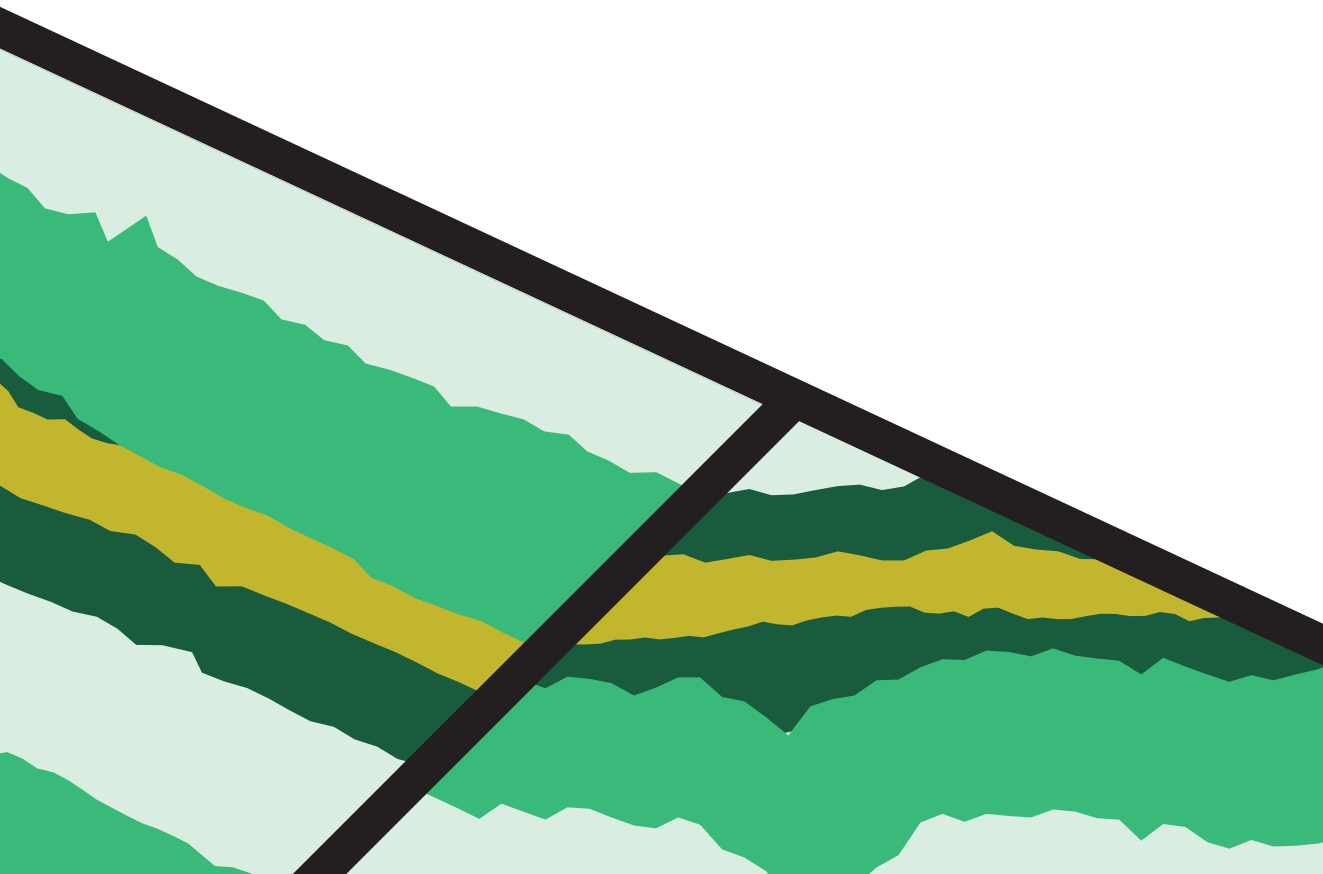
Australian Government
Australian Law Reform Commission

REPORT C: SUMMARY

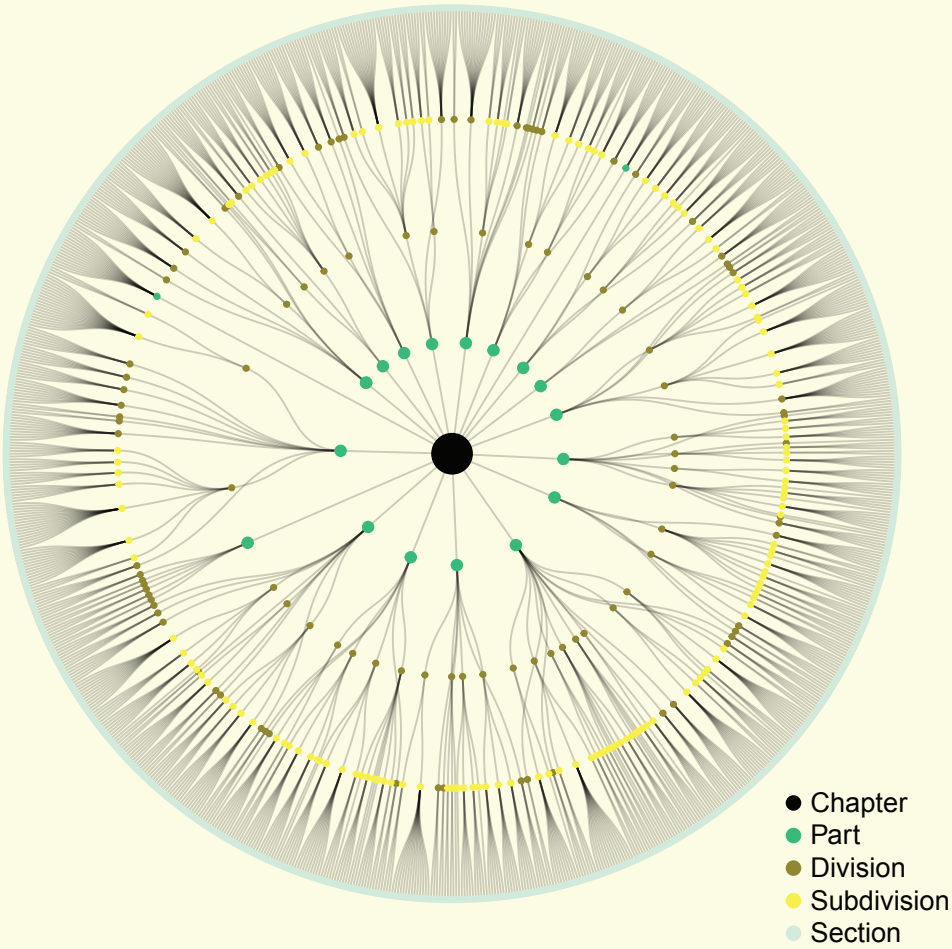
FINANCIAL SERVICES LEGISLATION

ALRC Report 140
June 2023



This visualisation highlights the intricate structure of Chapter 7 of the *Corporations Act*.

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



In this image, the central black dot is Chapter 7 of the *Corporations Act*. As explained in the key in the bottom right of the image, the other dots are parts, divisions, subdivisions, and sections of Chapter 7 of the *Corporations Act*. The ALRC's proposals seek to restructure and reframe provisions of Chapter 7 so that they are easier to navigate and understand. The structure visualised in this image would therefore be transformed.

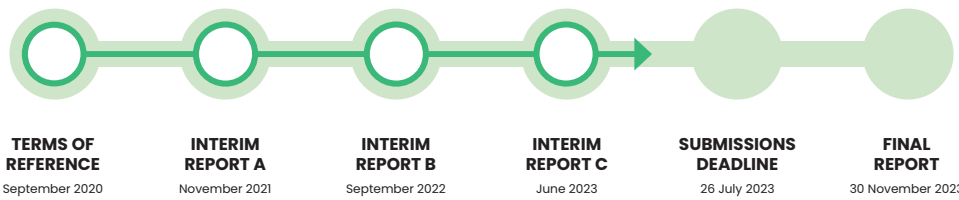
CONTENTS

INTRODUCTION

1. Interim Report C focuses on how legislation is structured and framed. Effective structure and framing of legislation are important for achieving the aim of an 'adaptive, efficient and navigable legislative framework' and ensuring 'there is meaningful compliance with the substance and intent of the law'.[1] While the structure and framing of legislation are relatively technical in nature, Interim Report C explains why they are critical for making the law navigable and comprehensible.

2. Interim Report C is designed to elicit feedback from stakeholders on law reform ideas for the simplification of corporations and financial services legislation, with a focus on restructuring and reframing Chapter 7 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') and the *Corporations Regulations 2001* (Cth) ('*Corporations Regulations*'). **Submissions are invited until 26 July 2023**.

