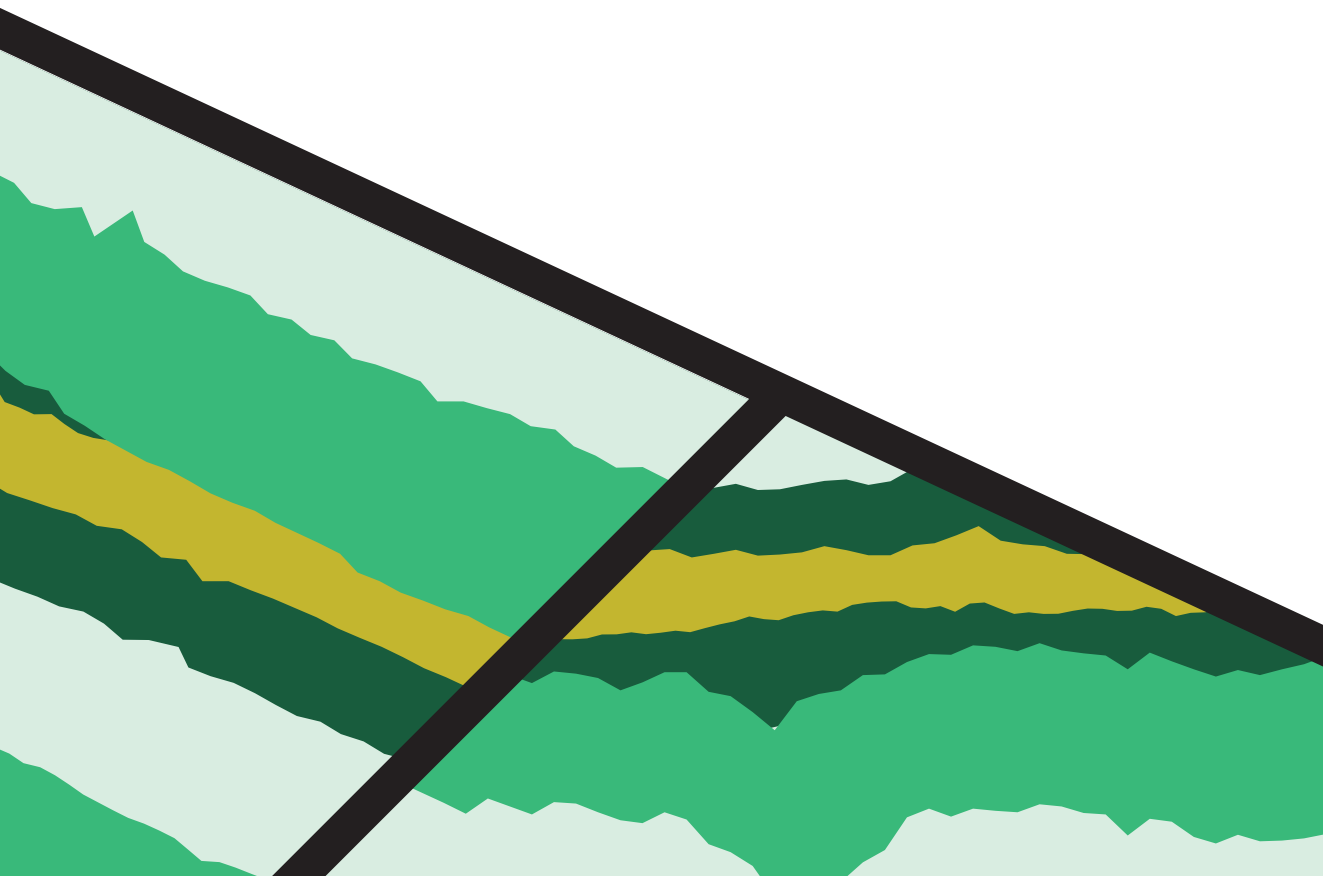
Australian Government
Australian Law Reform Commission

INTERIM REPORT C

FINANCIAL SERVICES LEGISLATION

ALRC Report 140
June 2023



Australian Government

Australian Law Reform Commission

INTERIM REPORT C

FINANCIAL SERVICES LEGISLATION

ALRC Report 140

June 2023

This Interim 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).

The office of the ALRC is at Level 4, Harry Gibbs Commonwealth Law Courts Building, 119 North Quay, Brisbane QLD 4000.

Postal Address:

PO Box 12953,
George Street Post Office QLD 4003

Telephone: within Australia (07) 3052 4224

International: +61 7 3052 4224

Email: info@alrc.gov.au

Website: www.alrc.gov.au

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: 978-0-6453501-4-2

Commission Reference: ALRC Report 140, 2023

© Commonwealth of Australia 2023

This work is copyright. You may download, display, print and reproduce this material in whole or part, subject to acknowledgement of the source, for your personal, non-commercial use or use within your organisation. Requests for further authorisation should be directed to the ALRC.

Printed by Fineline Print & Copy Service, NSW

Australian Government

Australian Law Reform Commission

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

1 June 2023

Dear Attorney-General

Review of the Legislative Framework for Corporations and Financial Services Regulation

On 11 September 2020, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into simplification of the legislative framework for corporations and financial services regulation. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996* (Cth), I am pleased to present you with the third Interim Report on this reference (ALRC Report 140, 2023).

Yours sincerely

The Hon Justice Mark Moshinsky

Acting President

Contents

Terms of Reference

Review of the Legislative Framework for Corporations and Financial Services Regulation

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

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

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

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

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

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

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

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

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

Scope of the reference

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

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

Consultation

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

Timeframe for reporting

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

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

Participants

Australian Law Reform Commission

President (A/g)

The Hon Justice M K Moshinsky, Federal Court of Australia (from January 2023)

President

The Hon Justice S C Derrington AM, Federal Court of Australia (until January 2023)

Part-time Commissioners

The Hon Justice C G Colvin, Federal Court of Australia

The Hon Justice J E Middleton AM, Federal Court of Australia (until December 2022)

General Counsel (A/g)

Dr Andrew Godwin *BA (Hons) LLB (Hons) LLM PhD (Melb). Admitted as an Australian Lawyer in the Supreme Court of Victoria, and as a Solicitor (practising) of the Senior Courts of England and Wales. Principal Fellow, Melbourne Law School, University of Melbourne.*

General Counsel

Matt Corrigan *BA (Hons I) LLB (Hons) (Melb), LLM (International Law) (Merit) (ANU), MAICD. Admitted as an Australian Lawyer in the Supreme Court of Victoria* (until March 2023).

Principal Legal Officer

Christopher Ash *BA LLB (Hons I) (Qld), BCL (Dist) (Oxon), GDLP (College of Law). Admitted as an Australian Lawyer in the Supreme Court of Queensland.*

Senior Legal Officers

Dr William Isdale *BA LLB (Hons) PhD (Qld), GDLP (ANU). Admitted as an Australian Lawyer in the Supreme Court of Queensland. Adjunct Fellow, TC Beirne School of Law, University of Queensland* (until March 2023).

Nicholas Simoes da Silva *BIR LLB (Hons I) GDLP (ANU). Admitted as an Australian Lawyer in the Supreme Court of the Australian Capital Territory.*

Legal Officers

Cindy Davies *BA (Rhodes College), MSHA/MBA (UAB), JD (UT). Admitted as a Legal Practitioner in the Supreme Court of Tennessee and as an Australian Lawyer in the Supreme Court of Queensland* (until February 2023).

Ellie Filkin *BA LLB (Hons I) (Monash)*.

Vannessa Ho *BIGS (USyd), JD GCPLP (UTS), MRes (MQ). Admitted as an Australian Lawyer in the Supreme Court of New South Wales* (from April 2023).

Research Associates

Hannah Coffey *BIR (La Trobe), JD (Dist) (RMIT)* (from April 2023).

Vien Siu *BCom (Dist) LLB (Hons 1) (NSW)* (October 2022 to February 2023).

