only after appropriate consultation.

We expect that the objectives of the Conduct Regulator would be based on the current objectives of ASIC Act and Chapter 7 of the Corporations Act. We therefore propose the following objectives for the Conduct Regulator:

- maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy;
- promote the confident and informed decision making by consumers of financial products and services;
- promote and facilitate efficiency, flexibility and innovation in the provision of financial products and services and respond quickly to market developments;
- promote fairness, honesty and professionalism by those who provide financial services;
- promote the competitiveness and sustainable growth of the Australian financial services sector;
- administer the laws that confer functions and powers on it effectively and with minimum procedural requirements; and
- take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

[722] Braithwaite J, *Types of responsiveness*, 2017, p 125.
[723] As above, p 125.

Design principle 7 – Twin peaks model

The twin peaks model remains appropriate as one regulator cannot effectively regulate both prudential and conduct matters. An essential element of the twin peaks model is both an appropriate allocation of responsibilities between the regulators and effective consultation and cooperation where responsibilities overlap.

As discussed above, one of the issues facing regulatory authorities and rendering them ineffective is an overburden of regulatory responsibility.[724] Consistent with that conclusion, we do not believe it would be appropriate to combine the role of oversight of the financial sector into one regulator.

Professor Dimity Kingsford-Smith and Dr Hannah Harris note that one of the reasons why Wallis supported a twin peaks approach to regulation is that it addresses different regulatory standards and approaches and assists policy and enforcement. This empowers ASIC to make better informed decisions and avoids regulatory fragmentation and duplication.[725]

Further the shift under Wallis from the institutional to the functional regulatory approach, was largely to promote competitiveness and efficiency and to reduce regulatory arbitrage between like products. The 'siloing' of institutions and inability of regulators to share information or take joint enforcement action and develop shared policies were all animating reasons for the shift to the current regulatory model.

As has been recognised recently in South Africa, the twin peaks model of financial sector regulation *'entails a shift away from the traditional prescriptive approach to financial sector legislation and regulation – which has typically led to a tick-box approach to compliance – toward an outcomes-focused approach supported by principles-based legislation, regulation and supervision'.*[726]

Nevertheless, appropriate allocation of responsibilities and enhanced cooperation and collaboration between the Conduct Regulator and APRA is essential for effective and efficient regulation of the financial services sector.

(f) Design principle 8 – Review and oversight

The Conduct Regulator and the Rules it makes should be subject to proper review and oversight.

The Conduct Regulator's processes, actions and Rules[727] should be subject to the review of another body to ensure the regulator is exercising its powers and functions properly. This external body must have the expertise and capability to review the regulator and the Rules it has developed so that a proper chain of accountability, review and oversight can be established.

The external body should also be able to oversee and assess whether regulators in the financial services industry are coordinating and collaborating effectively with each other. In order to ensure this, the external body must have expertise and a good understanding of financial services, and the regulation of financial services. The external body must also have an adequate mandate and remit to execute its reviews and action its recommendations and findings.

As Professor Helen Xanthaki, of the University College London, has stated:

> *... the life of citizens tends to be more directly affected by delegated legislation than it is by general framework type laws passed by the Houses of Parliament. Moreover, it is delegated legislation that is applied by most authorities in their interaction with citizens, thus rendering the possibility and danger of corruption all the more pronounced.*[728]

---

[724] Senate Standing Committee on Economics, *The performance of the Australian Securities and Investments Commission*, 2014, p xxii.
[725] The Centre for Law, Markets and Regulation, *Submission in response to the Interim Report of The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, 26 October 2018, p 33-34, 36.
[726] National Treasury of the Republic of South Africa, *Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill,* 2019, p 41.
[727] Although this section is focused on oversight of the Conduct Regulator's rule making powers, we expect that the FRAA would also have oversight over any regulations proposed by the Conduct Regulator as described in section 6.2(c). References to Rules in this section should therefore be understood to also refer to regulations proposed by the Conduct Regulator.
[728] Xanthaki H, *Drafting Legislation: Art and Technology of Rules for Regulation*, 2014, p 261.

Professor Xanthaki's observation reinforces the need for proper checks, balances and scrutiny of regulatory bodies. A principles-based approach to regulation supplemented by Rules would give greater power of the rule-making body which in turn would increase the need for accountability mechanisms.

Role for the FRAA

The FRAA is an independent statutory body established following the Financial Services Royal Commission and tasked with assessing and reporting on the effectiveness and capability of ASIC and APRA.[729] The FRAA's statutory mandate requires it to assess and report on the effectiveness and capability of ASIC and APRA on a biennial basis, with reports to be delivered to the Minister and subsequently tabled in Parliament.[730]

In accordance with s 18 of the *Financial Regulator Assessment Authority Act 2021* (Cth), *'the Authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions'*. As part of this authority the FRAA is able to require APRA and ASIC to:

- give the FRAA any information that is requested by the FRAA; and
- produce any document in APRA's or ASIC's possession that is requested by the FRAA; and
- answering any questions asked by the FRAA.[731]

Given its existing scope and responsibility, it seems appropriate to extend the FRAA's role to oversee the Conduct Regulator and the Rules it makes and the process by which those Rules are made. The FRAA's role should specifically extend to how other regulators with responsibility for the financial sector – e.g. the Conduct Regulator, APRA, the ACCC, the OAIC and the Reserve Bank of Australia – are coordinating with each other in their oversight of industry participants and in the requirements they are imposing.

The ALRC's approach

The ALRC also explores the limits of a rule-making power. It states that consideration to oversight and accountability must be given with a rule-making power. The ALRC considers that the rule-making power should be subject to ministerial consent in a similar manner to four out of ASIC's current five rule-making powers.[732] It further notes conditions such as s 12 of the ASIC Act could be invoked to allow the Minister to give directions to the specialist regulator on specific matters including to make or vary a Rule.[733]

With respect, we do not support the ALRC's proposals in relation to Ministerial consent. This would significantly compromise the independence and effectiveness of the ability of the Conduct Regulator to make Rules. Policy-based and political oversight can be achieved through the ability of either House of Parliament to disallow statutory instruments. There is no need to impose an additional layer of political or executive restriction or accountability on the exercise of the rule-making power.

We believe that it would be better to empower an independent oversight body such as the FRAA to perform the role of ongoing review of financial services regulators as is currently the case.

Form of oversight

The FRAA should be empowered to review the roles performed by financial services regulators. This would include rule-making, guidance and enforcement activities. We would expect the FRAA to undertake both periodic reviews of regulators as well as specific reviews of significant activity undertaken by a regulator, such as significant rules made during the period and post-implementation reviews of rules.

The FRAA should also be empowered to review and reconsider rules made by the Conduct Regulator both at its own initiative and on request by a stakeholder such as a consumer group or affected industry participant. This should extend to consideration of:

- whether rules are consistent with and best achieve the relevant regulatory objectives;
- whether the Conduct Regulator has engaged in appropriate consultation in relation to the Rule, including whether it has met the requirements we have recommended in Recommendation 5 (and the FRAA could potentially replace the role of the court in that recommendation); and
- the appropriateness of the transition periods and measures for the Rule.

---

[729] FRAA, *About FRAA*: https://fraa.gov.au/ (accessed on 12 May 2022).
[730] *Financial Regulator Assessment Authority Act 2021* (Cth), s 12 -13.
[731] As above, s 20.
[732] ALRC Interim Report A, [10.94].
[733] As above. No direction has been given to ASIC under s 12 of the ASIC Act in at least the past 20 years.

The FRAA should have explicit authority to require a regulator to reconsider any rule made or to issue new rules in place of those made by the regulator. It should also have an injunctive power to pause the application of a Rule until it determines whether to replace the Rule, send it back to the Conduct Regulator for reconsideration or retain the Rule without change.

Extending the FRAA's role in the manner contemplated will require a review of its resourcing. The FRAA is currently made up of three part-time members appointed by the Minister, supported by a Secretariat of Treasury staff.[734] It is likely to require additional resources to perform the role we are proposing.

(g) Design principle 9 – Self-regulation

Industry bodies should continue to identify opportunities to improve industry practice and develop effective means of self-regulation.

We also believe that there continues to be an important role for self-regulation as it can and should deliver better outcomes for all stakeholders and foster trust and confidence in the industry when it is designed and implemented effectively. This sentiment is reflected in the Explanatory Memorandum to the Hayne Response Bill when it states that '*Where an industry has the capacity, cohesion and commitment to develop an effective code, consumers can receive greater benefits than might otherwise have been achieved*'.[735]

Self-regulation can offer a number of advantages over traditional command and control regulation, including:

- greater flexibility and adaptability than Government regulations that tend to be more time consuming and entail significant procedural hurdles;
- quicker responses to regulatory gaps;
- higher technical expertise to develop rules and guidance;
- lower costs compared to Government regulation that can be passed on to consumers;
- higher compliance levels and greater commitment to the objectives, values and ethics of the self-regulation instrument as there is industry involvement and buy-in;[736] and
- reduced information asymmetry in the market, particularly when independent third party organisations are responsible for evaluating compliance with standards, as it tends to increase transparency of the monitoring and enforcement activities of the regulatory process, which in turn boosts consumer confidence.[737]

It has been noted that following the Financial Services Royal Commission there is greater impetus for the financial services industry to design and improve on Codes in order to regain trust, deliver better protections to consumers beyond the law and have regard to what is right.[738]

The 2014 Financial System Inquiry observed that self-regulation is often more successful when it sets governance, customer service or technical standards that supplement the law.[739] This should be considered when developing self-regulation in order to optimise its outcomes for the industry and consumers.

Also, self-regulation can deliver superior regulatory outcomes when it is embedded in the industry and within companies themselves.

As APRA's Chairman Wayne Byres stated at the *Crossroads: The 2019 Banking and Finance Oath Conference*:

> *If self-regulation is failing, we need to revive it, not write it off. Good self-regulation – in the broadest sense of the term, capturing self-discipline and restraint – is essential to providing the*

---

[734] FRAA, *FRAA*: https://fraa.gov.au/#:~:text=The%20FRAA%20is%20composed%20of,Crosbie%2C%20and%20Mr%20Craig%20Drummond (accessed on 12 May 2022).
[735] Explanatory Memorandum to Hayne Response Bill, [1.4].
[736] The Organisation for Economic Cooperation and Development, *Industry Self Regulation: Role and Use in Supporting Consumer Interests*, 1 March 2015, p 18-19.
[737] Castro D, *Benefits and Limitations of Industry Self-Regulation for Online Behavioral Advertising*, 2011, p 5.
[738] Byres W, Speech: *Is self-regulation dead?*, 8 August 2019.
[739] The Treasury, *Financial System Inquiry Final Report*, November 2014, p 194.

> *community with a well-regulated, efficient and value-adding financial services sector. It is not optional.*[740]

Self-regulation is an important mechanism for governing industry practices and has many benefits over government regulation for consumers, producers, the government, and the economy as a whole. While regulation is often promoted as a mechanism to reduce risk, overregulation also poses risk. Unnecessary or inefficient regulation raises production costs for businesses without any corresponding benefits, costs that are ultimately borne by consumers. Government regulation by its nature addresses identified harms, and as such can inadvertently create barriers to innovation or competitive entry when it regulates in a manner that only addresses current market participants and practices. Self-regulation on the other hand can be more efficient for business and when business is more efficient, costs are reduced and saving are passed on to consumers. Rule-making, monitoring, enforcement and remediation processes can also be faster using self-regulation rather than government regulation, given that less consultation is required and specialist knowledge is already present within industry bodies conducting self-regulation processes. This in turn means that consumers are protected sooner.[741]

Self-regulation can also help reduce information asymmetry in the market, particularly when independent third party organisations are responsible for evaluating compliance with standards, as is tends to increase transparency of the monitoring and enforcement activities of the regulatory process, which in turn boosts consumer confidence.[742]

Self-regulation can therefore continue to perform a useful role. It can potentially be more responsive and quicker to act than a statutory regulator. It can be used to design rules and requirements that are specific to and address issues faced by the industry. When done well, self-regulation can be more effective by imposing higher standards than an ‘even-handed’ regulator may feel is appropriate. While it can lead the way for the regulator to follow, where an industry imposes high standards and enforces them effectively, it can also supplant the need for the Conduct Regulator to itself make Rules for the sector. It is nevertheless important for the Conduct Regulator to have the capacity to make Rules where industry fails to regulate itself appropriately.

6.3 The ALRC's proposed legislative model

The ALRC proposes a 'principled legislative hierarchy' in ALRC Interim Report B to simplify the Corporations Act. The ALRC states that this model is intended to '*better manage legislative complexity, maintain regulatory flexibility, and address unforeseen circumstances or unintended consequences of regulatory arrangements*'.[743]

Under the ALRC's proposed model, the legislative hierarchy 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; and*
- *thematically consolidated rules, which for convenience may be labelled ‘rulebooks’, containing prescriptive detail (also currently spread across the legislative hierarchy).*[744]

In order to implement this, the ALRC proposes to confer scoping and rule-making powers on the Minister and ASIC.

Importantly, the ALRC is tasked with undertaking its inquiry within existing policy settings. Therefore, the ALRC states that the proposed model accommodates the following key characteristics that 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;*

---

[740] Byres W, *Is self-regulation dead?*, 8 August 2019.
[741] Castro D, *Benefits and Limitations of Industry Self-Regulation for Online Behavioral Advertising*, 2011, p 4.
[742] As above, p 4.
[743] ALRC Interim Report B, [2.1].
[744] As above, [2.4].

- *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.*[745]

Structurally, the ALRC's proposed legislative model is similar to the design principles we have developed.

(a) Primary legislation

The ALRC proposes that the primary legislation in Chapter 7 of the Corporations Act address critical matters contained in Chapter 7 of the Corporations Act and the various pieces of delegated legislation made under it. The ALRC suggests the following matters be included:

- key obligations and prohibitions, as well as the consequences of non-compliance – such as the obligation to hold an AFSL (s 911A), the best interests obligation (s 961B), DDO (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;
- 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;
- powers to prescribe detail that supports the operation of the Corporations Act and its key obligations (including, the power to make rules under 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'.[746]

This proposal is very similar to our conception of principles-based legislation, with the main difference being that we recommend moving the financial services regime into a separate act, the FSA.