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



4. While the Terms of Reference only require the ALRC to deliver Interim Report C before 25 August 2023, the ALRC has published the Interim Report in June 2023 to ensure that submissions and consultations in response can fully inform preparation of the Final Report.

Making a submission

5. The ALRC seeks stakeholder submissions on:

- 13 proposals for reform relating to how financial services legislation may be restructured and reframed;
- one question in relation to the ALRC's illustrative outline for how financial services legislation may be restructured and reframed (in Appendix D to Interim Report C); and

1 See the Terms of Reference for this Inquiry contained in **Appendix A**.

- one proposal relating to the principles that should be applied when structuring and framing corporations and financial services legislation.

6. Submissions made using the form on the ALRC website are preferred.[2] Alternatively, submissions may be emailed (ideally in PDF format) to financial.services@alrc.gov.au. Stakeholders are welcome to comment on other issues that they consider relevant, and that may not be addressed by particular proposals or questions.

7. Interim Report C is the third, and final, interim report of this Inquiry.[3] Interim Report C 'completes the picture' of the ALRC's proposals for reform of corporations and financial services legislation. It also represents the last call for submissions to the Inquiry before delivery of the Final Report.

Context

8. On 11 September 2020, the ALRC received Terms of Reference which asked the ALRC to consider whether the *Corporations Act* and the *Corporations Regulations* could be simplified and rationalised, particularly in relation to:

A. the use of definitions in corporations and financial services legislation;

B. the coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards; and

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

9. Significantly, the Terms of Reference do not require the ALRC to consider whether the substantive law by which corporations and financial services are regulated requires reform. Rather, the focus of the Inquiry is simplifying the existing regulatory framework within existing policy settings.

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

2 Australian Law Reform Commission, 'Making a submission' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/submission>.

3 The first interim report, Interim Report A, was published in November 2021 and examined the use of definitions in corporations and financial services legislation: Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021). The second interim report, Interim Report B, was published in September 2022 and examined the design choices relevant to determining where material is located within the legislative hierarchy, who makes regulation, and how the content of regulation is organised and structured: Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022).

of the law so that its intent is met.[4] In its Final Report, the Financial Services Royal Commission emphasised that the existing legislative framework for corporations and financial services regulation is unnecessarily complex, fails to communicate fundamental norms, and hinders compliance.[5]

11. The Terms of Reference for this Inquiry are therefore underpinned by a focus on simplification — designing legislation that can be more easily navigated and understood, and may therefore more effectively and efficiently achieve its policy objectives.

12. The support for simplification is significant.[6] As noted in Interim Report B, stakeholders continue to provide feedback to the ALRC that the law has become unmanageably and unnecessarily complex. Chapter 8 of Interim Report C explains how poor structure and framing create much of this complexity and thereby impede the effectiveness of legislation.

13. Stakeholders have also observed to the ALRC that complexity in the current legislative framework has created unnecessary costs. Chapter 7 of Interim Report C discusses some of the costs of complexity in further detail. It explains that by making legislation harder to navigate and understand, **poor structure and framing directly contribute to the costs of complexity in three main respects:**

- **Legislation that is harder to navigate and understand is more difficult, and therefore more costly, to comply with.** Research has established that poor structure and framing can increase the time it takes a person to read and understand legislation.[7] Unavoidably, this increases the time and resources required to comply with the law.[8]
- In turn, **legislation that is harder to understand and comply with is less likely to achieve compliance and the policy outcomes sought by the legislation.** This increases the costs of enforcement and the costs arising from non-compliance.[9] It also means that the benefits of achieving the legislation's policy objectives are not fully realised.
- Financial services legislation creates protections and rights for the benefit of consumers. **Difficulty in understanding the legislation makes it harder for consumers and their advocates to identify and enforce those protections and rights.** This may make it more costly for consumers to understand and enforce their rights or may mean that they do not exercise their rights at all,

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

5 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 494–6.

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

7 Susan Krongold, 'Writing Laws: Making Them Easier to Understand' (1992) 24(2) *Ottawa Law Review* 495, 503.

8 For illustrative data relating to compliance costs, see below [66]–[67]

9 For illustrative data relating to costs arising from non-compliance, see below [68]–[70].

despite the existence of free processes for internal and external dispute resolution.[10]

14. The existing complexity of corporations and financial services legislation also provides a poor platform from which to undertake future policy reforms. As the legislation continues to be amended, the level of complexity will only grow in the coming years. The sooner reforms can be made to the regulatory framework, the easier they will be to implement. Conversely, **the longer the existing ad hoc legislative design choices remain, the more difficult, time-consuming, and expensive it will become to address the complexity that continues to accumulate.** Delay also means that the **costs of complexity will endure**, and may rise.

15. While there is a level of consensus as to the need for reform, stakeholder feedback reveals varying appetites as to the extent of reform. Stakeholders have also emphasised the importance of appropriately managing reform and minimising transition costs. Chapter 7 of Interim Report C responds to those issues by setting out in detail how the reforms proposed by the ALRC may be implemented.

10 For further discussion, see below [71].

UNPACKING THE PROBLEM

16. The Terms of Reference for Interim Report C direct the ALRC to consider how Chapter 7 of the *Corporations Act* and the *Corporations Regulations* could be restructured or reframed. But what does the ALRC mean when it refers to the 'structure' and 'framing' of legislation?

17. Both structure and framing refer to how legislation is designed — specifically, how information is presented and organised to communicate the substance of the law. Structure and framing are elements of the overall architecture of a piece of legislation. This architecture is separate from the policy objectives or substance of the law, but is concerned with making that substance as easy to navigate and understand as possible, consistent with the underlying policy objectives pursued by the legislation.

Why structure and framing matter

18. Clear structure and framing of legislation are key to ensuring that users can navigate and understand it. **Examples 5** and **6** further below, which consider the fictional *Milk Act*, illustrate the difference that good structure and framing can make.

19. In addition to navigability and understanding, there are three particular reasons why the structure and framing of legislation matter:

- Legislation is 'the framework by which governments achieve their purposes'.[11] The structure and framing of legislation matter for **the effectiveness of the law** in achieving those purposes. Obviously enough, legislation that is easier to navigate and understand — because it is well structured and framed — is more likely to achieve its purpose. On the other hand, legislation that is poorly structured and framed makes interpreting and applying the law more difficult. This difficulty makes it more likely that persons subject to the law will not be able to comply with it and more challenging for courts to determine the intent and purpose of the law in question.
- The structure and framing of legislation have important implications for **the burdens and ease of compliance**. As a general principle, legislation should do no more disruption, or create no greater imposition, than is necessary to achieve its regulatory or policy objectives. Legislation imposes 'burdens of compliance' that are greater than necessary when it does not have a coherent structure and clear framing. As noted above, poorly structured and framed

11 Elohor Onoge, 'Structure of Legislation: A Paradigm for Accessibility and Effectiveness' (2015) 17(3) *European Journal of Law Reform* 440, 440.

legislation may add unnecessarily to the time it takes people to understand the law, which has real costs.[12]

- All legislation should support **the rule of law**. This requires that 'the law must be accessible and so far as possible intelligible, clear and predictable.'[13] The structure and framing of legislation are important means through which the rule of law can be advanced. Conversely, poorly structured legislation — which is unnecessarily difficult to navigate or understand — is contrary to rule of law values.

Problems with the structure and framing of Chapter 7

20. The Terms of Reference for Interim Report C direct the ALRC to focus on Chapter 7 of the *Corporations Act*. However, some of the problems in the structure and framing of Chapter 7 are emblematic of problems in the *Corporations Act* more generally. Overall, many of the problems in the existing structure and framing of the *Corporations Act* are products of history and broader developments in the legislative process.[14]

21. Three key takeaways from the ALRC's problem analysis in respect of the structure and framing of Chapter 7 of the *Corporations Act* are:

- Chapter 7 **lacks coherence and does not have an intuitive flow**. The current structure of Chapter 7 is akin to creating a chapter of the *Corporations Act* simply titled 'Companies', which then provides for everything to do with the establishment, operation, and deregistration of companies. Instead, that material is split between several chapters of the Act. Compared with every other substantive chapter of the *Corporations Act*, Chapter 7 does far too much. As some stakeholders have observed to the ALRC, Chapter 7 is effectively an Act within an Act.[15]
- Chapter 7 **fails to prioritise key messages**. Poor structure and framing that do not communicate important messages make it more difficult to comply with the law. This was one of the findings of the Financial Services Royal Commission — namely, in its design, financial services legislation failed to communicate the 'fundamental norms of behaviour [that] are being pursued

12 Krongold (n 7) 503. See generally Chapters 7 and 8 of Interim Report C.
13 Tom Bingham, 'The Rule of Law' (2007) 66(1) *The Cambridge Law Journal* 67, 69.
14 For a discussion of these wider issues, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.49]–[6.57].
15 In Interim Report A, the ALRC observed that if Chapter 7 of the *Corporations Act* were an Act, it would be the 11th longest Commonwealth Act: Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.63]. Based on analysis of the statute book as in force on 12 December 2022, Chapter 7 of the *Corporations Act* would be the 10th longest Commonwealth Act. For the original data, see the 'As made Commonwealth Acts' data set on Australian Law Reform Commission, 'DataHub' <www.alrc.gov.au/datahub/>.

when particular and detailed rules are made about a particular subject matter'.[16] In failing to communicate fundamental norms, the legislation undermines compliance and the potential for the law's intent to be realised.