Jonna-Susan Mathiessen *LLB (UOW), GDLP (ANU). Admitted as an Australian Lawyer in the Supreme Court of New South Wales* (until December 2022).

Executive Support Officer

Andrea Compston (from February 2023).

Claudine Kelly (until January 2023).

External Consultants

Technical Advisor: Legislative Drafting

Thomas Reid BA (Hons I) LLB (Hons I) (Melb). Admitted as an Australian Lawyer in the Supreme Court of Victoria.

Law Students

Melbourne University Students

Finn Jackson

Joanne Ng

Monash University Students

Andrew Attard

Hailey Holloway

Lachlan McNeary

Juanita Ravanal

Darcy Roma

Olivia Sasse

Advisory Committee

Professor Elise Bant, University of Western Australia

Mr Alan Cameron AO, Legal Services Council

Ms Shannon Finch, Westpac Group

Dr Andrew Godwin, University of Melbourne

The Hon Kenneth Hayne AC KC

Ms Bronwyn Livermore, Office of Parliamentary Counsel (Cth)

Mr Joseph Longo, Australian Securities and Investments Commission

Mr Trevor Power, Department of the Treasury (Cth) (from March 2023)

Mr Anthony Seebach, Department of the Treasury (Cth)

Mr Mark Steward, Financial Conduct Authority (UK)

The Hon Justice Julie Ward, Court of Appeal, Supreme Court of New South Wales

Expert Readers

Emeritus Professor Stephen Bottomley

Associate Professor Scott Donald

Professor Pamela Hanrahan

Ms Michelle Levy

Dr Emily Millane

Professor Jeannie Marie Paterson

Mr Peter Quiggin PSM KC

Mr Laurence White

Acknowledgements

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

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

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

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

List of Recommendations

Chapter 10 Penalty Provisions

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.

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.

List of Proposals and Questions

Chapter 2 Consumer Protection

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.

Chapter 3 Disclosure

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’.

Chapter 4 Financial Advice

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.

Chapter 5 General Regulatory Obligations

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.

Chapter 6 A Financial Services Law

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).

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?

Chapter 7 Implementation

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.

Chapter 9 Principles for Structuring and Framing Legislation

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**).

Chapter 10 Penalty Provisions

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

List of Background Papers

Background Paper Number	Title	Date
FSL1	**Initial Stakeholder Views**	June 2021
FSL2	**Complexity and Legislative Design**	October 2021
FSL3	**Improving the Navigability of Legislation**	October 2021
FSL4	**Historical Legislative Developments**	November 2021
FSL5	**Risk and Reform in Australian Financial Services Law**	March 2022
FSL6	**Reflecting on Reforms – Submissions to Interim Report A**	May 2022
FSL7	**New Business Models, Technologies, and Practices**	October 2022
FSL8	**Post-Legislative Scrutiny**	May 2023
FSL9	**All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law**	December 2022
FSL10	**Reflecting on Reforms II – Submissions to Interim Report B**	January 2023
FSL11	**Superannuation and the Legislative Framework for Financial Services**	May 2023

Glossary

AFCA	Australian Financial Complaints Authority
AFS Licence	Australian financial services licence (*Corporations Act 2001* (Cth) s 761A)
AFS Licensee	Holder of an Australian financial services licence
AFSL regime	Australian financial services licensing regime
ALRC	Australian Law Reform Commission
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
Australian Consumer Law	*Competition and Consumer Act 2010* (Cth) sch 2
Corporations Act	*Corporations Act 2001* (Cth)
Corporations Regulations	*Corporations Regulations 2001* (Cth)
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
FSG	Financial Services Guide
FSL Schedule	Proposed Financial Services Law in Sch 1 to the *Corporations Act 2001* (Cth), discussed in **Chapter 6** of this Interim Report
FSR Act	*Financial Services Reform Act 2001* (Cth)
illustrative FSL Schedule	Illustrative outline of the proposed Financial Services Law in Sch 1 to the *Corporations Act 2001* (Cth), contained in **Appendix D** to this Interim Report
ITA Act 1997	*Income Tax Assessment Act 1997* (Cth)
NCCP Act	*National Consumer Credit Protection Act 2009* (Cth)
OPC	The Office of Parliamentary Counsel (Cth), the agency responsible for drafting Commonwealth laws, publishing the authorised and up-to-date version of Commonwealth laws, and maintaining the Federal Register of Legislation
PDS	Product Disclosure Statement
Private Health Insurance Act	*Private Health Insurance Act 2007* (Cth)

Prototype Legislation B	Prototype legislative drafting available on the ALRC website, prepared for the purposes of Interim Report B
SIS Act	*Superannuation Industry (Supervision) Act 1993* (Cth)
SoA	Statement of Advice
Treasury	Department of the Treasury (Cth)
UK	United Kingdom

Figures and Tables

Figures

Tables

1. Introduction

Contents

Overview

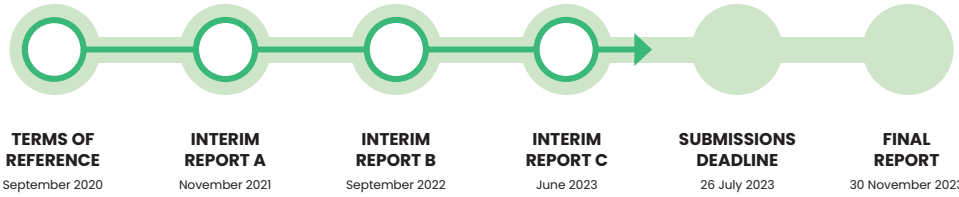
Scope of this Interim Report

1.1 The focus of this Interim Report is on how legislation is structured and framed. Structure and framing are closely related to the aims of achieving 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, this Interim Report explains why they are important for making the law navigable and comprehensible.

1.2 This Interim Report 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* and the *Corporations Regulations*.

1.3 The ALRC seeks written submissions in response to the proposals and question contained in this Interim Report until **26 July 2023**. 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. This Interim Report also includes recommendations that are in a form able to be considered for immediate or staged implementation as appropriate.

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



Making a Submission

1.4 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 this Interim Report); and
- one proposal relating to the principles that should be applied when structuring and framing corporations and financial services legislation.

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

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

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

Consultation

1.8 For the purposes of this Interim Report and subsequent to publishing Interim Report B, the ALRC has undertaken 36 consultations (meetings and roundtables on an individual and group basis) with various organisations and individuals, including: key participants in the financial services industry, government agencies, the legal profession, consumer groups, and academics.

1.9 **Appendix A** to this Interim Report provides an outline of the consultations conducted from September 2022 to April 2023.

Maintaining the impetus for reform

1.10 This Inquiry has come at a critical juncture. The Financial Services Royal Commission found that the existing legislative framework for corporations and financial services regulation is unnecessarily complex, fails to communicate fundamental norms, and hinders compliance.[2]

1.11 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.

1.12 The support for simplification is significant.[3] 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 this Interim Report explains how poor structure and framing create complexity and impede the effectiveness of legislation. Stakeholders have also observed to the ALRC that complexity in the current legislative framework has created unnecessary costs. **Chapter 7** of this Interim Report 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.[4] Unavoidably, this increases the time and resources required to comply with the law.
- 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 non-compliance and enforcement. 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 can mean that they do not exercise their rights at all, despite the existence of free processes for internal and external dispute resolution.

---

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

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

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

1.13 The existing complexity of corporations and financial services legislation also provides a poor platform from which to undertake future policy reforms. As the legislation nonetheless continues to be amended, the level of complexity will only continue to grow in the coming years. The sooner reforms can be made to the regulatory architecture, 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 outlined above will endure, and may rise.

1.14 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 this Interim Report responds to those issues by setting out in detail how the reforms proposed by the ALRC may be implemented.

Context

1.15 This is the third interim report that responds to Terms of Reference received on 11 September 2020, which asked the ALRC to consider whether the *Corporations Act* and the *Corporations Regulations* could be simplified and rationalised, particularly in relation to:

- the use of definitions in corporations and financial services legislation (Topic A);
- the coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards (Topic B); and
- how the provisions contained in Chapter 7 of the *Corporations Act* and the *Corporations Regulations* could be reframed or restructured (Topic C).[5]

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

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

---

5 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).