(b) Scoping Order

The ALRC's proposed Scoping Order will adjust the regulatory perimeter by outlining exclusions and class exemptions and all detail necessary for determining the scope of the Act. To implement this, the ALRC intends to enact a scoping power in the Act. Thereafter, the range of existing exclusions and class exemptions will be consolidated and rationalised for inclusion in the primary legislation where they are 'structural' in nature, with the remaining matters to be located in the Scoping Order.[747]

The ALRC intends for the Scoping Order to be a navigable and coherent way of consolidating the relevant detail in one instrument.[748]

The ALRC proposes that any legislative instrument amending the Scoping Order is accompanied by a statement explaining how it is consistent with the relevant objects in Chapter 7 of the Corporations Act.[749] Further, it is proposed that the contents of the Scoping Order are subject to a 10-year sunsetting period to ensure fitness-for-purpose.[750]

The main difference between the ALRC's proposal and our design principle 3 is that we envisage the main parameters being included in the Act with regulations having the ability to change the boundaries of the regime. As regulations and the ALRC's scoping order are both forms of delegated legislation, these proposals are essentially the same and we understand the motivation for wanting to include all boundary-setting concepts in one place.

---

745 As above, [2.5].
746 As above, [2.15].
747 As above, [2.23].
748 As above, [2.19].
749 As above, p 16.
750 As above, [2.29].

We do believe that it is appropriate for the Government to take the lead in setting the boundaries for the regime which is why we have proposed they be set by regulation. However, we acknowledge that relying on the executive to set boundary requirements has risks (such as resources, focus and politicisation) and have therefore proposed that the Conduct Regulator would also have the power to propose regulations. This adds to the similarities between our design principles and the ALRC's proposal.

(c) Rules and rulebooks

The ALRC proposes rules to accommodate much of the prescriptive detail required to tailor the regulatory regime to different products, services, industry sectors and circumstances. It also proposes consolidating these rules in thematic rulebooks to facilitate tailoring in a more coherent and navigable way.[751]

Given the importance of these rules, the ALRC proposes limiting the rule-making power by:

- only allowing this power to be exercised in relation to matters required or permitted by the Act;
- not allowing this power to be used to create serious criminal offences and significant civil penalties;
- requiring rules to be accompanied by an explanation as to how they further the objects of Chapter 7 of the Corporations Act;
- prescribing consultation as part of the rule-making process; and
- subjecting the rules to a 10-year sunsetting period.[752]

We strongly support this aspect of the ALRC's proposals for the reasons set out in design principle 4, subject to the following observations:

- We envisage that breach of the Rules would be a serious criminal offence where intentional or reckless and give rise to significant civil penalties – although we expect that the penalty regime would be specified in the FSA.
- While we understand the motivation for sunsetting the Rules, we are concerned that this may in fact make the Rules more complex by making it difficult to set them out in a single coherent form given we expect that they will be regularly reviewed and amended by the Conduct Regulator. Given the oversight role of the FRAA contemplated by design principle 8, it may be more appropriate for the FRAA to be tasked with the responsibility of conducting periodic reviews to ensure Rules remain current and appropriate.
- The ALRC asks whether rulebooks should 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.[753] Given we propose that the principles included in the FSA should be enforceable by both the Conduct Regulator and clients, we believe it would be appropriate for the Conduct Regulator to be able to provide a safe harbour for compliance with a principle in particular circumstances where appropriate after appropriate consultation.

(d) Law-making roles of the Minister and ASIC

The ALRC proposes that the Minister and ASIC are granted scoping and rule-making powers. A protocol between the Minister and ASIC is also proposed in order to coordinate their concurrent law-making functions.[754]

Our design principle 4 contemplates that the Rules would be made by the Conduct Regulator. The ALRC has proposed that the Minister would have concurrent authority to make rules.[755] The primary rationale for the ALRC's approach appears to be that *'the Minister and ASIC each possess different, but overlapping and complementary, access to information and expertise.'*[756] While this may be true, we

---

[751] As above, [2.43].
[752] As above, [2.45].
[753] As above, question B16.
[754] As above, p 16.
[755] As above, proposal B8.
[756] As above, [2.62]. See also [2.58] and [2.60].

expect that the Conduct Regulator would have access to any relevant information or expertise held by the Minister or Treasury when making Rules.

The mandated consultation we have proposed would certainly give the Minister and Treasury the opportunity to make their views known to the Conduct Regulator when making Rules. The Rules will also be subject to disallowance which not only ensures Parliamentary but also Government oversight.

We are concerned that giving two separate bodies authority to make Rules increases the risks of complexity, lack of coherence and uncertainty notwithstanding any protocol that may be agreed between the Minister and the Conduct Regulator or ASIC as proposed by the ALRC.[757] We are also concerned that having two equal rule-makers will effectively ensure that neither is ultimately responsible for making rules and there would be a significant risk of 'buck passing' between them, particular for more sensitive or controversial issues. The consequence of giving the Minister a co-rule-making power essentially means that the Conduct Regulator is subject to the political oversight of the Government which we believe would compromise its independence and effectiveness.

(e) Prescribed consultation

Given the significance of the proposed scoping and rule-making powers, the ALRC proposes safeguarding the exercise of these powers by building an enhanced consultation regime. Specifically, the ALRC proposes establishing a Rules Advisory Committee which must be consulted by the Minister or ASIC, in addition to the public, before new scoping orders or rules are made.

The ALRC suggests that this Rules Advisory Committee may comprise representatives from industry groups, consumer groups and legal experts such as practitioners and academics. The intention is for the Committee to possess sufficient technical expertise to effectively assist the Minister and ASIC in their delegated law-making functions. [758]

As set out in design principle 5 and Recommendation 5, we strongly support measures to improve consultation. Our focus has been on the measures required to make consultation more effective rather than focusing on how to consult with stakeholders. The ALRC's proposed Rules Advisory Committee would complement our proposals in this regard.

[757] As above, proposal B8.
[758] As above, [2.87].

Appendices

Appendix 1 – General insurance regulation

(referred to in sections Chapter 3, 4.1, 5.6 and 5.6(b) of this Report)

1. Brief history of insurance regulation

Insurance is fundamentally an exercise in spreading risk.[759] The role of insurers is therefore to facilitate the spread of risk. While the type and extent of insurance varies, it has become an institutionalised mechanism of financial protection. Therefore, the basic principle of all insurance is that the losses of the unfortunate few should be paid from the contributions of the many.[760]

Modern day general insurance is regulated via three forms of regulation:

1. prudential regulation;
2. consumer protection or conduct regulation; and
3. self-regulation.

Prudential regulation is concerned with maintaining the safety and soundness of financial institutions, so that the community can have confidence that they will meet their financial commitments under all reasonable circumstances. For the insurance sector, a key component of this is ensuring '*insurance companies have the financial means to pay all legitimate claims to their policyholders*'.[761] Therefore, prudential regulation has traditionally been focused on financial metrics but recently, focus has also been directed on non-financial issues such as leadership and accountability.[762] Prudential regulation achieves these objectives by requiring insurers to be authorised to carry on business and to comply with governance, capital and risk management requirements.[763] These prudential requirements are set out in the prudential standards determined by APRA under the Insurance Act (described further below).

Consumer protection and conduct regulation on the other hand is primarily concerned with ensuring *'that retail customers have adequate information, are treated fairly and have adequate avenues for redress.'*[764] The need for consumer protection regulation is said to arise from *'the complexity of financial products and the consequent scope for deception, misunderstanding and dispute.'*[765] Therefore, consumer protection regulation sets out:

- *how entities are required to engage and interact with consumers;*
- *how disputes between consumers and entities should be resolved; and*
- *the powers of government-established bodies responsible for oversight and external dispute resolution.*[766]

According to Sutton, the history of insurance regulation in Australia contains a number of key identifiers:

- regulation of general insurance is driven by a combination of financial crises and natural disasters;
- major regulatory developments have been in response to a financial crisis and the regulations have largely been prudential with an emphasis on securing systemic stability;
- consumer protection regulations have not been reactive to financial crises and there is anecdotal evidence to suggest that they have been developed as a result of actual and perceived failures to meet customer expectations;

---

[759] Kirby M, Speech to launch the Allens Arthur Robinson *Annual Review of Insurance and Reinsurance Law* 2004, https://data.allens.com.au/pubs/pdf/ari/2004/speech.pdf.
[760] Enright I, Mann P, Merkin R and Pynt P, *General Insurance: Background Paper 14*, Financial Services Royal Commission, 2018, p 7 citing the English Court of Appeal in *Callery v Gray* [2001] EWCA Civ 1117; Lloyd's Rep IR 743, [67].
[761] APRA, 'What is prudential regulation?', https://www.apra.gov.au/what-prudential-regulation (accessed 20 December 2021).
[762] As above.
[763] LexisNexis, *Financial Services* 16 General Insurance, 'Overview of general insurance industry', p 49 [1.6] (accessed on 23 November 2021).
[764] Hanratty P, 'The Wallis Report on the Australian Financial System: Summary and Critique', Research Paper No 16, Parliamentary Library, Parliament of Australia, 23 June 1997, p 9.
[765] As above, p 6.
[766] Senate Economics References Committee, *Regulatory framework for the protection of consumers in the banking, insurance and financial services sector*, November 2018, p 15, [3.4].

- the greater the crisis or natural disaster, the greater the community and political reaction and '*the more penetrating and intrusive the regulation and surveillance*';
- international influence is becoming more present in Australian regulation;
- the movement from self-regulation to government based and controlled regulation; and
- natural disasters becoming more prominent now than ever.[767]

An important development in the history of insurance regulation in Australia was the enactment of the Insurance Contracts Act which is a '*consumer-oriented*' insurance contract legislation.[768] Prior to the enactment of the Insurance Contracts Act, insurance contracts were governed and regulated by a combination of common law principles and a number of Federal and State statutes.[769] It was a significantly complex and uncertain area of law.

The origin of the Insurance Contracts Act was ALRC Report No 20, *Insurance Contracts* released in 1982. The purpose of that report was *'to improve the operation of the insurance market by ensuring that necessary and adequate information is available to prospective insureds'* and *'to provide a set of rules that are fairer in the context of present day insurance than the rules developed in an earlier and far different time.'*[770]

2. Sources of regulation of the Australian general insurance industry

Insurers and the insurance industry is regulated by Commonwealth, State and Territory legislation, some of which is specific to the insurance industry, some which has more general application across all financial services and some of which is economy wide.

The Corporations Act and the ASIC Act is the primary form of conduct regulation for financial services and products generally, including general insurance. In addition, there are also a range of regulations, legislative instruments, codes, guidelines and standards that contribute to the regulatory framework of the general insurance industry.

2.1 Chapter 7 of the Corporations Act

Chapter 7 of the Corporations Act regulates financial products, services and markets. It was introduced by the Financial Services Reform Act following recommendations made by the Financial System Inquiry (Wallis Inquiry) in 1997 to improve conduct and disclosure in financial services through disclosure requirements, a single licensing regime and a single set of standards.[771] ASIC was given responsibility for administering these conduct and disclosure requirements.

Since the Wallis Inquiry, Chapter 7 has undergone a number of inquiries and reforms, some of those relevant to general insurance are highlighted below:

- the direct offshore foreign insurers (**DOFIs**) reforms which prohibits AFSL holders from dealing in general insurance products offered by DOFIs unless an exemption applies;[772]
- the Financial System Inquiry in 2014 (Murray Inquiry) which recommended improving guidance and disclosure for general insurance and introduced the DDO regime and ASIC's product intervention power; and
- the Financial Services Royal Commission reforms which saw claims handling and settling for insurance products becoming a financial service, updates to the anti-hawking regime and stricter breach reporting obligations.[773]

General insurance products are defined to be financial products under s 764A(1)(d) of the Corporations Act and are therefore regulated by the Corporations Act. This means that general insurers that provide

[767] Thomson Reuters, *Sutton on Insurance Law* (at November 2021), [4.620].
[768] Enright I, Mann P, Merkin R and Pynt P, *General Insurance: Background Paper 14*, Financial Services Royal Commission, 2018, p 62, [1.2].
[769] Kirby M, ' Insurance contract law reform – 30 years on' (2014) 26 *Insurance Law Journal* 1, p 3.
[770] ALRC Report No 20, *Insurance Contracts* (1982), p xxi.
[771] LexisNexis, *Financial Services* (last updated August 2021), 'Chapter 1 Introduction to financial services regulation', [1.0020].
[772] *Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Act 2007* (Cth).
[773] Hayne Response Act.

financial services to retail clients must hold an AFSL and provide the services in accordance with the obligations outlined in Chapter 7, including the conduct and disclosure obligations.

The Corporations Act sets out a number of important consumer protection provisions in relation to general insurance products, including:

- requiring people who provide financial services to hold an AFSL;[774]
- imposing general obligations on licensees;[775]
- requiring licensees to report certain breaches of law to ASIC;[776]
- empowering ASIC to ban or disqualify a person from providing financial services;[777]
- requiring retail clients to be provided with disclosure documents about financial services and financial products;[778]
- requiring providers of personal advice to act in the best interests of the client;[779]
- prohibiting hawking of financial products to retail clients;[780]
- requiring issuers and distributors of financial products to comply with DDO for retail client financial products[781] and empowering ASIC to make product intervention orders;[782] and
- establishing an external dispute resolution scheme for retail clients.[783]

2.2 ASIC Act

As with Chapter 7 of the Corporations Act, the ASIC Act was enacted following recommendations made by the Wallis Inquiry to establish a single market and disclosure regulator for the financial sector which became ASIC.

Importantly, the ASIC Act includes consumer protection provisions in relation to financial services, including prohibitions on misleading, deceptive and unconscionable conduct, which were previously within the ACCC's jurisdiction.[784]

The ASIC Act includes a number of important consumer protection measures which apply to general insurance products, including:

- the UCT regime which applies to consumer and small business insurance contracts;[785]
- prohibiting misleading, deceptive and unconscionable conduct in connection with financial services;[786]
- setting out additional consumer protection measures in connection with financial services, including prohibitions on false or misleading representations, bait advertising and referral selling;[787]
- imposing a deferred sales model for the sale of add-on insurance products;[788]
- implying warranties in every contract for the supply of financial services that the services will be rendered with due care and skill and materials supplied in connection with those services will be reasonably fit for purpose;[789] and
- empowering ASIC with a range of investigation, information-gathering and enforcement powers.