- The structure and framing of Chapter 7 make it **difficult for users to find relevant law**. Provisions in Chapter 7 of the *Corporations Act* are frequently not grouped together or prioritised in a way that helps users navigate and understand the law that applies to their circumstances, or to disregard provisions that do not apply. This means users must read their way through the text of provisions to determine whether they may be relevant, with little help from the structure of provisions. These problems are compounded by the extensive and complex use of delegated legislation, discussed in detail in Interim Report B.[17]

22. The analysis further below and the more detailed discussion in Interim Report C contain several examples to illustrate these problems.

16 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 5) 496.

17 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.26]–[6.48].

RECOMMENDATIONS

Penalty Provisions Chapter 10		
Recommendation	**20**	Offence provisions in corporations and financial services legislation should include the following at the foot of each provision: a. the words 'maximum criminal penalty'; b. any applicable monetary or imprisonment penalty, expressed as one or more amounts in penalty units or terms of imprisonment; and c. a note referring readers to any additional rules for calculating the applicable penalty.
Recommendation	**21**	The definition of 'civil penalty' in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to be based on s 79(2) of *the Regulatory Powers (Standard Provisions) Act 2014* (Cth).
Recommendation	**22**	Civil penalty provisions in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should include the following at the foot of each provision: a. the words 'maximum civil penalty'; b. any applicable penalty, expressed as one or more amounts in penalty units; and c. a note referring readers to any additional rules for calculating the applicable penalty.

Penalty Provisions

Chapter 10

Recommendation	23	Offence provisions in corporations and financial services legislation should specify any applicable fault element, unless the provision creates an offence of strict or absolute liability.

PROPOSALS AND QUESTIONS

Consumer Protection

Chapter 2

Proposal	C1	The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to consumer protection, including by grouping and (where relevant) consolidating: a. Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth); b. Part 7.6 Div 11 of the *Corporations Act 2001* (Cth); c. sections 991A, 1041E, 1041F, and 1041H of the *Corporations Act 2001* (Cth); d. Part 7.8A of the *Corporations Act 2001* (Cth); and e. sections 1023P and 1023Q of the *Corporations Act 2001* (Cth).
Proposal	C2	Section 991A of the *Corporations Act 2001* (Cth) and s 12CA of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed, and s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to expressly provide that it encompasses unconscionability within the meaning of the unwritten law.
Proposal	C3	Proscriptions concerning false or misleading representations and misleading or deceptive conduct in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be replaced by a consolidated single proscription.

Disclosure

Chapter 3

Proposal	**C4**	The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions relating to disclosure for financial products and financial services, including by grouping and (where relevant) consolidating: a. Part 7.7 Divs 1, 2, 3A, 6, and 7; b. section 949B; and c. Part 7.9 Divs 1, 2, 3 (excluding ss 1017E, 1017F, and 1017G), 5A, 5B, and 5C.
Proposal	**C5**	Disclosure regimes in Chapter 7 of the *Corporations Act 2001* (Cth) that require disclosure documents to 'be worded and presented in a clear, concise and effective manner' should be amended to require that disclosure documents also be worded and presented 'in a way that promotes understanding of the information'.

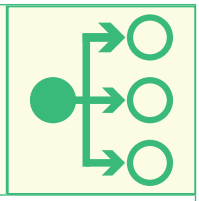
Financial Advice

Chapter 4

Proposal	**C6**	The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions relating to financial advice, including by grouping and (where relevant) consolidating: a. sections 912EA and 912EB; b. Part 7.6 Divs 8A, 8B, and 8C; c. Part 7.6 Div 9 Subdivs B and C; d. Part 7.7 Div 3; e. section 949A; f. Part 7.7A Divs 2, 3, 4 (excluding s 963K), Div 5 Subdiv B, and Div 6; and g. sections 1012A and 1020AI.

General Regulatory Obligations

Chapter 5



Proposal	**C7**	The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to financial services providers, including by grouping and (where relevant) consolidating: a. Part 7.6 Divs 2, 3, and 10; b. section 963K; c. Part 7.7A Div 5 Subdiv A, and Div 6; d. Part 7.8 Divs 2, 3, 4, 4A, 5, 6, and 9; and e. sections 991B, 991E, 991F, 992A, and 992AA.
Proposal	**C8**	The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to administrative or procedural matters concerning financial services licensees, including by grouping and (where relevant) consolidating Part 7.6 Divs 5, 6, and 8.

A Financial Services Law Chapter 6		
Proposal	C9	The *Corporations Act 2001* (Cth) should include a Financial Services Law comprising restructured and reframed provisions relating to the regulation of financial products and financial services, including: a. Part 7.1 Divs 1, 2, 3, 4, 5, and 7 of the *Corporations Act 2001* (Cth); b. Parts 7.6, 7.7, 7.7A, 7.8, 7.8A, 7.9, and 7.9A of the *Corporations Act 2001* (Cth); c. Part 7.10 of the *Corporations Act 2001* (Cth), excluding provisions that relate more closely to the regulation of financial markets; d. Part 7.10A of the *Corporations Act 2001* (Cth); e. Part 7.12 of the *Corporations Act 2001* (Cth), excluding provisions that relate more closely to the regulation of financial markets; f. Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth); and g. a list of terms defined for the purposes of the Financial Services Law.
Proposal	C10	The Financial Services Law should be enacted as Sch 1 to the *Corporations Act 2001* (Cth).

A Financial Services Law

Chapter 6

Question	C11	Would restructuring and reframing existing financial services legislation in the manner outlined in the illustrative Financial Services Law Schedule included in this Interim Report help to do any or all of the following: a. provide an effective framework for conveying how the law applies to consumers and regulated entities and sectors; b. make the law clearer, and more coherent and effective; c. give effect to the fundamental norms of behaviour being pursued by financial services regulation; and d. ensure that the intent of the law is met?

Implementation Chapter 7		
Proposal	**C12**	The Australian Government should establish a specifically resourced taskforce (or taskforces) dedicated to implementing reforms to financial services legislation.
Proposal	**C13**	As part of implementing Proposals C9 and C10, the *Corporations Act 2001* (Cth) should be amended to require that the Financial Services Law and delegated legislation made under it be periodically reviewed by an independent reviewer.

Principles for Structuring and Framing Legislation

Chapter 9

Proposal	**C14**	The following working principles should be applied when structuring and framing corporations and financial services legislation: a. Provisions should be designed in a way that minimises duplication and overlap (**Consolidation**). b. Related provisions should be proximate to one another (**Grouping**). c. Provisions should have thematic and conceptual coherence (**Coherence**). d. The most significant provisions should precede less important provisions or more technical detail (**Prioritisation**). e. Legislation should be structured to ensure an intuitive flow that reflects the needs of potential users (**Intuitive flow**). f. The structure and framing of legislation should help users develop and maintain mental models that enhance navigability and comprehensibility (**Mental models**). g. Legislation should be as succinct as possible (**Succinctness**).

Penalty Provisions

Chapter 10

Proposal	**C15**	Infringement notice provisions in corporations and financial services legislation should be identifiable on the face of the provision.

ANALYSIS

Restructuring and reframing financial services legislation

23. In Chapters 2–6 of Interim Report C, the ALRC sets out 10 proposals that would see Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') restructured and reframed so as to make financial services legislation easier to navigate and understand. Like Interim Report B, a key theme of Interim Report C is 'finding the right home' for different aspects of the law.

24. Chapters 2–5 of Interim Report C focus on how provisions relating to specific themes of financial services regulation may be restructured and reframed. In summary, the ALRC proposes that relevant provisions be grouped and consolidated to create an individual legislative chapter relating to each of the following:

- consumer protection in the provision of financial services (**Proposal C1**);
- disclosure for financial products and financial services (**Proposal C4**); and
- financial advice (**Proposal C6**).