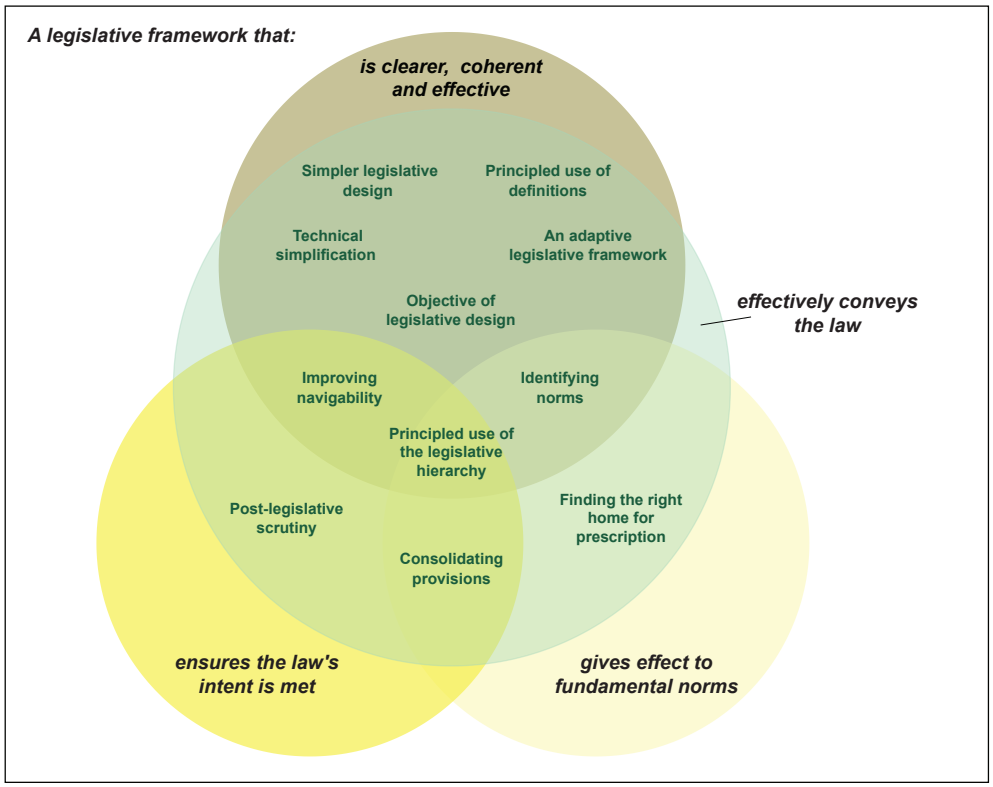
How the provisions contained in Chapter 7 of the *Corporations Act 2001* (Cth) and the *Corporations Regulations 2001* (Cth) could be reframed or restructured so that the legislative framework for financial services licensing and regulation:

- 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.

1.18 Much of the work undertaken by the ALRC to date, including in Interim Report A, Interim Report B, and numerous Background Papers,[6] is relevant to the Terms of Reference in respect of Topic C. This is illustrated by **Figure 1.1** below, with reference to key themes identified by the ALRC.

6 The ALRC has published the following Background Papers: Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021); Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021); Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021); Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021); Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022); Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022); Australian Law Reform Commission, 'New Business Models, Technologies, and Practices' (Background Paper FSL7, October 2022); Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, May 2023); Australian Law Reform Commission, 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law' (Background Paper FSL9, December 2022); Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023); Australian Law Reform Commission, 'Superannuation and the Legislative Framework for Financial Services' (Background Paper FSL11, May 2023).

Figure 1.1: Interim Report C and work undertaken to date



1.19 In line with the Terms of Reference, the focus of this Interim Report is on the regulation of financial services in Chapter 7 of the *Corporations Act* and the *Corporations Regulations*. The Interim Report does not engage with the restructuring or reframing of either the *Corporations Act* as a whole or other pieces of legislation, except to the extent that this is necessary for the purpose of restructuring or reframing Chapter 7.

Interim Report A: Principles

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

7 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [1.37]–[1.65].

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

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

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

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

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

1.21 The proposals and question in this Interim Report speak to the following overarching principles:

Proposals/Questions	Principles
Proposals C1–C8 in respect of restructuring and reframing provisions of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*	Principles One, Two, Three, and Four
Proposals C9–C10 and **Question C11** in respect of creating a schedule to the *Corporations Act* to be known as the Financial Services Law	Principles One, Two, Three, and Four
Proposals C12–C13 in respect of implementing and assessing reforms to financial services legislation	Principles One, Two, Three, Four, and Five
Proposal C14 in respect of principles for structuring and framing corporations and financial services legislation	Principles One, Two, Three, and Four
Recommendations 20–23 and **Proposal C15** in respect of clarifying penalty provisions	Principles One, Three, and Four

Key Concepts

The structure and framing of legislation

1.22 The Terms of Reference for this Interim Report direct the ALRC to consider how the provisions of Chapter 7 of the *Corporations Act* and the *Corporations Regulations* could be restructured or reframed.[8] But what does the ALRC mean when it refers to the 'structure' and 'framing' of legislation? This section explains these two concepts.

1.23 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, substance, or content of the law, but is concerned with making that substance as easy to navigate and understand as possible, consistent with the policy objectives pursued by the legislation.

1.24 This Interim Report is concerned with structure and framing in their 'horizontal' sense, rather than the vertical structure and framing of legislation. The vertical structure is referred to as the 'legislative hierarchy'[9] and relates to how law should be allocated between primary legislation and delegated legislation, or within 'soft law' such as regulatory guidance. The design of legislative hierarchies was considered in Interim Report B. In summary, a legislative framework will generally comprise:

- the substantive requirements of the legislation, including its fundamental norms, standards, obligations, rules, and other requirements; and
- the legislative architecture in which substantive requirements appear, encompassing the legislative hierarchy and the horizontal design of particular pieces of legislation within each 'layer' of that hierarchy.

What is the 'structure' of legislation?

1.25 The structure of legislation refers to the order in which material and concepts are introduced to readers and other aspects of presentation, such as the use of white space and indentation. In this Interim Report, the ALRC is concerned with the structure of particular pieces of legislation at one level, rather than between levels, of the legislative hierarchy. This is what is meant by the structure of legislation in a horizontal, rather than vertical, sense.

---

8 Throughout this Interim Report, the ALRC uses the term 'provision' to refer to any structural element of legislation. For example, as defined in s 9 of the *Corporations Act*, 'provision' includes: a subsection, section, subdivision, division, part, chapter, schedule, or an item in a schedule. For further discussion of legislative terminology, see ibid 52 (Table 2.1).

9 The concept of a 'legislative hierarchy' was defined in Interim Report A: see ibid [2.133]–[2.162].

1.26 For the purposes of this Interim Report, the ALRC distinguishes between the 'macrostructure' and the 'microstructure' of legislation, each involving different scales of reform. **Table 1.1** provides a snapshot of the types of provisions that constitute the 'macrostructure' and the 'microstructure' of legislation. This section then discusses each concept in further detail.

Table 1.1: Macrostructure and microstructure

Act or legislative instrument	**Macrostructure**
Chapter	
Part	
Division	
Subdivision	
Section	**Microstructure**
Subsection	
Paragraph	
Subparagraph	
Sub-subparagraph	
Sentence	

1.27 The 'macrostructure' encompasses the higher-level structure of a piece of legislation above the section level. Designing the macrostructure involves questions such as:

- How should material be allocated between Acts? Should more material be contained in one Act or would it be better to spread the material among several Acts? What are the constitutional or other constraints that may shape how material is allocated between Acts?
- Where should material be placed in the overall structure of an Act or legislative instrument? For example, where should a specific chapter or part appear relative to other chapters or parts? How should material be allocated to these chapters and parts?
- How should material be structured within particular chapters, parts, divisions, and subdivisions? For example, how should material be allocated within a chapter? Should there be multiple parts with divisions and subdivisions? Or could the material be presented in a larger number of parts that only have sections and no further divisions?