2.3 Insurance Act

The Insurance Act regulates insurers carrying on the business of insurance and outlines the criteria for seeking to carry on the business of insurance. The main object of the Insurance Act is to protect policyowners under insurance policies, issued by general insurers in ways that are consistent with the continued development of a viable, competitive and innovative insurance industry.[790] The Act ensures all

---

[774] Corporations Act, s 911A,.
[775] Corporations Act, s 912A,.
[776] Corporations Act, Subdiv B, Div 3, Pt 7.6,.
[777] Corporations Act, s 920A,.
[778] Corporations Act, Pt 7.7 and 7.9.
[779] Corporations Act, s 961B.
[780] Corporations Act, s 992A.
[781] Corporations Act, Pt 7.8A.
[782] Corporations Act, Pt 7.9A.
[783] Corporations Act, Pt 7.10A.
[784] LexisNexis, *Financial Services* (last updated August 2021), 'Chapter 1 Introduction to financial services regulation', [1.0020].
[785] ASIC Act, s 12BF.
[786] ASIC Act, Subdiv C, Div 2, Pt 2.
[787] ASIC Act, Subdiv D, Div 2, Pt 2.
[788] ASIC Act Subdiv DA, Div 2, Pt 2.
[789] ASIC Act, s 12ED.
[790] Insurance Act, s 2A(1).

general insurers operating in Australia have the appropriate financial resources to pay claims as and when they arise.[791] Furthermore, the Act establishes the prudential regime for regulating insurers, requiring them to be authorised and giving APRA the ability to make prudential standards which insurers are required to comply with.

The Act achieves these objectives by:

- restricting who can carry on insurance business by requiring insurers and their directors and senior management to meet certain suitability requirements;
- imposing primary responsibility for protecting the interests of policyowners on the directors and senior management of general insurers;
- imposing requirements to promote prudent management of insurance business on insurers;
- providing for the prudential supervision of general insurers by APRA;
- providing for judicial management of general insurers;
- providing APRA authority to pay valid claims on policies issued by insurers under judicial management and believed to be insolvent.[792]

2.4 Insurance Contracts Act

The Insurance Contracts Act was enacted to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, the insured and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts operate fairly.[793]

Prior to the enactment of the Insurance Contracts Act, insurance contracts were governed and regulated by a combination of common law principles and a number of Federal and State statutes. Scrutiny of the adequacy and appropriateness of these principles and statutes was minimal and lacked coherence prior to the ALRC's review of insurance contracts in 1976.

The overarching purpose of the Insurance Contracts Act is to 'improve the flow of information from the insurer to the insured so that the insured can make an informed choice as to the contract of insurance he or she enters into and is fully aware of the terms and limitations of the policy; and to provide a uniform and fair set of rules to govern the relationship between the insurer and insured.'[794]

Among other things, the Insurance Contracts Act:

- codifies the duty of utmost good faith and makes it a civil penalty obligation;[795]
- regulates remedies available to insurers, including for pre-contractual non-disclosure and misrepresentations by policyowners;[796]
- requires insurers to provide a Key Facts Sheet for certain insurance products;[797]
- establishes a standard cover regime for certain types of insurance;[798]
- imposes requirements relating to flood cover;[799]
- regulates certain types of insurance and terms in insurance contracts;[800]
- regulates expiration, renewal and cancellation of insurance contracts.[801]

2.5 Privacy law

There are a number of Federal laws including the Privacy Act, Spam Act, the Do Not Call Register Act and the Telecommunications Act as well as State and Territory health records privacy laws.[802]

---

[791] Enright I, Mann P, Merkin R and Pynt P, *General Insurance: Background Paper 14*, Financial Services Royal Commission, 2018, p 52, [2.3].
[792] Insurance Act, s 2A(2).
[793] Insurance Contracts Act, Long Title.
[794] Senator Gareth Evans, Attorney-General, Senate Hansard, 1 December 1983, p 3136.
[795] Insurance Contracts Act, Pt II.
[796] Insurance Contracts Act, Pt IV, Div 1A-3, Pt 5, Div 3 and Pt VI.
[797] Insurance Contracts Act, Pt IV, Div 4.
[798] Insurance Contracts Act, Pt V, Div 1.
[799] Insurance Contracts Act, Pt V, Div 1A.
[800] Insurance Contracts Act, Pt V, Div 2 and Pt VIII.
[801] Insurance Contracts Act, Pt VII.
[802] For example, *Health Records and Information Privacy Act 2002* (NSW).

Under the Privacy Act, general insurers are required to comply with the 13 Australian Privacy Principles, which set minimum standards for collection, storage, use, security and disposal of personal information. These core principles protect not only customer information, but employee information, third party information and the information of insurance intermediaries. In addition, under amendments made in 2014, the Privacy Act gives the Privacy Commissioner significant enforcement powers. The Commissioner has powers to investigate an alleged interference with privacy not only following a complaint, but also on its own initiative. The Commissioner can make a determination, to accept an enforceable undertaking and to bring proceedings to enforce such an undertaking and apply to the court for civil penalty orders. The Commissioner also has the authority under the Act to audit private sector organisations to determine whether they are handling personal information in accordance with the applicable legislation.[803]

The Spam Act is another statue regulating the use of personal information for general insurers. It is focused on *'prohibiting the sending of commercial electronic messages via email, SMS, multimedia message service or instant messaging without the consent of the receiver'.*[804] The Spam Act establishes an opt-in regime that differs from the provisions governing the use of information for direct marketing in the Privacy Act.[805] The Spam Act is significant for general insurance in light of anti-hawking regime restrictions on contacting clients that have failed to renew their insurance policy after 30 days.[806]

In a similar vein, the Do Not Call Register Act enables the holder of an account for an Australian telephone number to elect not to receive unsolicited telemarketing calls.

2.6 Collection of Data Act

Under the Collection of Data Act, all APRA reporting entities, including general insurers, are required to submit detailed financial data to APRA during reporting periods and in some instances upon request.[807] The Act was created to *'modernise and increase the relevance of data collections, thereby ensuring that APRA collects the data it requires for the purposes of its prudential functions… harmonise and increase the flexibility of the data-collections and publishing regimes, and [facilitate] a central repository for the collection of financial data.'*[808] Ultimately this was a way to streamline and simplify the previous methods of data collection performed by the RBA.[809]

Since its creation APRA's role has been to protect the interests of depositors, insurance policy holders and superannuation fund members.[810] It has and continues to do this through a number of risk management, compliance and enforcement processes of which analysing, researching and utilising key data to determine issues and trends is fundamental. The data collected is more frequent, and in some respects more detailed, than general purpose reporting, such as accounting standard and continuous disclosure.[811]

The Collection of Data Act affects the general insurance industry by and large through the mandated reporting requirements of APRA under the Act including carrying out effective data and information storage processes.

2.7 General Insurance Code

The General Insurance Code of Practice (**GICOP**) is a self-regulatory code that binds all general insurers who are signatories to it. By adopting the GICOP, an insurer enters into a contract with the Insurance Council of Australia and is subject to contractual remedies and sanctions for any breach.

The objectives of the GICOP are to:

---

[803] Privacy Act 1998, Part IV, Div 2.
[804] ALRC, *For Your Information: Australian Privacy Law and Practice (ALRC Report 108): Spam Act* 2010, [73.161].
[805] As above, citing Spam Act, s 16.
[806] *ASIC Regulatory Guide 38: The hawking prohibition,* September 2021, [RG 38.25]; see Corporations Regulations, reg 7.8.21A(j).
[807] APRA, *Reporting requirements for general insurance 2021*: https://www.apra.gov.au/reporting-requirements-for-general-insurance.
[808] Revised Explanatory Memorandum to *Financial Sector (Collection Of Data) Bill 2001* (Cth), [1.3].
[809] As above.
[810] As above, [3.1]
[811] As above, [3.2]

- commit insurers to high standards of service;
- promote better, more informed relations between insurers and policyowners;
- maintain and promote trust and confidence in the insurance industry;
- provide fair and effective mechanisms for the resolution of complaints and disputes; and
- promote continuous improvement of the general insurance industry through education and training.[812]

It does this by:

- setting conduct and education and training standards for employees and distributors;[813]
- setting conduct standards for service suppliers;[814]
- setting standards for dealing with concerns about employees, distributors and service suppliers;[815]
- imposing certain requirements when selling or cancelling insurance and in relation to claims;[816]
- requiring insurers to have appropriate measures in place to deal with vulnerable customers or those experiencing financial hardship;[817]
- setting standards for access to information by customers;[818] and
- establishing measures for enforcement, sanctions and oversight.[819]

It is also proposed that GICOP be approved by ASIC and that certain provisions of the Code become enforceable code provisions. Consultation has commenced on the enforceability of certain provisions but it is only in its early stages and a completion date is not yet known.

A breach of an enforceable code provision will constitute a breach of law and may attract civil penalties and/or other administrative enforcement from ASIC.[820] Commissioner Hayne recommended this reform, pointing in particular to the uncertainty about which provisions of industry codes could be relied upon, and enforced by, individuals. This uncertainty was found to be *'highly undesirable'* as participants in the industry must know what rules govern their dealings.[821]

2.8 Insurance Brokers Code of Practice (NIBA Code)

The most recent version of the NIBA Code was launched on 1 March 2022[822] following a review and consultation process, in which an earlier version of the Code was criticised for not sufficiently raising standards.[823] The new Code will take effect from 1 November 2022 and the 2014 NIBA Code will be in effect until 31 October 2022.

The NIBA Code is an initiative of the National Insurance Brokers Association (**NIBA**), which represents firms and individual insurance brokers, and sets out standards of conduct for subscribers when:

- arranging or advising on general insurance products or alternative risk transfer solutions on behalf of a client;
- interacting and dealing with prospective clients and other parties with whom the subscriber interacts in performing services for their clients.

The new NIBA Code sets the following standards for subscribers:

- engagement – including informing prospective clients about the subscriber's role and setting out the terms of engagement in writing;
- performance of services – including communicating with clients in a timely manner using clear and concise language and in plain English, behaving in accordance with the principles and acting on behalf of clients and in their best interests;

---

[812] GICOP, [1].
[813] GICOP, [23]-[29].
[814] GICOP, [35]-[40].
[815] GICOP, [30-]-[34] & [41] & Pt 11.
[816] GICOP, Pt 6-8 & 15.
[817] GICOP, Pt 9-10.
[818] GICOP, Pt 12.
[819] GICOP, Pt 13.
[820] Explanatory Memorandum to Hayne Response Act, [1.1].
[821] Final FSRC Report, vol 1, p 311.
[822] National Insurance Brokers Association, *Insurance Brokers Code of Practice*, March 2022.
[823] InsuranceNEWS.com.au, *NIBA releases revised draft code after 'strong criticism'*, 10 November 2021: https://www.insurancenews.com.au/daily/niba-releases-revised-draft-code-after-strong-criticism (accessed on 3 March 2022).

- disclosure of earnings – including disclosing remuneration to retail clients, not receiving contingent remuneration when not acting on behalf of an insurer or in relation to a binder arrangement, outlining non-monetary remuneration that may be received in certain situations and reviewing remuneration arrangements periodically to ensure they are not creating conflicts of interest;
- claims and renewals of insurance cover – including keeping clients informed about claims, advising and seeking instructions from clients in relation to settlements and contacting clients at least fourteen days prior to the client's insurance cover expiry date to review the client's needs and any changes;
- employees, agents and representatives – including ensuring these people comply with the Code and promote compliance with the Code;
- when things go wrong – including publishing information about making complaints; handling complaints by a person with appropriate authority, knowledge and experience; responding promptly to complaints and updating and resolving complaints in accordance with the Code timeframes;
- support clients experiencing vulnerability – including identifying vulnerable clients, encouraging communication about this and supporting and providing assistance to these clients; and
- enforcement of the Code – including reporting breaches of the Code and taking reasonable steps to cooperate with the IBCC in its review of compliance and investigations of any breaches of the Code.

3. Regulators and other relevant bodies

3.1 Federal regulators

The primary regulators of general insurance industry in Australia are APRA and ASIC. The industry is also subject to regulation by other Federal regulators, including the ACCC and the OAIC.

As identified by the Financial Services Royal Commission, oversight of regulators currently takes the following forms:

- Parliamentary oversight through relevant parliamentary committees, for example the Parliamentary Joint Committee on Corporations and Financial Services in the case of ASIC and typically the Senate Standing Committee on Economics Legislation and the House of Representatives Standing Committee on Economics in the case of APRA.[824]
- Annual reporting to the Minister responsible for the regulator, for example the Treasurer in the case of ASIC and APRA, for presentation to Parliament.[825] Annual reports are also tabled in Parliament.
- Direction by the Minister. The Minister can direct ASIC and APRA about policies they should pursue, or priorities they should follow, in performing or exercising any of their functions or powers.[826] In the case of ASIC, this is limited to the Corporations Act and the ASIC Act and does not extend to the consumer protection provisions of the ASIC Act.
- The Minister issues Statements of Expectations to regulators which respond with a statement of intent.
- ASIC and APRA report annually against the Government's Regulator Performance Framework and provide certified statements of their performance in accordance with the *Public Governance, Performance and Accountability Act 2013* (Cth). They are also subject to the best practice regulation process administered by the Office of Best Practice Regulation.
- ASIC and APRA also engage with the Treasurer's Financial Sector Advisory Council.
- Finally, the Australian National Audit Office also the annual financial accounts of Federal regulators and undertakes ad hoc reviews of their performance.[827]

[824] APRA, *Annual Report 20/21*, 17 September 2021, p 80.
[825] *Public Governance, Performance and Accountability Act 2013* (Cth), s 46.
[826] ASIC Act, s 12; APRA Act, s 12.
[827] Final FSRC Report, vol 1, [8.1.4].

In addition, the Government has implemented the Financial Services Royal Commission's recommendation to establish a new oversight authority for APRA and ASIC and to subject them to regular reviews at least[828] by enacting the *Financial Regulator Assessment Authority Act 2021* (Cth).

(a) APRA

APRA is responsible for prudential regulation of insurance companies, banks and superannuation funds and trustees.

APRA's main functions in relation to general insurance is to:

- authorise companies to carry on a general insurance business in Australia;
- importantly, to set prudential standards which authorised insurance companies and non-operating holding companies (NOHCs) are required to comply with;[829] and
- monitor insurers to ensure compliance with the Insurance Act, in particular prudential standards.

APRA has powers to investigate general insurers where:

- a general insurer is, or is likely to become, unable to meet its liabilities;
- a general insurer has not complied with requirements of the Insurance Act or the Collection of Data Act;
- there is a risk to the security of a general insurer's assets; or
- there is a sudden deterioration in a general insurer's financial condition.[830]

APRA can also apply to the Federal Court for an order that a general insurer be placed under judicial management.[831]

In performing and exercising its functions and powers, APRA is required *'to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality and, in balancing these objectives, is to promote financial system stability in Australia.'*[832]

(b) ASIC

ASIC has a number of roles. It regulates formation and ongoing operation of Australian companies, including fundraising activities, takeovers financial reporting and insolvency. It also regulates registered managed investment schemes, licensed trustee companies, registered foreign companies and other bodies. A key role for ASIC is its regulation of financial markets. Finally, and most relevant to general insurance, it regulates financial services and products. In this last role, it is the primary conduct and consumer protection regulator for the financial sector.