25. The ALRC also proposes creating two legislative chapters relating to the general regulatory obligations of financial services providers, including Australian financial services licensees ('AFS Licensees') (**Proposals C7** and **C8**).

26. The legislative chapters proposed by the ALRC would provide an identifiable and navigable home for provisions relating to each theme, which are currently spread across various provisions of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. In this way, the proposed chapters emphasise three of the principles for structuring and framing legislation outlined in **Proposal C14**: grouping, consolidation, and coherence.[18] Grouping and consolidation make it easier for users to find relevant law by reducing the number of places they need to look for it. Thematic coherence makes it easier to know where to look in the first place.

27. As discussed below, these proposals would best be implemented as part of the Financial Services Law Schedule ('FSL Schedule') contemplated by **Proposals C9** and **C10**.[19] This would mean the creation of a chapter relating to each of consumer protection, disclosure, and financial advice, and two chapters relating to general regulatory obligations, as part of the FSL Schedule in Sch 1 to the *Corporations Act*.

18 See below [73]–[81] and Chapter 9 of Interim Report C.
19 See below [53]–[57].

28. However, if **Proposals C9** and **C10** were not adopted, the proposals for grouping and consolidating provisions relating to consumer protection, disclosure, financial advice, and general regulatory obligations could nonetheless be implemented as chapters or parts within the body of the *Corporations Act*. The following analysis will focus on their implementation as chapters, although it would apply equally if the proposals were instead implemented as parts within a chapter of the *Corporations Act*.

Consumer protection

29. It is crucial that consumer protection provisions are as easy to navigate and understand as possible. These provisions have a potentially broader and often non-expert audience than other provisions. The audience may include (or *should potentially* include) consumers themselves, as well as their advocates and non-specialist lawyers.[20] For the law to be effective, it is important that consumers be able to navigate and understand the core rights and remedies that are designed for their protection and benefit. Consumers may otherwise be incapable of asserting and enforcing those protections. Accordingly, legislation in this area should be as navigable and comprehensible as possible.

30. Chapter 2 of Interim Report C discusses the range of generally applicable consumer protection provisions that should be grouped and consolidated in a single legislative chapter under **Proposal C1**. **Example 1** shows that these provisions are currently scattered across Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*.

Example 1: Finding and understanding consumer protection provisions

Consumer protection provisions, which include general conduct obligations and consumer rights in relation to 'financial products' and 'financial services' as defined in the *ASIC Act*, are located across dozens of provisions of multiple Acts.

For example, provisions prohibiting unconscionable conduct and misleading or deceptive conduct can be found across 11 sections of the *Corporations Act* and *ASIC Act*. The requirement to comply with product intervention orders, aimed at protecting consumers from the risk of significant detriment, appears towards the end of Part 7.9A of the *Corporations Act*, which itself is the 15th part in Chapter 7 of the Act.[21] Design and distribution obligations appear in Part 7.8A, towards the middle of Chapter 7, and amidst other parts that have a substantially narrower scope of application.

20 This is particularly the case in the financial services context given the role of the Australian Financial Complaints Authority as an external dispute resolution body available to consumers.

21 Product intervention orders can apply to anyone providing financial services in relation to 'financial products' as defined in the *ASIC Act*, and are therefore of general application: *Corporations Act 2001* (Cth) s 1023C.

Consumer protection provisions are also poorly and inconsistently structured to prioritise the core, generally applicable requirements of the law. For example, while the prohibition on unconscionable conduct in Part 2 Div 2 of the *ASIC Act* appears as the first substantive subdivision, the provisions prohibiting misleading or deceptive conduct appear as part of a 'shopping list' of consumer protections in a separate subdivision. This structure differs from that in the *Australian Consumer Law*, in which the 'general protections' against misleading or deceptive conduct appear first, followed by prohibitions on unconscionable conduct and unfair contract terms.[22]

31. The legislative chapter created under **Proposal C1** would serve as a single point of consideration for consumers who wish to understand (or need to be advised about) the key protections that apply for their benefit. For businesses, the new chapter would provide a single home for the core standards of generally applicable commercial behaviour.

32. Importantly, if implemented as part of the FSL Schedule (**Proposals C9** and **C10**), the consumer protection chapter would be located in a broader legislative structure focused on regulating financial services and financial products. At present, consumer protections in the *ASIC Act* are incongruously located among provisions that largely relate to the establishment of the Australian Securities and Investments Commission ('ASIC'), its functions, and its powers. In grouping provisions in a chapter with other relevant protective and regulatory provisions, the new structure and framing would highlight the broader context of the provisions.

33. The ALRC suggests that a consumer protection chapter should be the first substantive chapter in the FSL Schedule.[23] By adopting this structure, the consumer protection chapter would help frame the regulatory obligations that follow. These include, for example, disclosure obligations that are necessarily informed by the obligation (and fundamental norm) not to mislead or deceive.

34. Chapter 2 of Interim Report C also proposes consolidating existing prohibitions on misleading, deceptive, and unconscionable conduct (**Proposals C2** and **C3**). As discussed in the ALRC's Background Paper FSL9, there are several reasons why having numerous provisions that address unconscionable and misleading or deceptive conduct is problematic. These include:

- the expressive power of the law is reduced on account of unnecessary complexity resulting from overlap, duplication, and over-particularisation;

22 *Competition and Consumer Act 2010* (Cth) sch 2 ch 2.

23 See the illustrative FSL Schedule in Appendix D to Interim Report C, which is also available as a standalone document on the ALRC website: Australian Law Reform Commission, 'Illustrative FSL Schedule (Appendix D to Interim Report C)' <www.alrc.gov.au/wp-content/uploads/2023/05/Illustrative-FSL-Schedule.pdf>.

- the existence of numerous legislative provisions governing each subject invites or requires parties to consider and potentially plead (or defend against) more than one provision, thereby increasing the burdens of litigation and enforcement;[24] and
- more generally, the proliferation makes the law more difficult to understand and apply, wasting time, resources, and lessening the likelihood of compliance.

35. Consolidation would address these problems and help to further clarify the fundamental norms that underpin consumer protection provisions in financial services legislation.

Disclosure

36. Disclosure provisions are among the most complex and least coherent provisions in the *Corporations Act*, making extensive use of over 600 notional amendments, dozens of conditional exemptions, and excessively prescriptive provisions in primary legislation.[25] The complexity of disclosure provisions makes it unnecessarily difficult for regulated persons and their legal advisers to navigate and understand disclosure obligations. Complexity also makes the tasks of statutory interpretation and legislative maintenance more difficult, impacting the judiciary, regulators, and law-makers.

37. The structure of disclosure provisions often means that regulated entities face a collection of puzzle pieces, which they must seek to piece together to understand their obligations. As **Example 2** shows, the structure of the existing legislation does little to help users find the law that applies to relevant products, services, or circumstances.

24 See, eg, *Australian Securities and Investments Commission v National Australia Bank Limited* [2022] FCA 1324 [379]. In this case, Justice Derrington noted that the respondent was 'found liable upon several items for the same conduct in relation to different forms of legislation directed to the same purpose, consumer protection, where the added claims are based on no further culpability. … This result is undesirable'.

25 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [9.50]–[9.63], [9.90]–[9.117]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.33]–[6.39]; Australian Law Reform Commission, Recommendation 18 — Notional Amendments Database <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Notional-amendments-database.xlsx>.

Example 2: The superannuation disclosure puzzle

Superannuation providers must combine dozens of disparate provisions in Part 7.9 of the *Corporations Act* and *Corporations Regulations*, as well as several ASIC legislative instruments, to understand the product disclosure statement ('PDS') regime applicable to their circumstances.

Superannuation providers will have to locate tailored obligations to give a PDS,[26] customised content requirements,[27] additional application form provisions,[28] and dozens of regulations relating to fees and costs that have since been almost entirely (notionally) replaced by an ASIC legislative instrument.[29] They will face the confusing spectacle of 29 divisions in Part 7.9 of the *Corporations Regulations*, containing a further 34 subdivisions, each of which may or may not contain provisions applicable to the superannuation provider.[30]

38. Chapter 3 of Interim Report C discusses the range of provisions that should be grouped and consolidated in a single legislative chapter (**Proposal C4**). They include the existing regimes for financial product disclosure and financial services disclosure in Parts 7.7 and 7.9 of the *Corporations Act*. The proposed disclosure chapter would not include, for example, disclosure regimes that relate only to financial advice (discussed in Chapter 4 of the Interim Report) and provisions related to fundraising (located in Chapter 6D of the *Corporations Act*).