1.28 The 'microstructure' covers the lower-level structure of legislation at the section level and below. Designing the microstructure involves questions such as:

- How should material be allocated between sections? For example, if legislation is to contain an obligation to hold a licence and exemptions from that requirement, how many sections should the information be spread across?
- How should material and concepts be ordered and structured within sections? For example, should an obligation to hold a licence appear before an exemption from holding the licence if they appear in the same section? Should the material be broken down into subsections or paragraphs?
- How should particular components of a section, such as subsections and sentences, be structured? Should a long sentence or one with many clauses be broken up? If so, how should the sentence be structured? Within a subsection or paragraph, is the structure of the provision ordered most appropriately?

1.29 A question that is common to both macrostructure and microstructure is: how should material be presented in a way that maximises readability?

1.30 The concepts of macrostructure and microstructure help in understanding the different reforms that are involved in each type of provision. Targeted improvements can be made to the microstructure without disrupting the overall macrostructure. Reforms to the macrostructure bring greater costs but also potentially greater benefits, as discussed in this Interim Report.

What is the 'framing' of legislation?

1.31 The framing of legislation refers to the broader task of constructing (or conceiving the design of) legislation to ensure it is most effective in communicating with its relevant audience and complies with accepted standards of legislative design. The process of framing legislation includes not only the task of appropriately structuring legislation, but also the other elements of legislation that provide the 'context which shapes the meaning of a communication'.[10]

1.32 In addition to choices as to the structure of legislation, framing is provided by a range of legislative features, including the use and design of headings, simplified outlines, and notes. Aids to interpretation such as these are discussed further in **Chapter 8** of this Interim Report. Other features of legislation, such as consistent approaches to the wording and layout of provisions, also provide framing.

Plain English and legislative design

1.33 In this Interim Report, the ALRC does not generally refer to 'plain' or 'simple' English when suggesting changes to the structure and framing of legislation. The ALRC avoids such references for two reasons. First, OPC has already endorsed the importance of plain English drafting and has done so for decades.[11] This Interim

10 *Macquarie Dictionary* (6th ed, 2013) 'frame' [11].

11 OPC released a Plain English Manual in 1993: Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) 1.

Report therefore does not advocate for any innovations in respect of the use of plain English. Secondly, the ALRC has found it more useful to make targeted proposals related to the structure and framing of legislation than to recommend or endorse any overarching plain English approach.

1.34 Nonetheless, much of the analysis and many of the proposals in this Interim Report have drawn from scholars and agencies that identify with what is sometimes called the 'Plain English movement'. But there are also many other scholars and agencies who have developed and applied useful principles, without explicitly embedding their analysis and principles in the Plain English movement.[12] In this Interim Report the ALRC has sought out pragmatic and implementable principles and ideas, whatever their origin, and conducted its analysis without examining the issues through the lens of any single overarching 'movement' or 'theory'.

Why structure and framing matter

1.35 Clear structure and framing of legislation are key means of ensuring that users can navigate and understand it. As the UK's Report of the Committee on the Preparation of Legislation observed in 1975, a legislative drafter

> can contribute a great deal to comprehensibility by arranging the provisions of a statute logically and orderly, dividing it into parts in some cases and inserting headings, sub-headings and marginal notes … as guide posts.[13]

1.36 As Dr Onoge observes, a good 'design and structure set the tone and communicate the intent as much as the words do'.[14] A good structure, Onoge suggests, 'can help users locate relevant provisions' and improves the 'overall accessibility of the legislation'.[15]

1.37 The Law Commission of New Zealand has observed that 'Acts are easier to use if their provisions are generally arranged according to a logical order'.[16] And as the Final Report of the Inquiry into Legislative Drafting by the Commonwealth found in 1993, a 'considerable body of evidence … identified the importance of presenting material in legislation in a logical order that meets the reader's needs'.[17]

---

12 See, eg, Peter Butt, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge University Press, 3rd ed, 2013).

13 Committee on the Preparation of Legislation (Chaired by Lord Renton), *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (United Kingdom Parliamentary Report, 1975) 65 cited in Krongold (n 4) 511.

14 Elohor Onoge, 'Structure of Legislation: A Paradigm for Accessibility and Effectiveness' (2015) 17(3) *European Journal of Law Reform* 440, 446.

15 Ibid.

16 New Zealand Law Commission, *Legislation Manual: Structure and Style* (Report No 35, May 1996) [16].

17 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth* (September 1993) [7.29].

1.38 At one level, the importance of the objectives discussed in these extracts is clear enough. However, there are three particular reasons why structure and framing are important that are worth outlining in further detail. These relate to:

- the effectiveness of the law;
- the burdens and ease of compliance; and
- the rule of law.

The effectiveness of the law

1.39 As Onoge observes, legislation is 'the framework by which governments achieve their purposes'.[18] Accordingly, Onoge considers that the 'main goal' of legislation is to achieve 'effectiveness', which she defines as

> the extent to which the observable attitude and behaviour of the target population correspond to the attitudes and behaviours prescribed by the legislation.[19]

1.40 Another way of expressing this is that an underlying purpose of legislation is to secure compliance with certain policy and regulatory objectives. Obviously enough, legislation that is easier to navigate and understand — because it is well structured and framed — is more likely to secure that purpose. In other words, as the Final Report of the Inquiry into Legislative Drafting by the Commonwealth considered, a law 'will be most effective if the people to be regulated understand the law'.[20] According to Onoge, the

> effectiveness of the legislation is promoted by the logical organisation of the legislation, which assists users and contributes to the successful communication of the policy intent.[21]

1.41 Even apart from whether legislation is understood by regulated persons or entities, good structure and framing contribute to effectiveness by more clearly communicating the underlying policy intent of the law to those required to interpret and enforce it. In particular, it is imperative that courts interpreting legislation are able to discern the intent and purpose of the law in order to give effect to it. As observed by the High Court, the 'duty of the court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.[22]

1.42 This canon of statutory interpretation is also reinforced, in the context of Commonwealth legislation, by s 15AA of the *Acts Interpretation Act 1901* (Cth), which provides:

---

18 Onoge (n 14) 440.
19 Ibid 442.
20 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (n 17) [6.1].
21 Onoge (n 14) 445.
22 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [78].

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or objective of the Act (whether or not that purpose or objective is expressly stated in the Act) is to be preferred to each other interpretation.

1.43 In attempting to understand the purpose or object of provisions (or an Act as a whole), courts may have regard to the structure of the legislation in question. In other words, the 'purpose of a statute resides in its text *and structure*'.[23] Accordingly, it is desirable that the structure and framing of legislation increase, rather than detract from, the likelihood that courts will be able to accurately determine the intent and purpose of the law in question. A failure to do so may lead to needless litigation or frustrate the intent of Parliament — a failure of 'effectiveness'.

The burdens and ease of compliance

1.44 There are real, and negative, consequences of legislation that is poorly designed and expressed. These failures can make legislation more complex than it needs to be, with flow-on effects for its users. As Dr Isdale and Christopher Ash have noted:

> Complexity matters because it makes the law difficult to understand. In turn, this makes it harder for consumers and their advocates to know their rights and be able to exercise them; for practitioners to be able to advise their clients confidently; for regulated entities to know how to comply with the law; and for regulators to enforce the law. … We all bear the consequences of legislative complexity, including through increased costs for financial products and services, and in publicly funding courts and regulators to wade through the legislative thicket.[24]

1.45 Similarly, the Victorian Law Reform Commission has observed:

> A document that is not readily comprehensible takes longer to understand, is more likely to need a 'translator' and is more likely to be misunderstood. … Poorly drafted Acts and regulations consume the time of those who must administer or comply with them. They reduce the efficiency of administration and of business activity … They waste the time of lawyers and judges.[25]

1.46 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. When legislation does not abide by a coherent structure and clear framing, it imposes burdens of compliance that are greater than necessary.