Relevantly to general insurance, ASIC is responsible for:

- administration of the Insurance Contracts Act;[833]
- monitoring and promoting market integrity and consumer protection;[834] and
- regulating licensing and conduct requirements of insurers, insurance intermediaries and others in relation to the provision of financial services.[835]

In performing its functions and exercising its powers, ASIC must strive to:

- *maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and*

[828] Final FSRC Report, recommendations 6.13 and 6.14.
[829] Insurance Act, s 32.
[830] Insurance Act, s 52(1).
[831] Insurance Act, s 62K.
[832] APRA Act, s 8(2).
[833] Insurance Contracts Act, s 11A.
[834] ASIC Act, s12A(2).
[835] Corporations Act, Ch 7.

- *promote the confident and informed participation of investors and consumers in the financial system; and*
- *administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and*
- *receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and*
- *ensure that information is available as soon as practicable for access by the public; and*
- *take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it*.[836]

(c) ACCC

The ACCC is Australia's primary competition and consumer protection regulator. It administers the Competition and Consumer Act, including the ACL.[837]

However, as the ACL does not apply to financial services,[838] the ACCC's role in relation to general insurance is limited to competition, except to the extent that insurers and insurance intermediaries are engaged in non-financial services activities.

In a 2018 speech, ACCC Chairman Rod Sims said:

> *'As the economy-wide competition regulator, the ACCC has always had responsibility for tackling anti-competitive conduct in the financial services sector. Our late 2016 actions against ANZ and Macquarie Bank illustrate this… In the 2017/18 Budget, the government gave us additional resources to set up a dedicated Financial Services Unit (**FSU**). In addition to examining anticompetitive conduct, the FSU proactively identifies competition issues in the sector and conducts market studies*.''[839]

ACCC and ASIC nevertheless cooperate on consumer protection activities as they affect both financial and non-financial activities and ASIC is and does from time to time delegate enforcement activities in connection with the financial sector to the ACCC.[840] This is also underpinned by a MOU between the two regulators covering liaison, cooperation, assistance, joint enquiries and the exchange of confidential information.[841]

Furthermore, given its role as lead consumer protection regulator in Australia, guidance provided and enforcement activities undertaken by the ACCC are often very relevant to the financial sector.[842]

For example, in 2020, ACCC completed its inquiry of the affordability and availability of home, contents and strata insurance in northern Australia and found that premiums are on average considerably higher in northern Australia than the rest of Australia and made a number of recommendations to improve competition and consumer outcomes in this area.[843] This has led to the creation of a reinsurance pool for cyclone and related flood damage in northern Australia to improve the affordability of residential, strata

---

836 ASIC Act, s 1(2).
837 ACCC, *ACCC's role in regulated infrastructure,* https://www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/acccs-role-in-regulated-infrastructure (accessed on 20 December 2021).
838 *Competition and Consumer Act*, s 131A.
839 Sims R, Chair, ACCC, '2018 compliance & enforcement priorities', CEDA Conference Speech, 20 February 2018, https://www.accc.gov.au/speech/2018-compliance-enforcement-priorities.
840 ACCC, *Letter to the Royal Commission Re: Information Request dated 15 December 2017*, 15 January 2018, p 7. Section 26 of the Competition and Consumer Act and s 102 of the ASIC Act allow the ACCC and ASIC to delegate certain functions and powers to one another. From time to time, the ACCC obtains delegations from ASIC in respect of investigations involving issues where there is or may be an overlap between ASIC's and the ACCC's jurisdictions. Such delegations were deemed necessary in relation to the matters concerning the provision of extended warranty plans to consumers which may, in certain circumstances, constitute a 'financial service' for the purposes of the ASIC Act.
841 MOU between ASIC and ACCC, signed 15 December 2004.
842 Regarding enforcement activities undertaken by the ACCC in relation to the financial sector, the ACCC has:

- successfully brought civil penalty proceedings against Australia and New Zealand Banking Group, Macquarie Bank Limited and Visa Worldwide Pte Ltd in respect of anti-competitive conduct in contravention of the Competition and Consumer Act;
- issued a determination denying authorisation to four banks (Commonwealth Bank of Australia, Westpac Banking Corporation, National Australia Bank, and Bendigo and Adelaide Bank) to collectively bargain with Apple and collectively boycott Apple Pay; and
- considered a number of mergers in the financial services sector, including Commonwealth Bank of Australia's acquisition of BankWest (2009) and Aussie Home Loans (partial acquisition in 2008 and remaining interest in 2013), and Westpac Banking Corporation's acquisition of St George (2008).

843 ACCC, *Northern Australia Insurance Inquiry* (Final Report, November 2020).

and small business property insurance.[844] The reinsurance pool will be backed by a $10 billion annually reinstated Commonwealth guarantee and be administered by the Australian Reinsurance Pool Corporation from 1 July 2022.[845]

More recently, from 1 January 2022, the ACCC is required to monitor prices, costs and profits relating to the supply of insurance cover in respect of the destruction of, or damage to, a home building, contents of a residential building, a strata title residence, and certain commercial premises and contents of those commercial premises, before and after the introduction of a cyclone and related flood damage reinsurance pool.[846]

Like ASIC and APRA, the ACCC also releases guidance regarding its expectations of industry in relation to consumer protection. While consumer protection in financial services is outside the ACCC's purview (as this lies with ASIC), ACCC guidance is still useful in understanding the application of these protections. For example, general insurers may refer to the following guidance when developing these processes:

- Advertising Claims Guide
- Advertising & Selling Guide
- Consumer Guarantees and Refunds
- Social Media Claims Guide
- Sales and Telemarketing Guide.

The ACCC is also a co-regulator of the Consumer Data Right (**CDR**) with OAIC (see section 5.6(a) of this Report).

(d) OAIC

The OAIC is an independent national regulator for privacy and freedom of information. The key role of the OAIC is to promote and uphold privacy and information access rights. The OAIC does this by:

- ensuring that Australian Government agencies and Australian Privacy Principles (APP) entities comply with the Privacy Act and other laws when handling personal information;
- protecting the public's right of access to documents under the FOI Act;
- carrying out strategic information management functions within the Australian Government under the OAIC Act.[847]

The OAIC carries out these functions through its regulatory activities, including:

- conducting investigations into privacy breaches;
- handling complaints of privacy breaches;
- reviewing decisions made under the FOI Act;
- monitoring agency administration; and
- advising the public, organisations and agencies regarding privacy obligations and requirements.[848]

Given their conduct focus, it is worth noting the different enforcement powers of ASIC and the OAIC. This is set out in the table below.

Table 13

Enforcement Powers	ASIC	OAIC
Cooperation with regulator	✓	✓
Notice requiring information	✓	✓[849]

[844] *Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Bill 2022* received Royal Assent on 30 March 2022.
[845] Assistant Treasurer, Minister for Housing, Minister for Homelessness, Social and Community Housing, *Media release: Morrison Government passes legislation to deliver reinsurance pool,* 30 March 2022: https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/media-releases/morrison-government-passes-legislation-deliver (accessed on 1 April 2022).
[846] *Competition and Consumer (Price Monitoring – General Insurance Policies) Direction 2022*.
[847] OAIC, 'What we do', https://www.oaic.gov.au/about-us/what-we-do (accessed on 27 November 2022).
[848] As above.
[849] Where it relates to interference with the privacy of an individual or individuals or a complaint: Privacy Act, s 44.

Enforcement Powers	ASIC	OAIC
Investigate or deal with complaint	✗	✓
Examination by regulator	✓	✓[850]
Inspection of books	✓	✓[851]
Search warrant	✓	✓
Comply with directions	✓	✓
Impose licence conditions	✓	✗
Enforceable undertaking	✓	✓[852]
Reprimand	✓	✗
Public warning and communication	✓	✓
Banning orders	✓	✗
Suspend or cancel licence	✓	✗
Substantiation notice	✓	✗
Corporate management disqualification	✓	✗
Infringement notices	✓	✓[853]
Civil penalties	✓	~[854]
Strict liability offences	✓	~[855]
Full criminal offences	✓	~[856]
Representative action	✓	✓

While the enforcement powers of ASIC and the OAIC are broadly similar, ASIC has additional powers because it oversees licensing in its regulated sector (i.e. the AFSL regime) unlike the OAIC.

(e) ACMA

The Australian Communications and Media Authority (**ACMA**) is responsible for a broad range of functions which are spread across multiple pieces of legislation including the *Telecommunications Act 1997*, *Broadcasting Services Act 1992* and *Australian Communications and Media Authority Act 2005*.[857] In relation to the general insurance industry, ACMA monitors and investigates advertisement and information published across multiple platforms including TV and online to identify '*misinformation that may cause financial harm to individuals through scams or by influencing personal financial decisions*.'[858] ACMA has the authority to conduct investigations to inform itself of any matter relevant to its

[850] Where it relates to interference with the privacy of an individual or individuals or a complaint: Privacy Act, s 44–45.
[851] Where it relates to interference with the privacy of an individual or individuals or a complaint: Privacy Act, s 44.
[852] Privacy Act, s 33E, 33F.
[853] Privacy Act, s 98.
[854] Only for credit reporting related obligations and interference with the privacy of an individual or individuals: Privacy Act, s 13G and Pt IIIA.
[855] Only for certain credit reporting related obligations: Privacy Act, Pt IIIA.
[856] Only for certain credit reporting related obligations: Privacy Act, Pt IIIA.
[857] Department of Infrastructure, Transport, Regional Development and Communications, *ACMA legislated functions* 2021.
[858] ACMA, *Misinformation and news quality on digital platforms in Australia A position paper to guide code development* 2020, p11.

broadcasting, content and datacasting functions,[859] in addition to whether an internet service provider has contravened an applicable code or has contravened an applicable online provider rule.[860]

(f) AFCA

AFCA was established in 2018 as a result of the Ramsey Report which concluded that the external dispute resolution framework for the financial sector at the time was not resulting in the best possible outcomes for some participants, particularly consumers.[861] The report recommended the formation of a single external dispute resolution body for all financial disputes to replace the Financial Ombudsman Service, Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

While AFCA is not a government department or agency, nor a regulator of the financial services industry, its role as the dispute resolution scheme for financial services makes it a de facto regulator of the sector.

AFCA's role is to assist consumers and small businesses to reach agreements with financial firms and resolve complaints. AFCA is a completely impartial third party mediator and does not act for either party. AFCA does have powers to decide on an appropriate outcome if one is not reached and agreed to by both parties to the dispute.

As such, AFCA has the authority to make binding decisions on financial firms, including insurers, and award compensation for losses because of error or misconduct. AFCA does not however have the authority to award compensation or impose fines as a matter of punishment.

AFCA provides rules, guidelines and information aimed at ensuring insurers, consumers and government are aware of what complaints AFCA is able to consider; the procedures it can use to resolve those complaints; remedies it can provide and related matters, such as, its reporting obligations, as well as how AFCA interprets and applies its rules when considering complaints involving financial firms.

Of particular importance to its quasi-regulator role is AFCA's investigation and reporting of systemic issues within financial firms (including insurers). In accordance with rule A.17 of *AFCA Complaint Resolution Scheme Rules 2021*, AFCA has the authority to investigate systemic issues within financial firms, in doing so, *'can require the Financial Firm to provide any information and documents AFCA considers necessary to investigate the issue.'* If AFCA does identify a systemic issue, it will refer the matter to the firm for remedial action, obtain a report of and continue to monitor said remedial action.

In addition, AFCA can require a firm to do or refrain from doing any act which AFCA considers reasonably necessary to achieve any one or more of the following objectives:

- facilitating AFCA's investigation of the systemic issue;
- improving industry practice and communication;
- remedying loss or disadvantage suffered by consumers or small businesses (whether or not they have complained about the systemic issue);
- preventing foreseeable loss or disadvantage to consumers or small businesses;
- minimising the risk of the systemic issue recurring; or
- efficiently dealing with multiple complaints related to the systemic issue.

(g) Council of Financial Regulators

The Council of Financial Regulators (**CFR**) is the coordinating body for Australia's main financial regulatory agencies. The CFR consists of four members, APRA, ASIC, the Reserve Bank of Australia (**RBA**) and the Treasury with the Governor of the RBA acting as the chair. As a non-statutory body, the CFR has no legislative basis and no formal regulatory or policy decision making powers. The body rather aims to facilitate cooperation and co-ordination among member agencies.

The objectives of the CFR are outlined in a charter and focus on promoting stability of the Australian financial system and supporting effective and efficient regulation by Australia's financial regulatory agencies. The CFR focuses on a number of aspects of the market in order to achieve these goals, including:

---

[859] *Broadcasting Services Act 1992*, s 168.
[860] *Broadcasting Services Act 1992*, schedule 5.
[861] [Author], *Final Report: Review of the financial system external dispute resolution and complaints framework,* April 2017, p.8.

- *identifying important issues and trends in the financial system, with a focus on those that may impinge upon overall financial stability;*
- *exchanging information and views on financial regulation and assisting with coordination where members' responsibilities overlap;*
- *harmonising regulatory and reporting requirements, paying close attention to regulatory costs;*
- *ensuring appropriate coordination among the agencies in planning for and responding to instances of financial instability; and*
- *coordinating engagement with the work of international institutions, forums and regulators as it relates to financial system stability.*

Cooperation and coordination amongst the CFR is supported by multiple MOUs and bilateral coordination arrangements between member agencies. The MOUs focus on matters such as:

- information sharing;
- prompt notification of any regulatory decisions likely to impact other agencies' responsibilities; and
- consultation arrangements in the event of financial disturbances.

3.2 State Regulators

While Commonwealth regulators are the primary regulators of the general insurance industry, there are also State and Territory regulatory authorities which regulate certain types of insurance. Some States have regulators who regulate multiple insurance products, such as SIRA in NSW, and some have separate regulators for individual insurance products, such as Worksafe and the Motor Accident Insurance Commission in Queensland.