39. Meaningful reform to the legislation governing financial product and financial services disclosure requires consideration of the legislative hierarchy. Disclosure provisions make extensive use of delegated legislation which often uses notional amendments and conditional exemptions to set up tailored disclosure regimes for particular persons, products, services, and circumstances.[31] It is important to recognise, therefore, that restructuring and reframing the disclosure provisions of the *Corporations Act* independently of a reformed legislative hierarchy would result in significantly fewer benefits than a more complete reform package.[32]

26 *Corporations Act 2001* (Cth) s 1021I.

27 Ibid ss 1013D(1)(l), (2A); *Corporations Regulations 2001* (Cth) sch 10D; *ASIC Corporations (Shorter PDS and Delivery of Accessible Financial Products Disclosure by Platform Operators and Superannuation Trustees) Instrument 2022/497* (Cth).

28 *Corporations Act 2001* (Cth) pt 7.9 div 2 subdiv F; *ASIC Corporations (Superannuation: Accrued Default Amount and Intra-Fund Transfers) Instrument 2016/64* (Cth).

29 *Corporations Regulations 2001* (Cth) pt 7.9 div 4C; *ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070* (Cth).

30 See, eg, *Corporations Regulations 2001* (Cth) pt 7.9 div 2; pt 7.9 div 4 subdiv 4.2B.

31 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [9.50]–[9.63].

32 The legislative model proposed in Interim Report B offers a reformed legislative hierarchy.

40. In Chapter 3 of Interim Report C, the ALRC also proposes that the existing disclosure standard for financial products and services should be reframed to explicitly incorporate an outcomes-based standard for disclosure (**Proposal C5**).

41. **Proposal C5** does not involve an alternative standard of disclosure or a change in policy settings. Instead, the existing disclosure standards requiring information 'to be worded and presented in a clear, concise and effective manner' would be amended to incorporate a requirement that information also be worded and presented 'in a way that promotes understanding of the information'.

42. Incorporating this requirement into disclosure standards would focus attention on the need to promote understanding and would assist in framing the more tailored and prescriptive disclosure provisions by reference to the outcome that disclosure is intended to achieve. As Chapter 3 of Interim Report C explains, disclosure legislation is already widely thought to require a focus on consumer understanding, which is regarded as the desirable outcome of designing disclosure documents that are 'clear, concise and effective'.

Financial advice

43. The current structure and framing of provisions relating to financial advice in Chapter 7 of the *Corporations Act* present two particular problems.[33] First, they make it hard for advice providers and recipients of financial advice to find the law.[34] This is illustrated by **Example 3** below. In searching for the law relating to financial advice, users must read through the substantive provisions of the Act to identify advice-related provisions, or look to ASIC regulatory guidance to address the defects in the law's communicative power.[35]

33 Interim Report C refers to 'financial advice' rather than the *Corporations Act* concept of 'financial product advice'. The term 'financial advice' is used in a generic sense and is intended to reflect the potential for restructured and reframed financial advice provisions to adapt to any policy changes in the scope of the law, including the concept of 'financial product advice'. Nonetheless, for the purposes of the Interim Report, financial advice is taken to include the existing concepts of financial product advice, general advice, and personal advice. For further discussion of these terms, see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [11.23]–[11.33].

34 Advice providers include individuals who provide financial advice, as well as bodies corporate that employ or authorise individuals who provide such advice.

35 ASIC's guidance on financial product advice is extensive: see, eg, Australian Securities and Investments Commission, *Licensing: Financial Product Advice and Dealing* (Regulatory Guide 36, June 2016); Australian Securities and Investments Commission, *Giving Information, General Advice and Scaled Advice* (Regulatory Guide 244, December 2012); Australian Securities and Investments Commission, *Conflicted and Other Banned Remuneration* (Regulatory Guide 246, December 2020).

44. As noted in the joint submission of five financial advice and planning associations,

> finding provisions relevant to financial advice with absolute certainty as to the accuracy of the provision is extremely problematic for those operating under the legal framework.[36]

Example 3: Difficulty finding the law

Part 7.6 of the *Corporations Act* is titled 'Licensing of providers of financial services'. The Part includes at least nine divisions applying to anyone providing a financial service. However, three divisions relate only to 'relevant providers', which means individuals providing most forms of personal advice to a retail client. A fourth division contains a single subdivision that creates additional obligations relating to relevant providers, although the rest of the division applies only to ASIC. The design of Part 7.6 is unhelpful both for persons looking for financial advice regulation and those looking for provisions governing other financial services: neither can easily identify which sections of Part 7.6 may or may not apply to their circumstances.

Similarly, Part 7.7A of the *Corporations Act*, titled 'Best interests obligations and remuneration', includes several important obligations of advice providers. These obligations include the ban on conflicted remuneration for advice providers and the best interests duty for providers of personal advice. Part 7.7A also includes provisions applying to other persons. These include, for example, provisions relating to volume-based shelf-space fees for custodial arrangements, and provisions of more general application, such as the prohibition on any issuer or seller of a financial product providing conflicted remuneration. Again, the design of Part 7.7A does little to help users looking for financial advice law or those looking for obligations that may apply more generally.

45. Second, the current structure and framing of financial advice provisions make the law harder to understand, by obscuring the broader context and purpose of financial advice provisions. This is principally because the fractured structure of provisions — spread across the Act with no indication as to where they are to be found — obscures the context and purpose of each group of provisions. The lack of context means that the law fails to communicate that advice providers are subject to a highly developed and tailored regulatory regime. This regime contains fundamental norms and expectations that differ in purpose and substance from the more general provisions regulating financial services. In other words, financial advice is regulated differently to other financial services.

36 Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*. This view was also echoed in Financial Planning Association of Australia, *Submission 59*.

46. **Proposal C6** would see the creation of a single legislative chapter bringing together all provisions that only regulate financial advice. This restructure seeks to reflect the needs and expectations of users of the law, and thereby enable the law to communicate more effectively.

47. A single legislative chapter focused on financial advice would also better reflect the fact that Parliament has, over a number of years, sought to professionalise the financial advice industry, raise standards above those generally applicable to other financial service providers, and improve advice outcomes. Users would find it difficult to identify this context in the current structure of financial advice provisions.

General regulatory obligations

48. The general regulatory obligations of financial services providers are, broadly speaking, among the most wide-ranging and significant for the conduct of their business and engagement with ASIC. These obligations include the requirement to hold an Australian financial services licence and the obligation on AFS Licensees to provide their services 'efficiently, honestly and fairly'.[37] They also include prohibitions on hawking financial products and certain forms of remuneration.[38] Issues related to unsolicited contact and remuneration were central in many of the case studies examined by the Financial Services Royal Commission.[39]

49. For these reasons, it is important that general regulatory obligations are prominent and are capable of being as easily understood as possible. Unnecessarily complex legislation in this area, including legislation that is poorly structured or framed, is more likely to lead to non-compliance or a failure to achieve meaningful compliance with the substance and intent of the law. As the Financial Services Royal Commission observed, 'the more complicated the law, the harder it is to see unifying and informing principles and purposes'.[40] Problems in structure and framing also make effective statutory interpretation difficult and can result in legal uncertainty.

50. Many of the problems in the structure and framing of general regulatory obligations are not inevitable. For example, problems are generally not the result of complex policy decisions. Instead, the scattering of provisions and the lack of effective prioritisation of important provisions are examples of unnecessary complexity. This is further illustrated by **Example 4** below. Provisions could be restructured and reframed to express the law more effectively, without changing policy. Indeed, policy objectives such as protecting retail clients and promoting efficient markets are more likely to be achieved in legislation where less complex approaches to structure and framing are adopted.

37 *Corporations Act 2001* (Cth) s 912A.
38 Ibid pt 7.7A div 5 subdiv A, ss 963K, 992A.
39 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 5) 1–2, 13–14.
40 Ibid 44.

Example 4: The regulation of financial services providers

Obligations that apply to all or most financial services providers can be found scattered across Chapter 7 of the *Corporations Act*, in no clearly discernible order or way that communicates the relative importance of different provisions.

For example, various parts and divisions of Chapter 7 contain provisions regulating the conduct of financial services providers, though few of these parts and divisions *only* regulate the conduct of financial services providers. This means users of the legislation may need to read irrelevant provisions in search of the requirements that apply to their circumstances.

In addition to the important requirements contained in several divisions of Part 7.6 of the *Corporations Act* and the more specific regulatory regimes in Parts 7.7, 7.7A, and 7.9, AFS Licensees will find obligations spread throughout Parts 7.8 and 7.10. Parts 7.8 and 7.10 do not assist users by prioritising important requirements. For example, the prohibition on hawking and the requirement for AFS Licensees to give priority to clients' orders appear in the final two divisions of Part 7.8, in divisions labelled 'Other rules about conduct' and 'Miscellaneous'.