---

23 *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 [25] (emphasis added).

24 William Isdale and Christopher Ash, 'Undue Complexity in Australia's Corporations and Financial Services Legislation' <www.alrc.gov.au/news/undue-complexity/>.

25 Victorian Law Reform Commission, *Plain English and the Law: The 1987 Report Republished* (2017) [100].

1.47 Moreover, structure and framing of legislation are important for promoting 'meaningful compliance'.[26] As explained by the Financial Services Royal Commission and discussed in Interim Report A, meaningful compliance is about ensuring the intent of the law is met, rather than merely complying with its terms.[27] Meaningful compliance requires legislation that helps users contextualise individual obligations as part of a broader framework for achieving particular standards of behaviour. As this Interim Report shows, structure and framing are essential to communicating the context and purpose of provisions, allowing users to identify and understand the intent of the law. Better structure and framing therefore enable meaningful compliance.

The rule of law

1.48 All legislation should support the rule of law.[28] What the rule of law requires is sometimes contested, but as the Hon Chief Justice JLB Allsop AO has observed, it is commonly agreed that a key thread in the 'fabric of the Rule of Law' is the 'need for the law to be accessible in its coherence and writing'.[29] Lon L Fuller also argued that rules must be 'understandable' if a system of legal rules is to succeed.[30] According to Lord Bingham, the law 'must be accessible and so far as possible intelligible, clear and predictable'.[31] Isdale and Ash have observed that:

> A failure to satisfy that requirement will likely lead to non-compliance with the law (because people will not know the law and/or it will not be effectively enforced), and possibly do injustice in its enforcement (if people cannot reasonably be expected to know its requirements).[32]

1.49 The structure and framing of legislation are important means through which the rule of law can be advanced. Conversely, poorly structured legislation — which is difficult to navigate or understand — is contrary to rule of law values.

---

26 See, eg, Andrew Godwin and Micheil Paton, 'Social Licence, Meaningful Compliance, and Legislating Norms' (2022) 39(5) *Company and Securities Law Journal* 276. In particular, the authors note that 'the complexity of financial services law makes it very difficult to see unifying and informing principles and purposes': ibid 281.

27 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 2) 44, quoting from the submission by the Department of the Treasury (Cth) to the Interim Report of the Royal Commission. Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.24]–[2.27].

28 This is reflected in, for example, overarching Principle One noted above: 'It is essential to the rule of law that the law should be clear, coherent, effective, and readily accessible'.

29 The Hon Chief Justice JLB Allsop AO, 'The Rule of Law Is Not a Law of Rules' (Speech, Annual Quayside Oration, 1 November 2018).

30 Lon L Fuller, *The Morality of Law* (Yale University Press, 1964) 39.

31 Tom Bingham, 'The Rule of Law' (2007) 66(1) *The Cambridge Law Journal* 67, 69.

32 William Isdale and Christopher Ash, 'Legislative Morass and the Rule of Law: A Warning, and Some Possible Solutions' <www.auspublaw.org/2021/05/legislative-morass-and-the-rule-of-law-a-warning-and-some-possible-solutions/>.

Navigating Interim Report C

1.50 This Interim Report is divided into three parts:

- Part One: Restructuring and Reframing Financial Services Legislation;
- Part Two: The Importance of Structure and Framing; and
- Part Three: Technical Simplification.

Part One: Restructuring and Reframing Financial Services Legislation

1.51 Part One comprises **Chapters 2–7**, which directly address the Terms of Reference for Interim Report C by discussing how Chapter 7 of the *Corporations Act* may be restructured and reframed. Part One is underpinned and informed by the problem analysis and principles discussed in Part Two of this Interim Report.

1.52 **Chapters 2–5** focus on how provisions relating to discrete thematic aspects of financial services regulation may be restructured and reframed. In each of **Chapters 2–5**, the ALRC proposes that relevant provisions should be grouped and consolidated so as to create a single chapter (or part within a chapter) of the *Corporations Act* related to each theme.

1.53 **Chapter 2** discusses the range of generally applicable consumer protection provisions that should be grouped and consolidated (**Proposal C1**). **Chapter 2** also contains two proposals (**Proposals C2** and **C3**) relating to the consolidation of existing prohibitions on misleading, deceptive, and unconscionable conduct.

1.54 **Chapter 3** focuses on provisions relating to disclosure for financial products and financial services. It discusses the range of provisions that should be grouped and consolidated in a single chapter (or part within a chapter) of the *Corporations Act* (**Proposal C4**). **Chapter 3** also contains one proposal relating to the incorporation of an outcomes-based standard into the existing disclosure standard for financial products and services (**Proposal C5**).

1.55 **Chapter 4** discusses the range of provisions currently located throughout Chapter 7 of the *Corporations Act* relating to financial advice. The ALRC proposes that they be grouped and consolidated into a single chapter (or part within a chapter) of the *Corporations Act* (**Proposal C6**).

1.56 **Chapter 5** contains two proposals relating to the grouping and consolidation of general regulatory obligations of financial services providers (**Proposals C7** and **C8**). **Chapter 5** complements the discussion in **Chapters 2–4.**

1.57 Building on **Chapters 2–5**, **Chapter 6** discusses how the financial services-related provisions of Chapter 7 of the *Corporations Act* and related provisions, such as Part 2 Div 2 of the *ASIC Act*, may be restructured so as to create a ‘Financial Services Law’ contained in a schedule to the *Corporations Act*

(**Proposals C9** and **C10**). This is referred to throughout this Interim Report as the FSL Schedule. The ALRC seeks feedback from stakeholders on the illustrative FSL Schedule in **Appendix D**, which provides an outline of how the Schedule may be structured (**Question C11**).

1.58 **Chapter 7** discusses how the ALRC's proposed reforms may be implemented, including the proposed legislative model discussed in Interim Report B and the proposals relating to restructuring and reframing financial services legislation discussed in this Interim Report. As noted above, **Chapter 7** also discuses the benefits, costs, and challenges of implementing reform.

Part Two: The Importance of Structure and Framing

1.59 Part Two comprises **Chapters 8** and **9**.

1.60 **Chapter 8** explains why the structure and framing of legislation are important, with particular reference to design issues that appear in Chapter 7 of the *Corporations Act*. This chapter provides the ALRC's problem analysis that underpins the proposals for reform of financial services legislation contained in Part One of this Interim Report.

1.61 By reference to existing legislative drafting guidance and academic commentary, including from comparative jurisdictions, **Chapter 9** of this Interim Report discusses guiding principles for structuring and framing corporations and financial services legislation. These principles inform the proposals for reform contained in Part One.

1.62 **Chapter 9** contains one proposal relating to the principles for structuring and framing legislation identified by the ALRC (**Proposal C14**).

Part Three: Technical Simplification

1.63 Part Three contains **Chapter 10**, which focuses on how penalty provisions in corporations and financial services legislation may be clarified. **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.

PART ONE: RESTRUCTURING AND REFRAMING FINANCIAL SERVICES LEGISLATION

2. Consumer Protection

Contents

Introduction

2.1 In this chapter, the ALRC proposes restructuring and reframing provisions relating to consumer protection in financial services legislation so that they are easier to navigate and understand. The chapter also makes two proposals to specifically restructure and reframe provisions relating to misleading or deceptive conduct and unconscionable conduct.

2.2 This chapter explains how the principles for structuring and framing legislation, discussed in **Chapter 9** of this Interim Report, could be applied to consumer protection provisions. This chapter emphasises the principles of consolidation and prioritisation, thereby highlighting important norms, principles, and other provisions. The principles of coherence and intuitive flow would also improve communication of the law's effect, as well as underpinning a clear mental model of how provisions are located and work together. This mental model would be supported by aids to interpretation such as legislative notes, simplified outlines, and clearer headings.