State and Territory based regulators, such as SIRA, NSW Department of Fair Trading and the NSW Small Business Commissioner in NSW, administer regulatory authority through various State and Territory based Acts such as the *Home Building Act 1989* (NSW) and the *Fair Trading Act 1987* (NSW). While SIRA regulates specific types of insurance in NSW, the NSW Department of Fair Trading is responsible for protecting consumer rights and investigating alleged breaches of the consumer rights legislation, including issues involving consumer contracts, licensing and dispute resolution. The NSW Department of Fair Trading seeks to educate and engage with both consumers and traders on issues that affect their rights and obligations with a focus on minimising any direct financial or material harm or detriment to a consumer from a business that fails to comply with the law.[862]

An important area of regulation relating to insurance conducted by the NSW Department of Fair Trading and its counterparts in other States and Territories is trade promotions. When insurance companies promote their products through promotions they must comply with the rules of the trade promotion and all applicable requirements under the relevant State or Territory legislation, such as the *Community Gaming Act 1988* (NSW). In NSW, this includes applying for a valid NSW authority if the promotion has a total prize value exceeding $10,000 and is open to NSW residents, even if the operator is based outside of NSW.[863] It is important to note that trade promotions requirements do vary significantly from state to state. In the Northern Territory and SA, a permit will be required if the promotion has a total prize value exceeding $5,000;[864] in the ACT, the permit requirements are further reduced to a total prize value of $3,000;[865] while in Western Australia,[866] Queensland, Victoria or Tasmania,[867] permits are not required.

Similarly, in NSW the NSW Small Business Commissioner is an independent state based statutory officer that has the authority to:

- investigate allegations of unfair treatment or unfair contracts;

---

[862] NSW Department of Fair Trading, *Our compliance role,* https://www.fairtrading.nsw.gov.au/about-fair-trading/our-compliance-role.
[863] NSW Department of Fair Trading, *Trade promotions*, https://www.fairtrading.nsw.gov.au/community-gaming/trade-promotion-lottery.
[864] SA Government, *Trade promotions for businesses*, https://www.sa.gov.au/topics/business-and-trade/running-a-business/trade-promotions
[865] ACT Government, *Trade Promotion Lottery Information and Conditions*, p 1.
[866] *Gaming and Wagering Commission Act 1987* (WA), s 102
[867] Tasmanian Government Department of Treasury and Finance, *Trade Promotions*: https://www.treasury.tas.gov.au/liquor-and-gaming/gambling/applying-for-a-gaming-licence-or-permit/minor-gaming-permit/trade-promotions.

- compel local Councils, NSW Government bodies and other businesses to provide information or answer questions when a complaint is made;
- require parties to attend mediation before starting more expensive and time consuming court battles, whether those parties are businesses (small and large) or government departments; and
- report directly to Parliament where there is an issue of major importance to small businesses.[868]

This regulatory authority in relation to general insurers extends largely to assistance in the claims process for small business and disputes that may subsequently arise as a result.[869]

These State regulators, much like Federal regulators, provide guidelines, such as the Motor Accident Guidelines and Workers Compensation Guidelines, which they use to offer information and illustrate obligations of insurers in relation to such things as, competitive pricing requirements of policies; claims management and claims resolution requirements; and capital management requirements.[870]

3.3 Other relevant bodies

(a) Insurance Council of Australia

The Insurance Council of Australia is the industry body for the general insurance industry in Australia and established the General Insurance Code. Its role is to encourage improved service standards across the insurance sector and promote appropriate self-regulation. It does this largely through providing information outside the sector, such as regularly conducting research and making submissions to the Commonwealth Government on the industry.[871] The Insurance Council also periodically commissions reviews of the General Insurance Code and its operations.

Furthermore, the Insurance Council of Australia also has the power to declare an event as a 'catastrophe' and require insurers to respond in accordance with GICOP requirements for catastrophes.

(b) General Insurance Code Governance Committee

The General Insurance Code Governance Committee monitors and enforces compliance with the GICOP by general insurers. The Governance Committee ensures compliance with the GICOP by:

- requiring insurers to self-report to the Committee on breaches and significant breaches of the GICOP;
- investigating reports from consumers and others that an insurer has breached the GICOP; and
- conducting detailed monitoring activities and investigating compliance in specific areas of emerging risk.

The Governance Committee also provides guidance notes to insurers regarding requirements of the GICOP, for example guidance regarding significant breach obligations of insurers in relation to the GICOP.[872]

The Governance Committee then works with insurers to remedy any breaches of the GICOP and has enforcement authority to impose sanctions on any general insurers signatory to the code for a breach of its rules and obligations.

Finally, the Governance Committee works closely with the Insurance Council of Australia to advise on any changes required to the GICOP, as well as with government, regulators, consumers and the general public to ensure all relevant information is published and shared with them.

---

868 NSW Small Business Commissioner, *Our legal powers*, https://www.smallbusiness.nsw.gov.au/what-we-do/advocacy/our-legal-powers.
869 Small Business Commissioner, *Insurance claims for small business* 2019, p 2-3.
870 SIRA, Insurer Compliance, https://www.sira.nsw.gov.au/fraud-and-regulation/insurer-compliance.
871 Insurance Council of Australia, 'Consultation Paper 346: Anti- Hawking Legislation - Consultation Paper 346' 2021; 'Financial Accountability Regime – Consequential Amendments and Transitional Provisions' 2021; 'Submissions on the Financial Accountability Regime' July 2021.
872 General Insurance Code Governance Committee, *Guidance Note No.2 – Significant Breach Obligations,* June 2020.

(c) Insurance Brokers Code Compliance Committee

The NIBA Code is independently monitored and enforced by the Insurance Brokers Code Compliance Committee which has the power to impose sanctions on a subscriber for breaching the Code.

Appendix 2 – Consumer protection measures

(referred to in section 5.1(g) of this Report)

Consumer protection measure	ASIC Act	Corporations Act	Australian Consumer Law
Unconscionable conduct	✓ Must not, in connection with the supply or acquisition (or possible supply or acquisition) of financial services engage in conduct that is in all the circumstances unconscionable: s 12CA – 12CC.	✓ Essentially the same but does not apply to the possible provision of a financial service: s 991A.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 20 – 22.
Dishonest conduct	× No equivalent.	✓ Section 1041G provides that a person must not, in the course of carrying on a financial services business, engage in dishonest conduct in relation to a financial product or financial service.	× No equivalent.
Misleading or deceptive conduct	✓ Section 12DA provides that 'a person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive'. However, this does not apply to conduct in relation to certain disclosure documents, including PDSs, FSGs, SOAs and CSFSs.[873] However, it does apply to other disclosure documents such as Key Facts Sheets.[874]	✓ Section 1041H provides that a person must not engage in conduct in relation to a financial product or a financial service, that is misleading or deceive or is likely to mislead or deceive. However, this does not apply to conduct in relation to disclosure documents, including PDSs, FSGs, SOAs and CSFSs.[875] It also does apply to other disclosure documents such as Key Facts Sheets.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services and no exclusion for disclosure documents: s 18.
Misleading disclosure documents	× No equivalent.	✓ A 'defective' disclosure document includes a document that contains a misleading or deceptive statement.[876] This is an offence where the	× No equivalent, but no exclusion from the general prohibition in s 18.

[873] ASIC Act, s 12DA(1A).
[874] Insurance Contracts Act, Div 4, Pt IV; Insurance Contracts Regulations, Div 3, Pt 2 and Sch 5.
[875] Corporations Act, s 1041H(3).
[876] Corporations Act, s 953A and 1022A.

Consumer protection measure	ASIC Act	Corporations Act	Australian Consumer Law
		misleading or deceptive statement is materially adverse[877] and a consumer may recover loss or damage suffered from being provided with a defective document.[878] However, a person who takes reasonable steps to ensure that the disclosure document is not defective is liable under these provisions.[879]	
Future representations	✓ Section 12BB provides that a representation may be misleading if a person makes a representation with respect to any future matter and there is no reasonable grounds for making the representation.	✓ Essentially the same as the ASIC Act: s 769C.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 4.
Nature, characteristics or suitability	✓ Section 12DF provides that a person must not engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services.	× No equivalent.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 18.
False or misleading statements	✓ Section 12DB provides that a person must not in connection with the supply (or possible supply), or in connection with the promotion by any means of the supply or use of financial services, make a false or misleading representation of the services are of a particular standard,	✓ Section 1041E provides that a person must not (whether in this jurisdiction or elsewhere) make a statement or disseminate information which is materially false or is materially misleading where the statement is likely to affect a consumer's behaviour in relation to a financial product.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 29.

877 Corporations Act, s 952A, definition of 'defective' (Corporations Act, s 952D – 952G, 952L, 1021B, 1021D – 1021F, 1021J and 1021L).
878 Corporations Act, s 953B(2) and 1022B(2).
879 Corporations Act, s 952E(3), 952G(8), 953B(6), 1021E(3) and 1022B(7).

Consumer protection measure	ASIC Act	Corporations Act	Australian Consumer Law
	quality, value or grade (amongst others). However, this does not apply to conduct in relation to disclosure documents, including PDSs, FSGs and SOAs.[880]	A person may recover loss or damage suffered for breach of this prohibition.[881] There is no exclusion for PDSs, FSGs, SOAs or Key Facts Sheets.	
Rebates, gifts and prizes	✓ Section 12DE prohibits a person from offering a rebate, gift or prize in connection with a financial product or service if the person intends not to provide it, or not provide it as offered.	× No equivalent.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 32.
Bait advertising	✓ Section 12DE prohibits a person from advertising financial services at a particular price if they are not able to offer it, or ought reasonably to be aware that they cannot offer it at that price.	× No equivalent.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 35.
Referral selling	✓ Section 12DH prohibits a person from inducing a consumer to acquire financial services by representing that the consumer will receive a rebate, commission or other benefit for giving names of prospective customers or assisting the person to supply financial services to other consumers if the receipt of the rebate, commission or other benefit is contingent on an event occurring after that contract is made.	× No equivalent.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 49.
Accepting payment without intending or being able to supply	✓ Section 12DI prohibits a person from accepting payment or other consideration for financial services if they do not intend to supply	× No equivalent.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 36.

[880] ASIC Act, s 12DB(2).
[881] Corporations Act, s 1041I.

Consumer protection measure	ASIC Act	Corporations Act	Australian Consumer Law
	those services or supply materially different services and there are reasonable grounds for believing the person will not be able to supply the services.		
Harassment and coercion	✓ Section 12DJ prohibits a person from using force, harassment or coercion in connection with the supply, possible supply or payment for financial services to a consumer.	× No equivalent.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 50.
Pyramid selling	✓ Section 12DK applies to a trading scheme and prohibits certain inducing conduct.	× No equivalent.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 44 – 46.
Payment for unsolicited financial services or products	✓ Section 12DM prohibits a person from asserting a right to payment for unsolicited financial services or products. The other person is not liable for making payment or for loss or damages.[882]	× No equivalent.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 40.
Consumer guarantees	✓ Section 12ED implies the following warranties in contracts for the supply of financial services to consumers: • the services will be rendered with due care and skill; and • the services and any materials supplied in connection with those services will be reasonably fit for the consumer's purpose (if known).	× No equivalent.	✓ Essentially the same as the ASIC Act but applies to goods and non-financial services: s 55, 60 and 61. However, the ACL provides additional guarantees: • consumers will have title to goods: s 51; • undisturbed possession of goods: s 52; • goods are generally free from any security, charge or encumbrance: s 53; • goods are of an acceptable quality: s 54;

[882] ASIC Act, s 12DMA.

Consumer protection measure	ASIC Act	Corporations Act	Australian Consumer Law
			• goods correspond with their description: s 56 - 57; • the manufacturer of goods will take reasonable action to ensure that facilities for repair and parts are reasonably available for a reasonable period after the goods are supplied: s 58; • the manufacturer or supplier of goods will comply with any express warranty given or made in relation to the goods: s 59; and • services will be provided within a reasonable time if not specified: s 62.

Appendix 3 – General insurance PDS provisions

(referred to in section 5.3(b) of this Report)

The primary PDS provisions which apply to general insurance PDSs are set out below (the strikeout shows the notional amendments made by the regulations shown in square brackets).

1013B Title of Product Disclosure Statement

(1) The title "Product Disclosure Statement" must be used on the cover of, or at or near the front of, a Product Disclosure Statement.

1013C Product Disclosure Statement content requirements

(1) A Product Disclosure Statement:

(a) must include the following statements and information required by this Subdivision:

(i) the statements and information required by section 1013D; and

~~(ii) the information required by section 1013E; and~~ [Reg 7.9.15F]

(iii) the information required by the other provisions of this Subdivision; and

(b) may also:

(i) include other information; or

(ii) refer to other information that is set out in another document.

(3) The information included in the Product Disclosure Statement must be worded and presented in a clear, concise and effective manner.

1013D Product Disclosure Statement content—main requirements

(1) Subject to this section, subsection 1013C(2) and sections 1013F and 1013FA, a Product Disclosure Statement must include the following statements, and such of the following information as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product:

(a) a statement setting out the name and contact details of:

(i) the issuer of the financial product; and

(ii) if the Statement is a sale Statement--the seller; and

(b) information about any significant benefits to which a holder of the product will or may become entitled, the circumstances in which and times at which those benefits will or may be provided, and the way in which those benefits will or may be provided; and

~~(c) information about any significant risks associated with holding the product; and~~ [Reg 7.9.15D(a)]

(d) information about:

~~(i) the cost of the product; and~~ [Reg 7.9.15D(b)]

(ii) any amounts that will or may be payable by a holder of the product in respect of the product after its acquisition, and the times at which those amounts will or may be payable; and

(iii) if the amounts paid in respect of the financial product and the amounts paid in respect of other financial products are paid into a common fund--any amounts that will or may be deducted from the fund by way of fees, expenses or charges; and

~~(e) if the product will or may generate a return to a holder of the product--information about any commission, or other similar payments, that will or may impact on the amount of such a return; and~~ [Reg 7.9.15D(c)]

(f) information about any other significant characteristics or features of the product or of the rights, terms, conditions and obligations attaching to the product; and

(g) information about the dispute resolution system that covers complaints by holders of the product and about how that system may be accessed; and

~~(h) general information about any significant taxation implications of financial products of that kind; and~~ [Reg 7.9.15D(d)]

(i) information about any cooling-off regime that applies in respect of acquisitions of the product (whether the regime is provided for by a law or otherwise); and

~~(j) if the product issuer (in the case of an issue Statement) or the seller (in the case of a sale Statement) makes other information relating to the product available to holders or prospective holders of the product, or to people more generally--a statement of how that information may be accessed; and~~ [Reg 7.9.15D(e)]

(k) any other statements or information required by the regulations; and

~~(l) if the product has an investment component--the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment; and~~ [Reg 7.9.15D(f)]

(m) unless in accordance with the regulations, for information to be disclosed in accordance with paragraphs (b), (d) and (e), any amounts are to be stated in dollars.