51. **Proposals C7** and **C8** would see the creation of two chapters containing generally applicable obligations of financial services providers, and related detail not appropriate for delegated legislation.[41] These coherently grouped chapters would improve navigability and ease of understanding, particularly for AFS Licensees who presently must look across dozens of widely separated provisions of Chapter 7 of the *Corporations Act*. Chapter 5 of Interim Report C discusses in more detail the range of provisions that would fall within **Proposals C7** and **C8**, as well as their allocation between the respective legislative chapters.

52. **Proposals C7** and **C8** would be most effective if implemented alongside **Proposal C1**, relating to the creation of a chapter focused on consumer protection. Structuring generally applicable consumer protections and general regulatory obligations across three legislative chapters would more clearly communicate the relative significance and application of provisions in the respective chapters.

A Financial Services Law

53. The ALRC proposes that financial services legislation should be restructured and reframed in a way that creates a clear home and legislative identity for the regulation of financial services. In summary, the ALRC proposes that the financial services-related aspects of Chapter 7 of the *Corporations Act* and the entirety of

41 Interim Report B discussed the circumstances in which it is appropriate for matters to appear in delegated legislation: Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.48]–[3.73], [4.5]–[4.7].

Part 2 Div 2 of the *ASIC Act* be grouped in a single location (**Proposal C9**). The ALRC suggests that location should be a schedule to the *Corporations Act* (**Proposal C10**), in a similar manner to the *Australian Consumer Law*.[42] The schedule should be known as the Financial Services Law (referred to throughout Interim Report C and this Summary Report as the 'FSL Schedule').

54. The present constitutional foundation of the *Corporations Act* limits the possible forms that a restructured and reframed Chapter 7 of the Act may take, including by preventing the creation of a standalone financial services Act.[43] The ARLC suggests that using a schedule to the *Corporations Act* is preferable compared to other options within existing constraints. The FSL Schedule could be enacted as Sch 1 to the *Corporations Act*.[44]

55. The FSL Schedule should provide a 'one-stop shop' for the primary legislation that regulates financial products and financial services, with the exclusion of those aspects of Chapter 7 of the *Corporations Act* that relate more closely to the regulation of financial markets (such as the licensing and supervision of financial markets). The FSL Schedule would therefore contain provisions that are equivalent to much of the current Chapter 7 of the *Corporations Act*, including those discussed in Chapters 2–5 of Interim Report C. The FSL Schedule would also integrate and replace the consumer protection provisions contained in Part 2 Div 2 of the *ASIC Act*.

56. Appendix D to Interim Report C contains an indicative outline of how the FSL Schedule could be structured, in accordance with the principles for structuring and framing legislation outlined in **Proposal C14**.[45] Throughout Interim Report C, this is referred to as the 'illustrative FSL Schedule'. The illustrative FSL Schedule does not exhaustively replicate the existing law in a new structure. Instead, it uses an outline to show how a schedule to the *Corporations Act* might appear and how restructuring would provide an opportunity to significantly improve the existing legislation. **Table 1** provides an overview of the illustrative FSL Schedule at chapter level.

42 The *Australian Consumer Law* appears in Sch 2 to the *Competition and Consumer Act 2010* (Cth).

43 See Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [108]–[116], [168].

44 The *Corporations Act* has never contained a schedule numbered one. Upon enactment in 2001, the *Corporations Act* contained only Schs 2–4. The earlier *Corporations Act 1989* (Cth) included a Sch 1.

45 Appendix D to Interim Report C may also be downloaded as a standalone document on the ALRC website: Australian Law Reform Commission, 'Illustrative FSL Schedule (Appendix D to Interim Report C)' <www.alrc.gov.au/wp-content/uploads/2023/05/Illustrative-FSL-Schedule.pdf>.

Table 1: Overview of the illustrative FSL Schedule

Schedule 1—The Financial Services Law
Chapter 1—Introduction and application
Chapter 2—Consumer protections and generally applicable offences
Chapter 3—Obligations of financial services providers
Chapter 4—Disclosure about financial products and financial services
Chapter 5—Financial advice
Chapter 6—Financial services licensees and representatives
Chapter 7—Ministerial and ASIC powers
Chapter 8—Dictionary

57. The ALRC invites stakeholder feedback on the structure adopted in the illustrative FSL Schedule in response to **Question C11**. Several of the design choices that underpin the illustrative FSL Schedule are explained in further detail in Chapter 6 of Interim Report C.

Implementation

58. Chapter 7 of Interim Report C discusses how the reforms to financial services legislation proposed by the ALRC could be implemented. In part, the purpose of the chapter is to respond to stakeholders' desire for further detail about implementation. Canvassing issues relating to implementation in Interim Report C provides an opportunity for further stakeholder feedback in advance of the Final Report.

59. The ALRC's suggested approach to implementation seeks to provide a realistic roadmap for reform, identifying targeted and staged reforms that successive Parliaments and governments may take forward. The approach also attempts to learn from the successes and challenges of previous reform programs.[46]

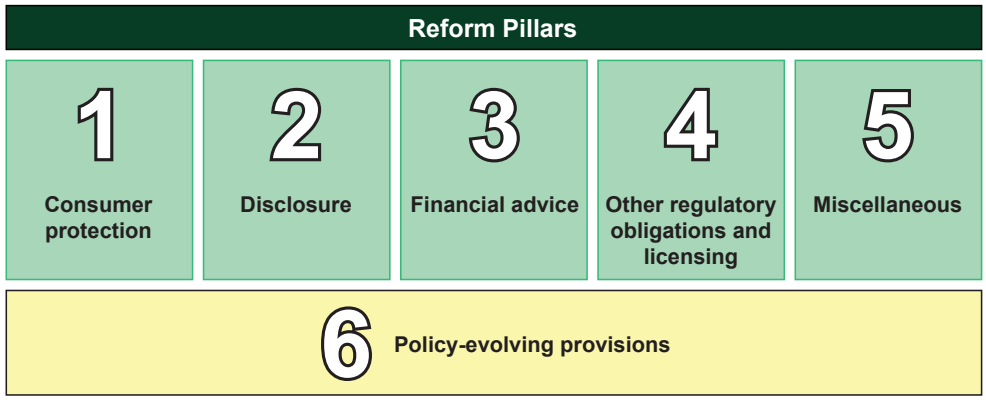
60. The ALRC has developed a reform roadmap based around six reform pillars, as illustrated in **Figure 1** below. The first four pillars cover the provisions relating to consumer protection, disclosure, financial advice, and general regulatory obligations discussed above.[47] These pillars include the most significant, policy sensitive, and complex financial services provisions of Chapter 7 of the *Corporations Act*. Pillar Five covers financial services-related provisions not covered by other pillars. Pillar Six

46 For example, the ALRC has had regard to the Corporations Law Simplification Program (1993), the Taxation Laws Improvement Project (1994), and the Corporate Law Economic Reform Program (1997). Similarly, the ALRC examined the private health insurance reforms that resulted in the *Private Health Insurance Act 2007* (Cth) and the rewrite of the *Social Security Act 1947* (Cth) that resulted in the *Social Security Act 1991* (Cth).

47 See **Proposals C1–C8** and Chapters 2–5 of Interim Report C.

reflects the possibility that policy initiatives may result in new or amended provisions, which could be implemented using the proposed legislative model and consistently with the ALRC's proposed principles for structuring and framing legislation.[48] Each pillar is discussed in further detail in Chapter 7 of Interim Report C.

Figure 1: Reform roadmap



61. Different governments may choose to prioritise different reform pillars. 'Policy-evolving provisions' allow for the fact that government will continue to undertake new policy initiatives. These would not disrupt implementation of the reform package and instead offer an avenue through which government may implement the ALRC's proposed principles for structuring and framing provisions and the proposed legislative model.

62. To ensure appropriate oversight of reforms arising out of this Inquiry, the ALRC proposes that reforms should be led by dedicated reform taskforces. Reflecting the fact that reform pillars may require different expertise and input, as well as the potential change of focus brought about by changes in government, **Proposal C12** recognises that there may be one or more differently composed taskforces during the reform process. The Australian Government would set the terms of reference for these taskforces. The principal responsibility of the taskforces would be to oversee the implementation of reforms, including how to do so most efficiently.

63. To assess the effectiveness of reforms arising out of this Inquiry, **Proposal C13** suggests that a requirement for post-enactment review should be built into the FSL Schedule implemented under **Proposals C9** and **C10**. As discussed in Background Paper FSL8, post-enactment review can help improve the quality of legislation and ensure that lessons are learned from reform efforts.[49]

48 See Chapter 9 of Interim Report C.

49 Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, May 2023) [1]–[3]. See also Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [5.26].