2.3 This chapter proceeds in four parts. The first part discusses the importance of structure and framing in the context of consumer protection. The second part explains how provisions could be restructured into a new legislative chapter that provides a 'home' for consumer protection provisions. The third part shows how that new legislative chapter may be designed, based on the principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report. The final part examines the possibility of consolidating overlapping product intervention power regimes.

2.4 This chapter refers to the illustrative FSL Schedule in **Appendix D**. The FSL Schedule, explained in **Chapter 6** of this Interim Report, offers one avenue through which a broader restructure and reframing of financial services legislation could be undertaken. However, were the FSL Schedule not adopted, the reforms discussed in this chapter could nonetheless be implemented within the body of the *Corporations Act* as a chapter or part of a chapter.

Terminology

2.5 This chapter distinguishes between two types of existing provisions of the *Corporations Act* and *ASIC Act* that operate for the benefit of consumers of financial products and services: 'generally applicable consumer protection provisions' and 'general regulatory obligations of financial services providers'. Currently, these provisions are spread both across and within those Acts. While there is no bright line between the two types of provisions, adopting the following categories and descriptions helps to facilitate discussion of how the structure of the existing legislation may be improved.

2.6 In referring to 'generally applicable consumer protection provisions', this chapter means those protections of the broadest scope and which therefore apply to the broadest group of financial services providers and consumers. This is because the protections apply to 'financial products' and 'financial services' as defined in the *ASIC Act*. Generally, these provisions also grant rights and remedies to individual consumers, such as the consumer protections in Part 2 Div 2 of the *ASIC Act*, design and distribution obligations, and product intervention powers.[1] As a result, these provisions are not purely 'regulatory' in nature. This chapter focuses on generally applicable consumer protection provisions, which are discussed in more detail below.

2.7 **Chapter 5** of this Interim Report discusses how the 'general regulatory obligations of financial services providers' may be restructured and reframed. Those obligations have a narrower scope than the generally applicable consumer protection provisions discussed in this chapter. At present, and as discussed in Interim Report A, narrower definitions of 'financial product' and 'financial service' in the *Corporations Act* give effect to that narrower scope.[2] The focus of **Chapter 5** of this Interim Report is therefore on the general obligations applicable to that narrower range of products, services, and regulated entities. By referring to 'general regulatory obligations', **Chapter 5** does not address the more specific disclosure, financial advice, and product distribution regimes that exist in the *Corporations Act*, as well as other more specific provisions of the Act.[3]

---

1 The design and distribution obligations appear in Part 7.8A of the *Corporations Act* and the product intervention powers appear in Part 7.9A of the *Corporations Act*.

2 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.74]–[7.91]. References to 'financial services providers' therefore include any person providing 'financial services' within the meaning of Part 7.1 Div 4 of the *Corporations Act*, including those who do not hold an AFS Licence and representatives of AFS Licensees.

3 See, eg, *Corporations Act 2001* (Cth) pt 7.6 divs 8A, 8B, 8C. Disclosure and financial advice are discussed in, respectively, **Chapter 3** and **Chapter 4** of this Interim Report.

Legislative architecture for consumer protection

2.8 In broad terms, two legislative regimes for consumer protection exist in Australia. The *Australian Consumer Law* applies to all products and services other than financial products and financial services.[4] Consumer protections relating to financial products and financial services appear in the *ASIC Act* and *Corporations Act*.

2.9 Some stakeholders have suggested that the ALRC should consider applying the *Australian Consumer Law* to financial products and financial services. This would allow the repeal of duplicative consumer protections in Part 2 Div 2 of the *ASIC Act*. The reforms to misleading, deceptive, and unconscionable conduct provisions proposed in this chapter could then be applied to the *Australian Consumer Law*.[5] For example, unconscionability provisions in the *Australian Consumer Law* are 'drafted in almost identical terms' to ss 12CB and 12CC of the *ASIC Act*, and the 'meaning of unconscionable conduct under each provision was intended to be the same'.[6]

2.10 Resolving whether the *Australian Consumer Law* should apply to financial products and services would require revisiting the constitutional underpinnings of the *Corporations Act* and the *Australian Consumer Law*, as discussed in Background Paper FSL4.[7] It may also involve issues of policy, including as to the distribution of regulatory and enforcement responsibilities between the Australian Competition and Consumer Commission ('ACCC') and ASIC. Moreover, in its application as a law of the Commonwealth, the *Australian Consumer Law* only applies to conduct in relation to corporations.[8] This could have implications for the enforcement of consumer protections in federal, as opposed to state, courts.[9] Given these issues, the ALRC has not proposed merging the two legislative architectures for consumer protection.[10]

Why restructure and reframe?

2.11 **Chapter 1** of this Interim Report explains why the structure and framing of legislation are important in general terms. It notes that reasons to focus on structure and framing include the need to ensure the law is effective by clearly communicating its requirements, the desirability of imposing the least burden possible on the regulated community and other users of the legislation, and promoting the rule of

4 *Competition and Consumer Act 2010* (Cth) s 131A. There are some minor exceptions provided for in s 131A(1)(a)–(c) of the Act.
5 See, eg, N Howell, *Submission to Background Paper FSL9* (received 14 April 2023).
6 Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2011 (Cth) [2.10].
7 See Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [126]–[133].
8 *Competition and Consumer Act 2010* (Cth) s 131.
9 This may also have implications for the operation of AFCA.
10 For further discussion of how the two legislative regimes for consumer protection may be consolidated, and the potential benefits of doing so, see Nicola J Howell, 'Addressing the Contrasting Definitions of Financial Product and Financial Service in Australian Financial Services and Consumer Legislation' (2022) 39(2) *Company and Securities Law Journal* 86.

law. **Chapter 9** of this Interim Report suggests that the key objective of legislative design should be that legislation can be navigated and understood as easily as possible.

2.12 Within the context of consumer protection, pursuing this objective is critical. Consumer protection provisions have a potentially broader and often non-expert audience. The audience may include (or *should potentially* include) consumers themselves, as well as their advocates and non-specialist lawyers.[11] 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.

2.13 **Example 2.1** illustrates how provisions related to consumer protection are presently scattered across Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*.

Example 2.1: 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.[12] 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.

11 This is particularly the case in the financial services context given the role of AFCA as an external dispute resolution body available to consumers.

12 Product intervention orders can apply to anyone providing financial services in relation to *ASIC Act* financial products, 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.[13]

Furthermore, the prohibition on harassment and coercion,[14] which reflects the fundamental norm that contracts be entered consensually and in an informed manner, is included among more specific protections in the *ASIC Act* that seek to particularise the core obligations to not mislead, deceive, harass, or coerce.[15] This structure partially reflects the *Australian Consumer Law*, in which the prohibition on 'harassment and coercion' appears as a 'specific protection'. Overall, though, the structure of provisions in Part 2 Div 2 of the *ASIC Act* differs substantially from the *Australian Consumer Law*, where provisions are better grouped and prioritised for readers.

Ultimately, consumer protections in financial services legislation are scattered and do not distinguish core consumer protections of general application from the more specific protections, such as those concerning credit cards or commissions for add-on risk products supplied in connection with motor vehicles.[16]

2.14 **Examples 8.3** and **8.5** in **Chapter 8** of this Interim Report further illustrate how the structure and framing of consumer protection provisions often fail to prioritise the key messages of the law — thereby obscuring the standards of commercial behaviour it requires.

2.15 Generally applicable consumer protections are foundational to the regulation of financial services and need to be understood by both financial services providers and consumers. It is therefore essential that they be appropriately structured and framed to promote their effectiveness.

13 *Competition and Consumer Act 2010* (Cth) sch 2 ch 2.
14 *Australian Securities and Investments Commission Act 2001* (Cth) s 12DJ.
15 For example, it could be helpful to identify the prohibition on bait advertising in s 12DG of the *ASIC Act* as a specific protection, thereby framed by the general consumer protections that seek to communicate the minimum standards of commercial behaviour in relation to financial services and financial products.
16 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DL, 12DMC.

A home for consumer protections

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).