(2) For the purposes of paragraph (1)(d), an amount will or may be payable in respect of a financial product by the holder of the financial product if:

(a) the holder will or may have to pay an amount in respect of the product; or

(b) an amount will or may be deducted from:

(i) a payment to be made by the holder; or

(ii) a payment to be made to the holder; or

(iii) an amount held on the holder's behalf under the financial product; or

(c) an account representing the holder's interest in the financial product will or may be debited with an amount.

It includes an amount that the holder will or may have to pay, or that will or may be deducted or debited, as a fee, expense or charge in relation to a particular transaction in relation to the financial product.

(4) The regulations may:

(a) provide that a provision of subsection (1) does not apply in a particular situation; or

(b) provide that particular information is not required by a provision of subsection (1), either in a particular situation or generally; or

(c) provide a more detailed statement of the information that is required by a provision of subsection (1), either in a particular situation or generally.

~~1013E General obligation to include other information that might influence a decision to acquire~~

~~Subject to subsection 1013C(2) and sections 1013F and 1013FA, a Product Disclosure Statement must also contain any other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product.~~ [Reg 7.9.15F]

1013F General limitations on extent to which information is required to be included

(1) Despite anything in section 1013D or 1013E, information, or a statement containing information, is not required to be included in a Product Disclosure Statement if it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find the information in the Statement.

(2) In considering whether it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find particular information in the Statement, the matters that may be taken into account include, but are not limited to:

(a) the nature of the product (including its risk profile); and

(b) the extent to which the product is well understood by the kinds of person who commonly acquire products of that kind as retail clients; and

(c) the kinds of things such persons may reasonably be expected to know; and

(d) if the product is an ED security that is not a continuously quoted security--the effect of the following provisions:

(i) Chapter 2M as it applies to disclosing entities;

(ii) sections 674, 674A, 675 and 675A; and

(e) the way in which the product is promoted, sold or distributed; and

(f) any other matters specified in the regulations.

Regulation 7.9.15 More detailed information in Product Disclosure Statement: unauthorised foreign insurer

(1) For paragraph 1013D(4)(c) of the Act, the more detailed information that must be included in a Product Disclosure Statement that relates to a financial product issued by an unauthorised foreign insurer is:

(a) a statement that the product issuer is:

(i) an unauthorised foreign insurer; and

(ii) not authorised under the Insurance Act 1973 to conduct insurance business in Australia; and

(b) a statement that an insurer of that kind is not subject to the provisions of the Insurance Act 1973, which establishes a system of financial supervision of general insurers in Australia; and

(c) a statement that the person should consider whether to obtain further information, including:

(i) the country in which the product issuer is incorporated, and whether the country has a system of financial supervision of insurers; and

(ii) the paid up capital of the product issuer; and

(iii) which country's laws will determine disputes in relation to the financial product; and

(d) a statement that the insurer of that kind cannot be a declared general insurer for the purpose of Part VC of the Insurance Act 1973, and, if the insurer becomes insolvent, the person will not be covered by the financial claims scheme provided under Part VC of that Act.

(2) In this regulation: unauthorised foreign insurer means:

(a) an insurer that:

(i) does not have an authority under the Insurance Act 1973 to carry on insurance business; and

(ii) is not a person who, because of section 5 of that Act, is not required to have such an authority; and

(iii) carries on insurance business outside Australia and the external Territories to which the Insurance Act 1973 extends; or

(b) if a direction is in force under section 74 of the Insurance Act 1973 — a Lloyd's underwriter.

Regulation 7.9.15E More detailed information in product disclosure statement: general insurance product

For paragraph 1013D(4)(c) of the Act, the more detailed statement of the information, for paragraph 1013D(1)(f), that must be included in a Product Disclosure Statement that relates to a general insurance product is:

(a) the terms and conditions of the policy document (within the meaning of the Insurance Contracts Act 1984) being terms and conditions that are not provided in a Schedule to the policy document; and

(b) information that, if the issuer were seeking to rely on subsection 35 (2) and section 37 of the Insurance Contracts Act 1984, the issuer would have had to provide to the insured before the contract of insurance was entered into.

Appendix 4 – Advice obligations

(referred to in section 5.5(a) of this Report)

Obligation	Source	Description
General law duty of care	General law	Where advice is provided through an agreement, the provider of the advice will owe contractual duties as well as an implied duty of care. The provider can also be liable in negligence. When providing advice on financial products (such as insurance policies), the provider must exercise the standard of care and skill that would be expected of a professional in such a position.[883] This common law duty of care is concurrent with the implied contractual obligation to act with reasonable care and skill. A court will determine the minimum standard of care required by having regard to consumer's attributes, including factors such as their knowledge, dependence and vulnerability.[884] Courts have determined that a provider of advice must at least make the client aware of reasonably foreseeable risks, to which the client would reasonably be likely to attach significance.[885]
Fiduciary duties	General law (equity)	Generally where personal advice is provided, the provider is a fiduciary. As a fiduciary, the 'no-conflicts' and 'no-profits' rules will apply.[886]
Duty to provide financial services efficiently, honestly & fairly	Corporations Act, s 912A(1)(a)	Under s 912A of the Corporations Act, an AFSL holder is required to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'. By implication, this means that an AFSL holder who provides financial product advice, must do so 'efficiently, honestly and fairly'. Section 912A has also been interpreted to require an adviser to make a sound judgment, giving consideration to a client's circumstances or state of affairs, when providing the advice.[887]
Manage conflict of interests	Corporations Act, s 912A(1)(aa)	An AFSL holder is required to 'have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative'.
Licence conditions	Corporations Act, s 912A(1)(b)	An AFSL holder is required to comply with the conditions attached to their AFSL, including the standard licence conditions, the conditions under the Corporations Regulations[888] and any other conditions imposed by ASIC under s 914A. Generally licence conditions include requirements relating to compliance systems, training of representatives, financial resources and retention of records.
Disclosure requirements – FSG	Corporations Act Pt 7.7	A FSG must usually be provided to a retail client where it becomes apparent to an AFSL holder that a financial service will be, or is likely to be, provided to that client and, in any event, they must give an FSG to the client before a financial service is

[883] *Tanevski v Trenwick International Ltd* (2004) 13 ANZ Ins Cas 61-587.
[884] *Goddard Elliot v Fritsch* [2012] VSC 87.
[885] *Goddard Elliot v Fritsch* [2012] VSC 87.
[886] *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, per Finn, Stone and Perram JJ at [174].
[887] *Re Hres and Australian Securities and Investments Commission* (2008) 105 ALD 124.
[888] Corporations Regulations, reg 7.6.04.

Obligation	Source	Description
		provided.[889] While it is generally not required for general advice,[890] it may be required when providing personal advice. There are lengthy and detailed provisions for determining whether and when a FSG must be provided (as well as provisions relating to the content of the FSG). Interpretation of these requirements requires close attention to the Regulations and ASIC instruments.[891]
Disclosure requirements – General advice warning	Corporations Act Pt 7.7	Where general advice is provided to a retail client, s 949A requires that an AFSL holder warn a consumer that: • the advice has been prepared without taking account of the client's objectives, financial situation or needs; and • because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's objectives, financial situation and needs; and • if the advice relates to the acquisition, or possible acquisition, of a particular financial product - the client should consult the PDS or information statement (as appropriate). The warning must be given to the client at the same time as the advice is provided and by the same means as the advice is provided.
Disclosure requirements – Statement of Advice	Corporations Act Pt 7.7	A statement of advice is not required for general insurance products, other than sickness and accident policies and consumer credit insurance.[892]

Best interests duty	Corporations Act Pt 7.7A	Part 7.7A contains obligations for the provider of personal advice, to have regard to the client's best interests.
		Section 961B(1) states that the provider 'must act in the best interests of the client in relation to the advice'. There is a 'safe harbour' available for providers of advice, where they have taken into account a number of considerations. The safe harbour is curtailed for general insurance providers, but nevertheless requires that the insurer must have:
		• identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;
		• identified:
		  ○ the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and
		  ○ the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the client's relevant circumstances); and
		• where it was reasonably apparent that information relating to the client's relevant circumstances was

[889] Corporations Act, Pt 7.7, Div 2, Subdiv A
[890] For example, a FSG does not have to be given if general advice is provided to the public in a manner described in the Corporations Regulations (Corporations Act, s 941C(4) and Corporations Regulations, regs 7.7.02(2), 7.7.02(4)).
[891] See Corporations Act, Pt 7.7, Div 2, Subdiv A and Corporations Regulations, regs 7.7.02 and 7.7.02A.
[892] Corporations Regulations, reg 7.7.10.

Obligation	Source	Description
		incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information.[893] Under s 961G, the provider can only provide the advice, if the advice is considered appropriate to the client, had the provider satisfied its duty under s 961B. The provider must also warn the client if the advice is based on incomplete or inaccurate information.[894]
Misleading and deceptive conduct – ASIC Act	ASIC Act Pt 2, Div 2	Prohibits misleading or deceptive conduct in trade or commerce in relation to financial services. This is explained in more detail in section 5.1(g) above.
Misleading and deceptive conduct – Corporations Act	Corporations Act Pt 7.10	Prohibits misleading or deceptive conduct in relation to financial products and services. This is explained in more detail in section 5.1(g) above.

[893] Corporations Act, s 961B(2).
[894] Corporations Act, s 961H.

Appendix 5 – Key responsible person terms

(referred to in section 5.7(a) of this Report)

Regulator and provision(s)	Term	Definition and key considerations
ASIC Corporations Act, s 9	'Officer'	An officer of a corporation includes (among others): • a director or secretary of the corporation; • a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the body corporate's business, or who has the capacity to significantly affect the body corporate's financial standing; • a person whose instructions or wishes the directors of the body corporate are accustomed to act on (excluding advice given by the person in a professional capacity or as part of their business relationship with the directors or the body corporate).
ASIC Corporations Act, s 9	'Senior manager'	A 'senior manager' is defined in the Corporations Act as a person who: • makes, or participates in making, decisions that affect the whole, or a substantial part, of the applicant's business; or • has the capacity to affect significantly the financial standing of the applicant.
ASIC Corporations Act, s 913BA and 913BB	'Fit and proper person'	ASIC must believe that the following people are 'fit and proper': • any officers of a body corporate applicant (see above for the definition of 'officer'); • any partners or senior managers of a partnership applicant; • any trustees or senior managers of a multiple trustee of a trust applicant; • any controller of the applicant; • if a controller is a body corporate, any officer of the controller; • if a controller is a partnership, any partner or senior managers of the controller.
ASIC ASIC Regulatory Guides 1 and 105	'Responsible manager'	The people who manage the licensee's financial services business and are: • directly responsible for significant day-to-day decisions about the ongoing provision of the licensee's financial services; • together, have appropriate knowledge and skills for all of the licensee's financial services and products; and • individually, meet one of the five options for demonstrating appropriate knowledge and skills at outlined in RG 105.
APRA Prudential Standard CPS 520: Fit and Proper, [22], [23] and Attachment C	'Responsible person'	A 'responsible person' is defined as any person who is: • a director; • a senior manager (see below); • the Appointed Auditor; • the Appointed Actuary; • the Reviewing Actuary; • a responsible auditor; • a person who performs activities for a subsidiary where those activities may materially affect the whole, or a substantial part, of the business of the institution or its financial standing, either directly or indirectly.

Regulator and provision(s)	Term	Definition and key considerations
		APRA also has the power to determine that a person is or is not a responsible person.
APRA Prudential Standard CPS 520: Fit and Proper, [25]	'Senior manager'	A 'senior manager' is defined as a person who: • makes, or participates in making, decisions that affect the whole, or a substantial part, of the business; • has the capacity to affect significantly the institution's financial standing; • may materially affect the whole, or a substantial part, of the business of the institution or its financial standing through their responsibility for: ○ enforcing policies and implementing strategies approved by the Board; ○ the development and implementation of risk management systems; or ○ monitoring the appropriateness, adequacy and effectiveness of risk management systems.
APRA Prudential Standard CPS 511: Remuneration, [48] Prudential Practice Guide CPG 511: Remuneration	'Specified roles'	The Board, or relevant oversight function, must approve the variable remuneration outcomes for persons in specified roles as follows: • individually for senior managers (see CPS 520 above) and executive directors; and • on a cohort basis for 'highly-paid material risk-takers', other material risk-takers and risk and financial control personnel. 'Material risk-taker' – means a person whose activities have a material potential impact on the entity's risk profile, performance and long-term soundness. 'Risk and financial control personnel' – means persons whose primary role is in risk management, compliance, internal audit, financial control or actuarial control.
APRA and ASIC *Financial Accountability Regime Bill 2022* (Cth)	'Accountable person'	An accountable person of an entity in the insurance sector will be a person who has actual or effective senior executive responsibility: • for management or control of the accountable entity; or • for management or control of a significant or substantial part or aspect of the operations of the accountable entity or the accountable entity's relevant group. In practice, an accountable person will typically be a director or senior executive of an entity, such as the Chief Executive Officer or officer reporting directly to the Chief Executive Officer. Lower-level executives are generally not expected to be accountable persons under FAR.[895]

[895] Explanatory Memorandum to *Financial Accountability Regime Bill 2022*, [1.53].