64. Post-enactment review could assess whether, and the extent to which, the reformed legislation produces an adaptive, efficient, and navigable legislative framework for the regulation of financial services (as contemplated by the Terms of Reference for this Inquiry).[50] Aided by stakeholder input, a review could also examine the extent to which the anticipated benefits arising from reform have been achieved.

65. Chapter 7 of Interim Report C also discusses the challenges, costs, and benefits of reform. In particular, it discusses the ways in which legislative complexity contributes to compliance costs, the costs of non-compliance, and the costs of enforcement.

66. The impact of legislative complexity on compliance costs is well-recognised. For example, over 20 years ago, Professor Ramsay noted that complexity can

> lead to inefficiency with respect to the costs of obtaining advice in order to comply with the complex requirements and also the opportunity costs involved in the time and energy devoted to compliance with the requirements.[51]

67. While there is little data on the costs directly attributable to legislative complexity, the total costs of regulatory compliance are instructive. For example, Macquarie Group Limited, the fifth largest authorised deposit-taking institution in Australia,[52] reported that its 'total regulatory compliance spend' for the full year ending 31 March 2023 was approximately $1 billion.[53] Growth in Macquarie Group Limited's total regulatory compliance spend from the 2018 financial year to the 2023 financial year represented a 19% compound annual growth rate.[54] In the case of Macquarie Group Limited and other similarly regulated entities, these costs would ultimately be borne by customers and shareholders.

68. As the ALRC has previously noted, legislative complexity makes it more difficult to comply with the law. It is 'relatively uncontroversial' that 'the greater the complexity of legislation and the rules that it embodies … the greater the challenges for achieving compliance'.[55] Failures to comply with the law lead to increased expenditure of public resources by way of ASIC investigations and litigation, and by courts in resolving disputes that are the subject of litigation. Ultimately, this also leads to increased costs in defending litigation, paying pecuniary penalties when

50 That assessment could be undertaken by reference to the overarching principles identified by the ALRC in Interim Report A: see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [1.37]–[1.65].

51 Ian Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14(4) *Sydney Law Review* 474, 478–9.

52 This has been determined by reference to total resident assets reported in data published by the Australian Prudential Regulation Authority, as at March 2023: see Australian Prudential Regulation Authority, 'Monthly Authorised Deposit-Taking Institution Statistics' <www.apra.gov.au/monthly-authorised-deposit-taking-institution-statistics>.

53 Macquarie Group Limited, 'Presentation to Investors and Analysts: Result Announcement for the Full Year Ended 31 March 2023' (Presentation, 5 May 2023) 36. This only includes 'direct costs of compliance' and does not include 'indirect costs'.

54 Ibid.

55 Andrew Godwin, Vivienne Brand and Rosemary Teele Langford, 'Legislative Design — Clarifying the Legislative Porridge' (2021) 38 *Company and Securities Law Journal* 280, 281.

contraventions are established, and instituting remediation programs for affected consumers.

69. Data produced by ASIC is informative as to the costs arising from non-compliance. As at 7 February 2023, ASIC reported that $161 million in civil penalties and $1.71 million in criminal penalties had been imposed in cases arising out of the Financial Services Royal Commission.[56] For the calendar year 2022, more general enforcement action by ASIC resulted in the imposition of $222.1 million in civil penalties (which may include civil penalties arising out of the Financial Services Royal Commission imposed during 2022).[57] ASIC has also reported that, as at 30 June 2022, six of 'Australia's largest banking and financial services institutions' had 'paid or offered a total of $3.6 billion in compensation' to customers who suffered loss or detriment as a result of misconduct related to financial advice.[58] According to ASIC, this arose out of two reviews it undertook in 2016 and 2017.[59]

70. Although it is not possible to determine the extent to which contraventions and penalties result from the unnecessary complexity of the legislative framework (as distinct from intentional misconduct on the part of wrongdoers), the complexity of the legislative framework, highlighted by the Financial Services Royal Commission, cannot be ignored.

71. Legislative complexity also makes it more difficult for consumers and investors to understand and enforce their rights. This is particularly problematic in the area of financial services because consumers are intended to have access to the free external dispute resolution services of the Australian Financial Complaints Authority ('AFCA').[60] In the 2021–22 financial year, for example, complaints resolved through AFCA produced approximately $207 million in compensation and refunds.[61] Legislative complexity and increased costs (such as for the provision of legal advice) risk undermining the utility of AFCA's dispute resolution mechanisms, including by potentially deterring consumers from making claims because they cannot identify and understand their rights.

56 Australian Securities and Investments Commission, 'Financial Services Royal Commission: Summary of ASIC Enforcement Action' <https://asic.gov.au/regulatory-resources/regulatory-index/financial-services/financial-services-royal-commission-summary-of-asic-enforcement-action/>.

57 See Australian Securities and Investments Commission, 'Summary of Enforcement Outcomes: January to June 2022' <www.asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/summary-of-enforcement-outcomes-january-to-june-2022/>; Australian Securities and Investments Commission, 'Summary of Enforcement Outcomes: July to December 2022' <www.asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/summary-of-enforcement-outcomes-july-to-december-2022/>.

58 Australian Securities and Investments Commission, 'ASIC update: Compensation for financial advice related misconduct as at 30 June 2022' (Media Release 22-231MR, 24 August 2022).

59 Ibid.

60 Australian Financial Complaints Authority, 'About AFCA' <www.afca.org.au/about-afca>.

61 Australian Financial Complaints Authority, *Annual Review: 2021–22* (2022) 39.

72. Even marginal improvements brought about by legislative reform could produce significant savings in respect of compliance costs, the costs arising from non-compliance, and enforcement costs.

Principles for structuring and framing legislation

73. The ALRC's proposals for restructuring and reframing financial services legislation are underpinned by the principles outlined in **Proposal C14** and discussed in Chapter 9 of Interim Report C. In accordance with the Terms of Reference for Interim Report C, the principles discussed are those most relevant to the structure and framing of corporations and financial services legislation. Nonetheless, the principles are broadly applicable, and could inform the design of other Commonwealth legislation.[62]

74. The ALRC suggests that the key objective when designing legislation should be to ensure that it is as easy to navigate and understand as possible, consistent with the underlying policy objectives pursued by the legislation.

75. That objective may appear to some people as so obvious or general as to be unhelpful. After all, who would argue that legislation should be unnavigable or incomprehensible? However, the ALRC has sought to articulate a single, clear objective in designing legislation — one that fuses the objectives of implementing policy and crafting legislation that is as easy to navigate and understand as possible. The objective therefore puts both policy and the interests of users at the core of the legislative design process. The objective seeks to challenge a potential dichotomy or trade-off between either:

- legislation that can be navigated and understood; or
- legislation that is legally accurate or precise.[63]

76. Although the ALRC suggests there is no dichotomy between more 'navigable and comprehensible' legislation and more 'effective' legislation, unrealistic timeframes and resource constraints can create pressure to focus on a narrow conception of legal effectiveness. Ministers or policy instructors may impose timelines on the design and drafting of legislation, and these can be short relative to the scale of the

62 These principles have been developed from a review of existing guidance published by various drafting offices both in Australia and internationally, judicial and academic commentary, the current structure and framing of Commonwealth legislation, explanatory materials and literature produced as part of efforts to simplify Commonwealth legislation, and views expressed to the ALRC by stakeholders in submissions and consultations.

63 The apparent dichotomy between comprehensible and precise legislation has also been criticised by former Commonwealth First Parliamentary Counsel, Ian Turnbull KC: see Ian Turnbull, 'Plain Language and Drafting in General Principles' [1995] *The Loophole* 25, [18]–[19].

legislative project. In Interim Report B, the ALRC examined how short timelines for designing and drafting legislation can significantly affect an Act's quality.[64]

77. The principles for restructuring and framing legislation outlined in **Proposal C14** all seek to achieve the legislative design objective outlined above. They are not 'rules' because they may be relaxed, modified, or traded off in certain circumstances to best achieve the legislative design objective. There are numerous principles that can help in practice, but important among them are:

- provisions should be designed in a way that minimises duplication and overlap (consolidation);
- like provisions should be proximate to one another (grouping); and
- the most significant provisions and details should precede less significant provisions or more technical provisions (prioritisation).