2.16 **Proposal C1** would result in the creation of a new chapter focused on consumer protection in the provision of financial services. As discussed further in **Chapter 6** of this Interim Report, **Proposal C1** would best be implemented as part of the broader restructuring and reframing contemplated by **Proposals C9** and **C10**.[17] However, **Proposal C1** could also be implemented as either a chapter or part within the existing *Corporations Act*. The following discussion focuses on implementing **Proposal C1** as a legislative chapter. However, the underlying analysis would apply equally if it were instead implemented as a part within a chapter.

Grouping consumer protection provisions

2.17 Grouping related material promotes navigability and ease of understanding, making it easier to situate individual provisions within their broader legislative context and purpose.[18] At present, this is made difficult by the spread of generally applicable consumer protection provisions within and across Acts.

2.18 **Proposal C1** would see generally applicable consumer protection provisions located within a single chapter. This new chapter would serve as a single point of consideration for consumers who wish to understand the key protections that apply for their benefit (or who need to be advised about these protections). For businesses, the new chapter would provide a single home for the core standards of generally applicable commercial behaviour.

17 In summary, **Proposals C9** and **C10** suggest the creation of a schedule to the *Corporations Act* (referred to in this Interim Report as the FSL Schedule) which would provide a 'home' for restructured and reframed financial services legislation.

18 See **Chapter 8** of this Interim Report.

2.19 Importantly, if implemented as part of the FSL Schedule discussed in **Chapter 6** of this Interim Report, 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 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. The ALRC suggests that a consumer protection chapter should be the first substantive chapter in the FSL Schedule.[19] By adopting this structure, the consumer protection chapter would help frame the regulatory obligations that follow, such as disclosure provisions that are necessarily informed by the obligations not to mislead or deceive.

What are generally applicable consumer protection provisions?

2.20 **Proposal C1** provides a non-exhaustive list of provisions that should be included in a chapter focused on consumer protections. As noted above, the distinction between 'generally applicable consumer protection provisions' and other provisions may not always be clear. While the prohibitions on misleading or deceptive conduct provisions and unconscionability will clearly be generally applicable consumer protection provisions, others may be more difficult to characterise. This means that in implementing **Proposal C1** and **Proposals C7** and **C8** discussed in **Chapter 5** of this Interim Report, some provisions may appropriately reside in more than one chapter.[20] Navigability and comprehensibility could be maintained, however, using aids to interpretation — such as notes, signposts, and cross-references — which help users to locate all relevant provisions and understand the regulatory regime more broadly.

2.21 For example, s 923A in Part 7.6 Div 10 of the *Corporations Act* (Restrictions on use of terminology) is arguably a consumer protection provision because it particularises the norms that underlie the prohibitions on misleading or deceptive conduct. While it has general application to any 'person', it only applies to 'financial services' within the meaning of Part 7.1 Div 4 the *Corporations Act*. The ALRC suggests it would be undesirable to create a consumer protection chapter that jumps between completely different scopes of application, from a broad to a narrower scope for 'financial product'. This could be addressed through policy changes that apply s 923A to a broader scope of financial services. However, the Terms of Reference limit the ALRC to existing policy settings. As such, the ALRC therefore suggests that s 923A be placed in a legislative chapter relating to the general regulatory obligations of financial services providers.[21]

---

19 See **Chapter 6** of this Interim Report and the illustrative FSL Schedule in **Appendix D**.

20 In summary, **Proposals C7** and **C8** would see the creation of two chapters relating to the general regulatory obligations of financial services providers. As discussed in this chapter, there is no firm boundary between 'generally applicable consumer protections' and the 'general regulatory obligations of financial services providers'.

21 This is discussed further in **Chapter 5** of this Interim Report.

2.22 As discussed in Interim Report A, the ALRC's proposal to create a single definition for the terms 'financial product' and 'financial service' would facilitate the grouping of consumer protection provisions currently spread across the *Corporations Act* and *ASIC Act* without requiring any change in policy.[22] At present, those terms are defined differently between those Acts (with the *ASIC Act* defining them more widely) to create different scopes of application. The ALRC's proposal would see the creation of a single, broad definition for the terms 'financial product' and 'financial service' across the whole *Corporations Act*. The definitions of these terms would be based on those found in the *ASIC Act*, thereby providing the broadest possible definition at the level of the *Corporations Act*. Exclusions for particular financial products and financial services could then be created for particular chapters so as to replicate the existing scope of the law.[23]

Designing a consumer protection chapter

2.23 This part discusses how a chapter created under **Proposal C1** could be designed. The discussion is based on the principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report. As discussed at the beginning of this chapter, those principles are particularly important in the context of provisions concerning consumer protection.

Consolidating consumer protection provisions

2.24 Consolidation involves the removal and combination of provisions that address the same subject matter. As observed in **Chapter 9** of this Interim Report, legislation should generally contain no greater number of provisions than is necessary to achieve its legislative purpose. To improve the law's communicative power, provisions may be consolidated without affecting their substance or effect.

2.25 This section explains how some consumer protection provisions could be consolidated, drawing on the methodology in Background Paper FSL9.[24] As explained below, the methodology used in Background Paper FSL9 could also be applied more broadly as part of reviewing and reforming provisions in Chapter 7 of the *Corporations Act* to produce a smaller number of more principled obligations.

---

22 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.74]–[7.88].

23 For example, exclusions based on s 12BAA(8) of the *ASIC Act* would be used as part of implementing **Proposal C1** to preserve the existing scope of consumer protection provisions.

24 Australian Law Reform Commission, 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law' (Background Paper FSL9, December 2022).

Unconscionable and misleading or deceptive conduct

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.

2.26 **Proposals C2** and **C3** are based on the detailed statutory and doctrinal analysis conducted by the ALRC for the purposes of Background Paper FSL9. Background Paper FSL9 examined the proliferation of provisions that proscribe unconscionable and misleading or deceptive conduct in financial services legislation, and considered in detail how they could be consolidated. The Background Paper observed that numerous provisions were 'directed at broadly similar instances of misconduct, in a way that serves to cloud the fundamental norms and clutter the statute books'.[25]

2.27 Background Paper FSL9 outlined 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;
- 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;[26] and
- more generally, the proliferation makes the law more difficult to understand and apply, wasting time, resources, and lessening the likelihood of compliance.

25 Ibid 1.

26 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'.

2.28 This section provides a summary of the justifications for **Proposals C2** and **C3**. The full analysis underpinning the proposals appears in Background Paper FSL9.[27]

Unconscionable conduct

2.29 Unconscionable conduct is currently proscribed by four provisions, outlined in **Table 2.1** below. Three provisions appear in the *ASIC Act* and one in the *Corporations Act*.[28] **Proposal C2** seeks to consolidate these provisions so that unconscionable conduct is prohibited by just one provision, the equivalent of s 12CB of the *ASIC Act*. This would be accompanied by the equivalent of s 12CC of the *ASIC Act*, which provides a non-exhaustive list of matters to which a court may have regard in determining whether a person has engaged in unconscionable conduct.

Table 2.1: Provisions relating to unconscionability

Act	Section	Title of section
Corporations Act	991A	Financial services licensee not to engage in unconscionable conduct
ASIC Act	12CA	Unconscionable conduct within the meaning of the unwritten law of the States and Territories
	12CB	Unconscionable conduct in connection with financial services
	12CC	Matters the court may have regard to for the purposes of section 12CB

2.30 **Proposal C2** is based on the analysis conducted by the ALRC for Background Paper FSL9, which examined the 'bewildering myriad' of legislative provisions prohibiting unconscionable conduct.[29] Background Paper FSL9 found that s 12CB of the *ASIC Act* (accompanied by s 12CC) had the broadest scope of application of all unconscionable conduct provisions, and encompassed within it all of the conduct captured by s 991A of the *Corporations Act*. Section 12CB likely also includes all conduct covered by s 12CA of the *ASIC Act*, and the section provides access to the greatest range of remedial relief for consumers.