Appendix 6 – Fit and proper requirements

(referred to in section 5.7(b) of this Report)

Overarching requirement	CPS 520/510 and GPS 520 – Fit and Proper Person/Responsible Person	RG 105 – Responsible Manager	FAR – Accountable Person
Competency requirement	Under its Fit and Proper Person Policy, an insurer must consider the person's character, competence and experience relative to the duties involved, including whether the person: • possesses the necessary skills, knowledge, expertise, diligence and soundness of judgement to undertake and fulfil the particular duties and responsibilities of the role in question; and • has demonstrated the appropriate competence and integrity in fulfilling occupational, managerial or professional responsibilities previously and/or in the conduct of his or her current duties. [896]	Responsible managers of an AFS licensee must: • have appropriate knowledge and skills for all of the licensee's financial services and products; and • meet one of the five options for demonstrating appropriate knowledge and skills.[897] For example, under Option 1 a responsible manager must meet widely adopted and relevant industry standard or relevant standard set by APRA and have 3 years' relevant experience in the last 5 years. In comparison, under s 913BB of the Corporations Act, ASIC does not specifically have regard to the knowledge and skills of an 'officer' generally.[898]	An accountable person is required to act with 'due skill' and in a manner that prevents adverse impact to the entity's prudential standing. This includes the requirement of accountable persons to prevent breaches of certain financial sector laws 'relevant to their area of responsibility'.[899] To meet this requirement, accountable persons must possess a certain level of specific knowledge of financial sector laws.[900]
Character requirement	A responsible person must possess the character, diligence, honesty, integrity and judgement to perform properly the duties of the responsible person position.[901]	A responsible manager must be 'fit and proper'.[903] ASIC has regard to a number of matters when applying the fit and proper	An accountable person is required to act with honesty and integrity, and with due skill, care and diligence. The person must also act in a manner that prevents actual or likely adverse

---

[896] Paragraph 12, GPS 520 provides the example of a director who is generally expected to understand the role and responsibilities of a director and have a general knowledge of the institution, its business and its regulatory environment. However, each director is not generally expected to have all the competencies that the Board collectively needs if other directors have those competencies or they are obtained from external consultants or experts.
[897] RG 105.5.
[898] In saying that, the 'knowledge and skills' may be a matter ASIC considers relevant to have regard to under the Corporations Act, s 913BB(1)(k).
[899] *Financial Accountability Regime Bill 2022* (**FAR Bill**), s 21(1)(d) and Explanatory Memorandum to FAR Bill (**FAR Bill EM**), [1.63].
[900] While the FAR Bill EM explains that this new obligation will only be triggered by material and significant breaches so that an accountable person does not face unduly serious consequences for involvement in occasional minor or technical contraventions (FAR Bill EM, [1.61]), in our view the requirement for accountable persons to possess a certain level of financial sector laws will apply. The FAR Bill provides an example in s 21(1)(d) where a senior executive is responsible for the management of an ADI's financial resources – this responsible person must take reasonable steps to ensure that the management of those resources complies with the requirements of laws, instruments, directions and orders referred to in s 21(1)(d)(i) to (x) that apply in relation to financial resource management.
[901] CPS 520, [30(a)].
[903] As assessed under the Corporations Act, s 913BA and 913BB. The *Financial Sector Reform (Hayne Royal Commission Response - Stronger Regulators (2019 Measures)) Act 2020* (Cth) replaced the 'good fame or character' test with a 'fit and proper' person test for 'officers' of an AFS licensee.

Overarching requirement	CPS 520/510 and GPS 520 – Fit and Proper Person/Responsible Person	RG 105 – Responsible Manager	FAR – Accountable Person
	An insurer must consider certain relevant matters of responsible persons in its Fit and Proper Person policy, including: • compliance with legal obligations, regulatory requirements or professional standards; • breaches of fiduciary obligations; • reprimand, disqualification or removal by a professional or regulatory body; • failure to manage personal debts or financial affairs which cause loss to others; • involvement with a failed business or company; • bad repute in any business or financial community or any market; • civil or criminal proceedings or enforcement action in relation to the management of an entity; • conduct and events that have taken place overseas.[902]	person test, including a previous: • conviction; • suspension or cancellation of licence; • banning order; • disqualification; • link to a refusal or failure to give effect to a determination made by AFCA; • insolvency or bankruptcy.[904] The test applies to both officers and responsible managers.	impact to their accountable entity's prudential standing, where standing is considered within the entity's industry as well as among the general public.[905]
Key general requirements to demonstrate competency and character	An insurer must maintain a Fit and Proper Policy that requires annual fit and proper assessments (or as close to annual as is practicable) for each responsible person position (paragraph 43).[906] The fitness and propriety of a responsible person must generally be assessed prior to initial appointment and	As part of the AFSL application, an AFS licensee must provide evidence of the responsible manager's competency including qualification certificates and business references for the responsible manager. AFS licensees have an ongoing obligation to formally notify ASIC when it	Generally, an accountable entity must ensure each of its accountable persons and those of its significant related entities are registered with APRA/ASIC before the person starts occupying a role as an accountable person.[914] However, unlike the CPS 520 and RG 105, the FAR provides flexibility for:

902 GPG 520, [13(b)].
904 Corporations Act, s 913BA and 913BB.
905 FAR Bill, s 21(1)(a) and (c) and FAR Bill EM, [1.58].
906 CPS 520, [43].
914 FAR Bill, s 23(1)(b) and 24.

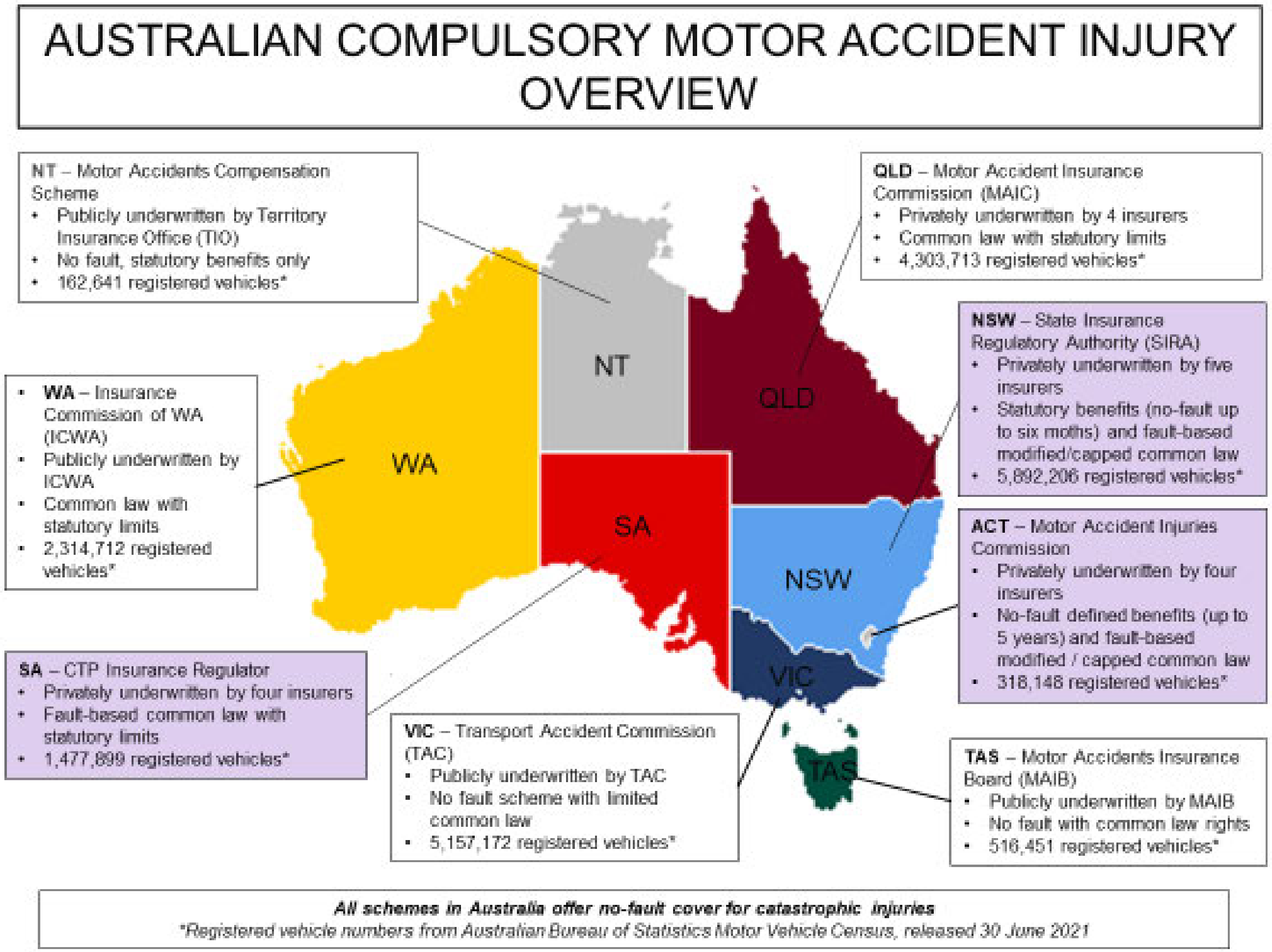
Overarching requirement	CPS 520/510 and GPS 520 – Fit and Proper Person/Responsible Person	RG 105 – Responsible Manager	FAR – Accountable Person
	then re-assessed annually.[907] When documenting the competencies required for each responsible person position, an insurer might consider documenting any training or induction processes required for each position, on appointment to the position and on an ongoing basis.[908] An insurer must ensure that certain information is provided to APRA regarding responsible persons and the APRA-regulated institution's and Head of a group's assessment of their fitness and propriety.[909]	changes any of its responsible managers.[910] If the responsible manager is also a key person, the AFS licensee must also apply to vary the key person condition on its licence.[911] An AFS licensee is required to consider the matters relating to the fitness and propriety of its officers and responsible managers on an ongoing basis.[912] ASIC has however indicated that it would accept standards set by APRA if an AFSL applicant is an APRA-regulated body and the standard is relevant to the responsible manager's role. For example, to demonstrate the Option 1 knowledge and skills requirement, ASIC may accept a person who is a 'responsible person' for the purposes of CPS 520 as having appropriate knowledge about dealing in general insurance products.[913]	• temporary and unforeseen vacancies; • directors appointed at general meetings; and • new entities entering the industry.[915] In addition, certain insurers may be required to provide an 'accountability map' to ASIC/APRA within 30 days of becoming subject to FAR which must contain the following information: • the names of all of the accountable persons of the accountable entity and each of its significant related entities; • details of the reporting lines and lines of responsibility of those accountable persons; and • sufficient information to identify an accountable person for each of their responsibilities.[916]

[907] CPS 520, p 1.
[908] GPS 520, [15].
[909] CPS 520, [4].
[910] RG 105.96.
[911] RG 105.97.
[912] This is the practical effect of the Corporations Act, s 915C(1)(b).
[913] ASIC RG 105.55.
[915] FAR Bill, s 24(2)-24(7).
[916] FAR Bill, s 34.

Appendix 7 – Compulsory motor accident injury insurance

(referred to in section 5.8(b) of this Report)

The following diagram and table have been provided by IAG:



The following summary has been provided by IAG:

Summary of compulsory motor accident injury schemes

	NSW	ACT	SA	QLD	VIC	WA	NT	TAS
Regulatory body	State Insurance Regulatory Authority (SIRA)	Motor Accident Injuries Commission (MAI Commission)	CTP Insurance Regulator	Motor Accidents Insurance Commission (MAIC)	Transport Accident Commission (TAC)	Insurance Commission of WA (ICWA)	Motor Accidents Compensation Commission	Motor Accidents Insurance Board (MAIB)
Underwriting	Private	Private	Private	Private	Public	Public	Public	Public
Fault	Primarily fault based	No fault	Fault based	Fault based	No fault	Fault based	No fault	No fault
Scheme	Statutory benefits and modified/capped common law	Defined benefits and modified/capped common law	Common law with statutory limits	Common law with statutory limits	Defined benefits, limited common law rights	Common law with statutory limits	Statutory benefits only, no common law rights (abolished under s 5).	Statutory benefits and common law
Relevant act(s)	• *Motor Accident Injuries Act 2017* • *Civil Liability Act 2002*	• *Motor Accident Injuries Act 2019* • *Civil Law (Wrongs) Act 2002* •*Limitation Act 1985*	• *Motor Vehicles Act 1959* • *Motor Vehicles (Third Party Insurance) Regulations 2013* • *Civil Liability Act 1936*	• *Motor Accident Insurance Act 1994* • *Civil Liability Act 2003* • *Civil Liability Regulation 2014*	• *Transport Accident Act 1986*	• *Motor Vehicle (Third Party Insurance) Act 1943*	• *Motor Accidents (Compen-sation) Act 1979*	• *Motor Accidents (Liabilities and Compen-sation) Act 1973* • *Motor Accidents (Liabilities and Compen-sation) Regulations 2010*
Definition of accident	An incident or accident involving the use or operation of a	An incident that: • involves the use or operation of	Death or bodily injury will be regarded as being caused	An incident from which a liability for personal injury arises that is	Transport accident means: An incident directly caused	"Accident" is not defined. However, the long title of the Act is:	A motor accident is an occurrence: • caused by or arising out of	A person suffers personal injury from a motor accident if the

	NSW	ACT	SA	QLD	VIC	WA	NT	TAS
	motor vehicle that causes the death or injury to a person where the death or injury is a result of and is caused (whether or not as a result of a defect in the vehicle) during: • the driving of the vehicle, or • a collision, or action taken to avoid a collision, with the vehicle, or the vehicle's running out of control, or • a dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle,	a motor vehicle; and • causes personal injury to an individual and • happens when -someone is driving the motor vehicle; or ○ someone or something collides with the motor vehicle; or ○ someone takes action to avoid colliding with the motor vehicle; or ○ the motor vehicle runs out of control. Section 11 also defines 'use' of motor vehicle	by or arising out of the use of a motor vehicle only if it is a direct consequence of: • the driving of the vehicle; • the vehicle running out of control; or • a person travelling on a road colliding with the vehicle when the vehicle is stationary, or action taken to avoid such a collision.	covered by insurance under the statutory insurance scheme.	by the driving of a motor car or motor vehicle, a railway train or tram	*"An Act to require owners of motor vehicles whilst on a road, to be insured against liability in respect of deaths or bodily injuries directly caused by, or by the driving of, such motor vehicles, whether caused on or off a road, to make certain provisions in relation to such insurance and in relation to the awarding of damages in respect of such bodily injuries, and for other purposes. "*	the use of a motor vehicle; and • resulting in the death of, or injury to, a person. A motor accident is caused by or arises out of the use of a motor vehicle if, and only if, it results directly from: • the driving of the motor vehicle; or • the motor vehicle moving out of control; or • a collision, or action to avoid a collision, with the motor vehicle (whether the motor vehicle is stationary or moving).	injury results directly from: • a collision, or action taken to avoid a collision, with a motor vehicle, whether the motor vehicle is stationary or moving; or • motor vehicle moving out of control; or • the driving of a motor vehicle

		NSW	ACT	SA	QLD	VIC	WA	NT	TAS
		or the vehicle's running out of control.							
No fault medical expenses	**Children**	Children (under the age of 16 at time of accident) entitled to statutory benefits (medical), not limited by fault.	No special provision	Reasonable and necessary treatment, care and support needs of children (under 16 at the time of the accident) are paid on a no-fault basis, if the accident occurred in SA.	No special provision	No special provision	No special provision	No special provision	No special provision
	Generally	Up to 26 weeks of statutory benefits, including medical and income replacement available to injured people regardless of fault. Benefits to those suffering only minor injuries cease at 26 weeks.	Up to five years of treatment and care medical expenses available regardless of fault. Exclusions and limitations apply - eg. driving offences injuries self-inflicted.	Ambulance costs covered, regardless of fault . This is a government agreement, not a legislative requirement.	No provision	Reasonable medical benefits available indefinitely. A medical excess applies to injured persons not admitted to hospital. Excess applies only to accidents before 14 February 2018.	Agreement with Health Department to cover cost of emergency public hospital treatment and transport. Not a legislative requirement.	Reasonable medical costs payable. Statutory benefits may be commuted.	Maximums: • $500,000 if injured person was hospitalised for more than 4 days from the date of the accident • $400,000 in other cases. There is no limit on medical expenses where the injured person