78. These principles operate alongside other principles — including coherence, intuitive flow, and succinctness — so as to help users develop and maintain mental models of legislation. Mental models provide the foundation for how humans understand and navigate the world. Good mental models give users a 'structure to the apparent randomness' of the law, which enables users to navigate and understand provisions more easily.[65]

79. The following example of the fictional *Milk Act* illustrates how applying these principles can significantly improve the readability and comprehensibility of legislation. The fictional provision is deliberately drafted to highlight several poor design choices — thankfully, no legislative provision would be drafted so as to suffer all these problems simultaneously.[66]

64 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.49]–[6.57].

65 Donald A Norman, *The Design of Everyday Things* (Basic Books, 2013) 247. Norman was writing in relation to general design issues, rather than the law specifically.

66 For an example of particularly poor structure and framing, see *Instruments Act 1958* (Vic) s 31.

Example 5: Poor structure and framing

Section 20 Regulation of Milk Carriers

The Minister may, by legislative instrument, make rules (the Milk Carrier rules). The Milk Carrier rules may provide for: the times at which milk may be delivered; the permitted types of milk for delivery; the minimum age of Milk Carriers; the means by which Milk Carriers may make delivery; and any other matters that the provisions of this Act provide may be dealt with in the Milk Carrier rules. A Milk Carrier licensee must comply with the Milk Carrier rules. A person may sell milk without a Milk Carrier licence if they sell the milk in the course of carrying on a small business. A person must not sell milk unless they hold a Milk Carrier licence. A person may apply for a Milk Carrier licence by lodging an application with the Milk Operations Office (the MOO). A person must not hold out that they have a Milk Carrier licence if that is not the case. A person commits an offence, subject to a penalty of $1,000,000 or 15 years imprisonment, or both, if they do not comply with this section.

80. Only a patient and committed reader would make it to the end of s 20 of the *Milk Act*. The section has several problems, outlined below.

- **It fails to prioritise information for users**: The obligations and offences that appear at the end of s 20 are more important than the Ministerial power to create rules and the process for obtaining a licence.
- **It lacks thematic consistency**: The provision covers the making of rules by the Minister, compliance with the rules by Milk Carrier licensees, licensing requirements and processes, and prohibitions on claiming to hold a licence if a person does not in fact have one.
- **It lacks an intuitive order**: The section goes from specific provisions that only apply to the Minister (making rules) and Milk Licensees (compliance with the rules) to the general provisions that apply to all persons (requirements to hold a licence and the prohibition on holding out). The exemption from the requirement to hold a Milk Carrier licence appears before the obligation to hold such a licence.
- **The framing of the provision means the law is not expressed clearly and coherently**: Section 20 is 181 words long and is comprised of eight sentences, the longest of which contains 57 words. It includes no sub-provisions to break up conceptually distinct elements of the section.
- **It lacks any aids for users**: The provision has no useful headings, notes, or subsections to help with referencing, or white space to assist users in processing the information.

81. The poor structure and framing of s 20 of the *Milk Act* in **Example 5** make it difficult to read, understand, and act upon. The provision's complexity comes largely

from its structure and framing, rather than its substance. Consider how much simpler the provision is when restructured and reframed in **Example 6** below, using similar wording.

Example 6: Good structure and framing

Part 2—Obligations on persons selling milk

Section 20 Sellers of milk must be licensed

(1) A person commits an offence if:

(a) the person sells milk; and

(b) the person does not hold a Milk Carrier licence.

Maximum criminal penalty: Imprisonment for 15 years or $1,000,000, or both.

Note: The procedures for obtaining a Milk Carrier licence appear in section 43 of this Act. ***Milk*** is defined in section 8 of this Act.

Exemption where milk seller is a small business

(2) Subsection (1) does not apply to a person selling milk in the course of carrying on a small business.

Section 21 Prohibition on holding out that a person is licenced

(1) A person must not hold out that they have a Milk Carrier licence if that is not the case.

Offence

(2) Failure to comply with subsection (1) is an offence.

Maximum criminal penalty: Imprisonment for 15 years or $1,000,000, or both.

Section 22 Compliance with the Milk Carrier rules

(1) A Milk Carrier licensee must comply with the Milk Carrier rules.

Note: The Milk Carrier rules are made under section 23. The rules are published as a legislative instrument available at www.legislation.gov.au.

Offence

(2) Failure to comply with subsection (1) is an offence.

Maximum criminal penalty: Imprisonment for 15 years or $1,000,000, or both.

Section 23 Minister may make Milk Carrier rules

(1) The Minister may, by legislative instrument, make rules (the ***Milk Carrier rules***).

(2) The Milk Carrier rules may provide for the following:

(a) the times at which milk may be delivered;

(b) the permitted types of milk for delivery;

(c) the minimum age of Milk Carriers;

(d) the means by which Milk Carriers may make delivery; and

(e) any other matters that the provisions of this Act provide may be dealt with in the Milk Carrier rules.

…

Part 4 Obtaining a Milk Carrier licence and other licences

Section 43

A person may apply for a Milk Carrier licence by lodging an application with the Milk Operations Office (the ***MOO***).

TECHNICAL SIMPLIFICATION: PENALTY PROVISIONS

82. Chapter 10 of Interim Report C focuses on clarifying penalty provisions in corporations and financial services legislation. Chapter 10 contains four recommendations (**Recommendations 20–23**) that relate to how offence and civil penalty provisions may be made more transparent, and one proposal (**Proposal C15**) relating to infringement notice provisions.

83. Similar to the proposals and recommendations in Chapters 7–9 of Interim Report B, the proposal and recommendations in Chapter 10 of Interim Report C focus on discrete improvements that could be implemented alongside, or independently of, other reforms. Nonetheless, the proposal and recommendations reflect the principles for structuring and framing legislation discussed in Chapter 9 of Interim Report C. In particular, they seek to consolidate provisions so that users of the legislation no longer need to consult multiple provisions to identify and understand penalty provisions.

84. **Recommendations 20–23** formalise Proposals B17 and B18 in Interim Report B, which suggested that:

- each offence and civil penalty provision in corporations and financial services legislation, and the consequences of any breach, should be identifiable from the text of the provision itself; and
- offence provisions in corporations and financial services legislation should be amended to specify any applicable fault element.

85. Submissions to Interim Report B expressed overwhelming support for Proposals B17 and B18.[67] **Recommendations 20–23**, and the design approaches they adopt, are important for making the law easier to navigate and understand. Allowing users of legislation to identify penalty provisions, and related penalties, from the text of the provisions themselves will make understanding the consequences of breaching these provisions simpler. Some complexity will remain, however, where alternative penalties are available.

86. **Proposal C15** extends this same logic to infringement notice provisions. Corporations and financial services legislation does not clearly and consistently identify infringement notice provisions. There are several ways the text of provisions could be used to identify the power to issue infringement notices. These include:

67 Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023) [7] (Figure 1).

- with the words ‘infringement notice’ at the foot of the provision, and with the value of any applicable penalty, expressed as one or more amounts in penalty units;
- with a note explaining that the provision is subject to an infringement notice; or
- with a sub-provision, such as a subsection, providing that the provision is subject to an infringement notice.

87. Infringement notice provisions should be clearly identifiable given their importance as an enforcement mechanism and as an element of the ‘regulatory pyramid’, including as part of dual- or triple-track approaches to regulation in which contraventions may be offences, civil penalties, or subject to infringement notices.[68]

68 See Australian Law Reform Commission, *Corporate Criminal Responsibility* (ALRC Report No 136, 2020) [5.24]–[5.26].

APPENDIX A TERMS OF REFERENCE

Review of the Legislative Framework for Corporations and Financial Services Regulation

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

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

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

A. The use of definitions in corporations and financial services legislation, including:

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

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

- how legislative complexity can be appropriately managed over time;
- how best to maintain regulatory flexibility to clarify technical detail and address atypical or unforeseen circumstances and unintended consequences of regulatory arrangements; and
- how delegated powers should be expressed in legislation, consistent with maintaining an appropriate delegation of legislative authority.

INTERIM REPORT C

C. How the provisions contained in Chapter 7 of the *Corporations Act 2001* (Cth) and the *Corporations Regulations 2001* (Cth) could be reframed or restructured so that the legislative framework for financial services licensing and regulation:

- is clearer, coherent and effective;
- ensures that the intent of the law is met;
- gives effect to the fundamental norms of behaviour being pursued; and
- provides an effective framework for conveying how the law applies to consumers and regulated entities and sectors.

Scope of the reference

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

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

Consultation

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

Timeframe for reporting

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

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

This Summary Report reflects the law as at 1 May 2023.

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

ALRC publications are available to view or download free of charge on the ALRC website: www.alrc.gov.au/publications. If you require assistance, please contact the ALRC.

ISBN: 978-0-6453501-5-9

Commission Reference: ALRC Report 140, 2023

Printed by Fineline Print & Copy Service, NSW

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