		NSW	ACT	SA	QLD	VIC	WA	NT	TAS
									requires daily care.
Contributory negligence		Mandatory finding of CN depending on whether wearing seatbelt or helmet, or passenger relied on intoxicated driver. Rebuttable presumption where drug or alcohol conviction.	Applies to common law only. Rebuttable presumption of CN depending on whether wearing seatbelt or helmet, intoxicated, relied on intoxicated driver x..	Rebuttable presumption of CN depending on whether intoxicated or relied on intoxicated person, not wearing seatbelt or helmet drug or alcohol conviction.	Rebuttable presumption of CN if injured person was intoxicated or relied on intoxicated person.	No presumption. In determining whether a defendant breached their duty of care, the court must consider whether the plaintiff was intoxicated and the level of intoxication.	Presumption of CN where plaintiff intoxicated - s 5L *CLA*. No minimum reduction. Presumption does not apply unless intoxication self-induced.	Mandatory reduction if intoxicated or child not wearing a seatbelt or helmet.	<u>Common law claims</u> Presumption of CN where plaintiff intoxicated. CN if not wearing a seatbelt.
Statutory limits on quantum	**Non-economic loss**	In addition to statutory benefits claim - to claim NEL must make a damages claim and then only available if the injured person has sustained a whole person impairment > 10%.	Defined benefits: Quality of life benefits available on a no fault basis if whole person impairment (WPI) is 5% or more. Common law (where available): Quality of life	NEL only available for Injury Scale Value (ISV) > 10. The amount payable depends on the financial year of accident and the ISV.	No threshold. Payment determined by Injury Scale Value (ISV).. If employment was a significant contributing factor to the injury and injured person received workers	<u>Common law - "pain and suffering":</u> only available where serious impairment or injury. Min and max amounts vary annually. <u>Impairment benefits (including no fault)</u>	Claims for NEL must exceed $22,000 and the maximum amount payable is $425,000. The threshold (deductible) amount gradually reduces for claims	Permanent impairment payments are available where WPI at least 5%. Payments amounts are determined by a sliding scale. Permanent impairment payments are capped at	No impairment benefits for no fault. <u>Common law:</u> •Damages calculated by formula •Threshold for NEL, currently $5,500 •No cap.

		NSW	ACT	SA	QLD	VIC	WA	NT	TAS
		NEL is capped (as at 1 October 2019) at $565,000.	damages available*. Damages payable are determined by a scale.		compensation, then the *CLA* does not apply - damages would be assessed at common law.	Available for WPI >10%. The payment amount is calculated through a table of indexed benefits, using the % of WPI.	assessed between $63,750 (15%) and $85,000 (20%) and does not apply to assessments over $885,000 (caps and thresholds indexed annually 1 July, figures are as at 1 July 2019).	figure indexed 6 monthly.	
	Past economic loss	Weekly statutory benefits: fortnightly payment of lost income (at 80-95% of average pre-accident weekly earnings to cap. Past economic loss damages: (top up weekly statutory benefits) for loss of earnings or deprivation or impairment of earning	Defined benefits: weekly income replacement benefits for lost income (80 -100% of pre-injury weekly income, depending on dollar amount and time since accident). Available for up to five years on a no-fault basis. Capped. Exclusions and limitations apply - eg.	Damages for loss of earnings cannot exceed the prescribed maximum. Further deduction of 20% after discount rates and contributory negligence. <u>PAST</u> •No damages for first week of loss •Interest payable <u>FUTURE</u>	Loss of earnings are capped at 3 times AWE.	<u>No fault - defined benefits:</u> No damages for first 5 days of loss. Maximum of 80% of gross income, up to cap. •Benefits only payable for 18 months.	Past economic loss is capped at 3 times AWE.	No payment for day of accident. Payments for LOEC are capped at 85% of the AWE at time of payment. Payments terminate at retirement age. Statutory benefits may be commuted.	<u>No fault - defined benefits:</u> No benefits payable for first 7 days. Payments capped at the lesser of 80% of pre-accident income or 3 times AWE. Benefits payable for 2 years. <u>Common law:</u> Loss of earning capped at 3 times AWE.

		NSW	ACT	SA	QLD	VIC	WA	NT	TAS
		capacity to cap.	driving offences injuries self-inflicted. Common law: top-up of defined benefits, excluding first year after accident) available. Capped at three times AWE.	•No interest payable •Only payable where the injured person's ISV is > 7.					
	Future economic loss	Future economic loss, for loss of earnings or the deprivation or impairment of earning capacity capped and indexed annually. Future expenses related to treatment, rehabilitation or care are not recoverable as a lump sum rather	Capped at three times AWE.		Loss of earnings are capped at 3 times AWE. Court must consider injured person's most likely future economic circumstances but for the injury	<u>Common law:</u> indexed annually.	Future economic loss is capped at 3 times AWE.		Loss of earning capped at 3 times AWE.

		NSW	ACT	SA	QLD	VIC	WA	NT	TAS
		paid on an as incurred basis as a statutory benefit. Future economic loss damages must be based on percentage possibility of 'the claimant's most likely future circumstances but for the injury'.							
	Discount rate	5% - future economic loss.	3% - common law.	5%	5%	6%	6%	N/A	5%
	Gratuitous services	No allowance for gratuitous care provided to the injured person. Some reimburse-ment available for substitute services in some cases of loss of capacity to provide gratuitous services.	No allowance)	Entitlement only: •where the injured person's ISV is >10 • if care is provided for 6 hours a week for 6 months •where parent, spouse, domestic partner or child provides services. Weekly	No allowance for gratuitous services unless: •There is a reasonable need for care •The need for care has arisen from the subject injury •The services would not have been provided but for the injury •The services cover a period	Not applicable	No damages are payable for gratuitous services less than $6,500. In addition hourly rates are capped at AWE and where > 40 hours required per week 1/40 of AWE.	Not applicable Paid attendant care is available following OT assessment and approval by TIO.	Threshold of more than 6 hours per week and for more than 6 consecutive months. Weekly rate not to exceed AWE and hourly rate not to exceed 1/40th of AWE. -

		NSW	ACT	SA	QLD	VIC	WA	NT	TAS
				amount must not exceed 4 times state AWE, however the court can award more if the plaintiff has to pay another person to provide the services.	of time equal to or more than 6 hours/week over 6 consecutive months. If common law applies, there is no threshold.				
	Loss of consortium	Not applicable	Not applicable	Available if ISV of injured person is >10 (provides for limited recovery of loss of servitium - family business)	Available if: •The injured person died; or •NEL for the injured person is assessed at a prescribed amount •Capped at 3 times AWE - (extends to provide for recovery by an employer for loss of servitium)	Not applicable	Not applicable	Not applicable. However, lump sum death benefits are available to surviving spouses and dependent children.	Not applicable

	NSW	**ACT**	**SA**	**QLD**	**VIC**	**WA**	**NT**	**TAS**
Time limits for making a claim	Claim for statutory benefits - within 28 days for recovery of all benefits from date of accident, otherwise 3 months Claim for damages - within 3 years of the accident.	Defined Benefits: 13 weeks from date of accident*)* Common law: 5 years from date of accident <u>Additional limits apply.</u>	Injury Claim Form (ICF) - 6 months from date of accident	Notice of Claim - 9 months from the date of accident or, if symptoms of the injury are not immediate apparent, the first appearance of symptoms of the injury, OR within 1 month of instructing a lawyer, whichever is earlier	No fault benefits: 12 months from date of accident or from the date the injury manifests itself Common law claims: 6 years - see below	3 years from the date the injured person becomes aware of their injury (generally date of accident)	As soon as practicable after the accident - the Commission *may* refuse to consider claims made later than 6 months after the accident, and *will* refuse to consider claims made later than 3 years after the accident	12 months from the date of the accident Note that the Tribunal may extend the period to no longer than 5 years
Statutory limitation periods	Claim assessment prerequisite to commence-ment of court proceedings, referral to claims assessment to be made by 3 years from date of accident	Common law - five years from date of accident	3 years from date of accident	3 years from date of accident	6 years from date of accident	3 years from the date the injured person becomes aware of their injury (generally date of accident)	3 years	3 years

Appendix 8 – Home warranty insurance

(referred to in section 5.8(c) of this Report)

State / Territory	Insurance	Legislation	Cover	Minimum building cost	Period for structural work
Australian Capital Territory	Residential building insurance	*Building Act 2004* (ACT)	Covers building work on certain residential apartment buildings and houses and provides more coverage than the statutory warranty, including subsidence. [917]	$12,000	6 years
New South Wales	Home building compensation	*Home Building Act 1989* (NSW)	Protects homeowners as a last resort if their builder cannot complete the residential building work or fix defects because they have become insolvent, died, disappeared or had their licence suspended for failing to comply with a court or tribunal order to compensate a homeowner.[918]	$20,000	6 years
Queensland	Home warranty insurance	*Queensland Building and Construction Commission Act 1991* (Cth)	Residential building work where a licensed contractor does not complete the contracted work and the homeowner has terminated the contract, the contractor fails to rectify defective work or the building suffers from subsidence or settlement.[919]	$3,300	6 years 6 months
South Australia	Building indemnity insurance	*Building Work Contractors Act 1995* (SA)	Protects homeowners if domestic building work has not been completed or faulty work has not been rectified and the builder dies, disappears or is declared bankrupt.[920]	$12,000	5 years
Victoria	Domestic building insurance	*Building Act 1993* (VIC)	Protects homeowners in the event that their domestic building project cannot be completed or has defective work which cannot be rectified as their builder has died, disappeared, become	$16,000	6 years

[917] ACT Government, *Statutory warranties and insurance*: https://www.planning.act.gov.au/build-buy-renovate/build-buy-or-renovate/building-101/statutory-warranties-and-insurance.
[918] SIRA, *What is home building compensation?*: https://www.sira.nsw.gov.au/insurance-coverage/home-building-compensation-insurance/do-i-need-home-building-compensation-insurance.
[919] Queensland Building and Construction Commission, *Home warranty insurance explained*: https://www.qbcc.qld.gov.au/home-warranty-insurance/home-warranty-insurance-explained.
[920] Government of South Australia, *Building indemnity insurance*: https://www.sa.gov.au/topics/planning-and-property/land-and-property-development/engaging-building-industry-professionals/building-indemnity-insurance.

State / Territory	Insurance	Legislation	Cover	Minimum building cost	Period for structural work
			insolvent or failed to comply with a Tribunal or Court Order in relation to the insurance.[921]		
Western Australia	Home indemnity insurance	*Home Building Contracts Act 1991* (WA)	Protects homeowners against financial loss if a builder cannot complete residential building work or meet a valid claim for faulty or unsatisfactory building work because of death, disappearance or insolvency.[922]	$20,000	6 years

On 21 December 2021, the Tasmanian Government also announced its intention to reintroduce home warranty insurance in Tasmania. The Department of Justice, in consultation with the Department of Treasury and Finance, is developing a model for how it will operate in Tasmania.[923]

[921] Victorian Managed Insurance Authority, *What is DBI?*: https://dbi.vmia.vic.gov.au/what-is-dbi.
[922] Government of Western Australia Department of Mines, Industry Regulation and Safety, *Home indemnity insurance*, 25 March 2021.
[923] Tasmanian Government, *Further protections for Tasmanians building homes*, 21 December 2021: https://www.premier.tas.gov.au/site_resources_2015/additional_releases/further_protections_for_tasmanians_building_homes (accessed on 28 January 2022).

Appendix 9– Glossary

The following terms are used in this Report.

Term	Meaning
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AFCA	Australian Financial Complaints Authority
AFCA Rules	Australian Financial Complaints Authority (AFCA) Complaint Resolution Scheme Rules (13 January 2021)
AFS	Australian financial services
AFSL	Australian financial services licence
ALRC	Australian Law Reform Commission
ALRC Interim Report A	ALRC Report 137, *Interim Report A: Financial Services Legislation,* November 2021
ALRC Interim Report B	ALRC Report 139, *Interim Report B: Financial Services Legislation,* September 2022
APRA	Australian Prudential Regulation Authority
APRA Act	*Australian Prudential Regulation Authority Act 1998* (Cth)
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
ASIC Regulations	*Australian Securities and Investments Commission Regulations 2001* (Cth)
Collection of Data Act	*Financial Sector (Collection of Data) Act 2001* (Cth)
Competition and Consumer Act	*Competition and Consumer Act 2010* (Cth)
Conduct Regulator	The regulator responsible for conduct regulation relating to financial services and products. This is currently ASIC but could be its successor if the financial services conduct regulation function is separated from ASIC as proposed in section 6.2(e) of this Report.
Corporations Act	*Corporations Act 2001* (Cth)
Corporations Regulations	*Corporations Regulations 2001* (Cth)
DDO	Design and distribution obligations (in Part 7.8A of the Corporations Act)
Do Not Call Register Act	*Do Not Call Register Act 2006* (Cth)
FAR	Financial Accountability Regime
Final FSRC Report	Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 1 February 2019
Financial Services Reform Act	*Financial Services Reform Act 2001* (Cth)
Financial Services Reform Bill	*Financial Services Reform Bill 2001* (Cth)
FSG	Financial Services Guide
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
FRAA	Financial Regulator Assessment Authority
General Insurance Code or GICOP	General Insurance Code of Practice, 1 July 2021 as updated on 5 October 2021

Term	Meaning
Hayne Response Act	*Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth)
Hayne Response Bill	*Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* (Cth)
IAG	Insurance Australia Group
Insurance Act	*Insurance Act 1973* (Cth)
Insurance Contracts Act	*Insurance Contracts Act 1984* (Cth)
Interim FSRC Report	Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 28 September 2018
Insurance Brokers Code	Insurance Brokers Code of Practice 2014
Legislation Act	*Legislation Act 2003* (Cth)
MOU	Memorandum of Understanding
NIBA	National Insurance Broker Association
OAIC	Office of the Australian Information Commissioner
PDS	Product Disclosure Statement
Privacy Act	*Privacy Act 1988* (Cth)
Rules	The Rules made by the Conduct Regulator to supplement the principles in the main statute as discussed in section 6.2(d) of this Report.
SIRA	State Insurance Regulatory Authority (NSW)
SOA	Statement of Advice
Spam Act	*Spam Act 2003* (Cth)
TMD	Target Market Determination
UCT	Unfair contract terms