---

27 For the analysis in relation to unconscionable conduct, see Australian Law Reform Commission, 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law' (Background Paper FSL9, December 2022) [21]–[90]. For the analysis in relation to misleading or deceptive conduct, see ibid [91]–[173].

28 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA, 12CB, 12CC; *Corporations Act 2001* (Cth) s 991A; Australian Law Reform Commission, 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law' (Background Paper FSL9, December 2022) 10.

29 Michelle Sharpe, *Unconscionable Conduct in Australian Consumer and Commercial Contracts* (LexisNexis Butterworths, 2018) xi.

2.31 To address the small risk that s 12CB does not encompass all conduct covered by s 12CA, the Background Paper suggested amending s 12CB to make it clear that it includes unconscionability within the meaning of the general law.[30] Sections 12CA of the *ASIC Act* and s 991A of the *Corporations Act* should then be repealed because they do not contribute anything further to the law, and serve only to cloud and obscure the law in this area.

2.32 Overall, implementing **Proposal C2** would preserve the existing protections afforded to consumers in relation to unconscionable conduct, and would enhance the communicative power of these provisions by reducing overlap and duplication.

Misleading or deceptive conduct

2.33 Misleading or deceptive conduct is currently proscribed by at least four sections in the *ASIC Act* and three in the *Corporations Act*, including those outlined in **Table 2.2** below.[31] **Proposal C3** would consolidate these seven sections into just one, framed so as to prohibit all the conduct currently captured by the seven sections.

Table 2.2: Provisions relating to misleading or deceptive conduct

Act	Section	Title of section
Corporations Act	1041E	False or misleading statements
	1041F	Inducing persons to deal
	1041H	Misleading or deceptive conduct (civil liability only)
ASIC Act	12DA	Misleading or deceptive conduct
	12DB	False or misleading representations
	12DC	False or misleading representations in relation to financial products that involve interests in land
	12DF	Certain misleading conduct in relation to financial services

30 Mention of the unwritten law is inserted out of an abundance of caution. Concerns have been raised that consolidating s 12CA may reduce the scope of statutory unconscionable conduct under the *ASIC Act*: B Horrigan, *Submission to Background Paper FSL9* (received 3 April 2023). The current case law indicates that s 12CB encompasses the scope of general law doctrine, and therefore also s 12CA: Australian Law Reform Commission, 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law' (Background Paper FSL9, December 2022) [54]–[55]. Debate remains as to the extent to which s 12CB extends beyond the general law: see, eg, *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1. The reference to suppliers and acquirers of financial services in s 12CC should not be read as limiting the scope of s 12CB, as s 12CC is a non-exhaustive list of guiding factors going to the operation of s 12CB and is expressed as not limiting the operation of that provision. The reference to 'a person' in s 12CB should be construed to the same level of generality as in s 12CA.

31 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12DB, 12DC, 12DF; *Corporations Act 2001* (Cth) ss 1041E, 1041F, 1041H.

2.34 Background Paper FSL9 found that s 12DA of the *ASIC Act* had the broadest scope of application of all provisions prohibiting misleading or deceptive conduct. The Background Paper concluded that s 12DA likely encompasses within it all the conduct proscribed by the prohibitions on 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. Because s 12DA appears in the *ASIC Act*, the reference to 'financial service' includes a 'financial product',[32] thereby ensuring the breadth of the prohibition.

2.35 The key limitation of s 12DA, however, is that it is neither a civil penalty provision nor an offence provision. To consolidate provisions in this area and ensure that an appropriate range of remedies and penalties (including criminal penalties) would remain available, the ALRC suggests the repeal of provisions other than s 12DA, the amendment of s 12DA to make it a civil penalty provision, and the addition of a new offence provision (applicable where the conduct is dishonest, intentional, or reckless).[33] As a consequential amendment, it may be helpful to amend s 12DA to provide that it applies in relation to financial services *and financial products*. This would make explicit the effect of s 12BAB(1AA) of the *ASIC Act*.

2.36 While **Proposal C3** could be largely implemented in this way, the ALRC suggests that greater simplification could be achieved by examining the range of provisions that give effect to the fundamental norm not to mislead or deceive, and giving consideration to broader consolidation in accordance with the methodology outlined below.[34]

Implementing Proposals C2 and C3

2.37 The purpose of consolidation is to reduce overlap and duplication between provisions. It is not intended to alter the existing scope and operation of the law. For example, reform to misleading or deceptive provisions should not affect regulatory or other arrangements, such as between the ACCC and ASIC.[35]

Consolidation of other provisions: a methodology

2.38 More generally, Background Paper FSL9 demonstrates how the consolidation of like provisions could be approached. This approach could be applied more broadly

32 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAB(1AA).

33 Australian Law Reform Commission, 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law' (Background Paper FSL9, December 2022) [150]–[164].

34 For example, the Law Council of Australia suggested that the prohibitions on false and misleading conduct in ss 1308B, 1308, and 1309 of the *Corporations Act* 'create similar complexity and overlap' to the provisions discussed in Background Paper FSL9: Law Council of Australia, *Submission to Background Paper FSL9* (received 5 April 2023).

35 The Law Council of Australia also noted the importance of preserving existing regulatory arrangements: ibid.

to provisions relating to consumer protection and the regulation of financial services providers beyond the provisions discussed above.

2.39 For example, Part 2 Div 2 Subdiv D of the *ASIC Act* contains several provisions relating to sales tactics,[36] which are all specific instances of conduct in which broader conduct norms are potentially contravened. For example, ss 12DE and 12DI arguably represent specific instances in which a person would engage in misleading or deceptive conduct. In implementing **Proposal C2**, consideration could be given to whether any of these provisions could be consolidated or repealed, to streamline the law and enhance its communicative power.

2.40 Many other opportunities for consolidation may involve questions of policy, which are outside the Terms of Reference for this Inquiry. For that reason, the ALRC has focused on opportunities for consolidating provisions that may be achieved within the confines of existing policy.

Prioritisation and intuitive flow

2.41 Consistently with the principles outlined in **Chapter 9** of this Interim Report, the generally applicable consumer protection provisions should be presented first, while more specific obligations and matters of detail should come later. Provisions that may be considered the most generally applicable are those that apply most broadly, or those that are most central to the legislative regime and the achievement of its objectives.

2.42 Ideally, prioritisation (from the most significant to the least significant, and from the most general to the most granular) should take place within thematically defined parts. Chapter 2 of the illustrative FSL Schedule in **Appendix D** demonstrates this approach. For example, within Part 2.2, which groups together the core consumer protection provisions, broad and significant provisions appear first. These include the prohibitions on misleading, deceptive, or unconscionable conduct, provisions relating to unfair contract terms, and the provisions relating to conditions and warranties in consumer transactions. These provisions assign essential rights and remedies to consumers and provide overarching standards of behaviour for financial services providers.

2.43 Parts 2.3 (specific consumer protections) and 2.4 (design and distribution obligations) of the illustrative FSL Schedule in **Appendix D**, which are narrower in scope and of somewhat lesser significance compared to general consumer protections, appear after, and are contextualised by, the general consumer protections in Part 2.2. The structure therefore seeks to group and order provisions to provide an intuitive flow that helps readers understand the scope, significance, and theme of provisions.

---

36 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DE, 12DG, 12DH, 12DI, 12DJ, 12DK.

2.44 Generally applicable offences appear in Part 2.5 of the illustrative FSL Schedule. These offences, which are less significant than many others in the *Corporations Act*, are located in Chapter 2 of the illustrative FSL Schedule because of their application to all persons. An alternative approach to developing an intuitive flow might be to place these relatively targeted, but generally applicable offences, towards the end of the FSL Schedule. Chapter 2 concludes with Part 2.6, covering enforcement, remedies, and other powers in relation to consumer protection. Some of these provisions could also be located in a dedicated chapter on ministerial and regulator powers (see Chapter 7 of the illustrative FSL Schedule).

Mental models

2.45 As discussed in **Chapter 9** of this Interim Report, legislation should ideally help users to form (and then use) a mental model, which guides them in their interactions with the legislation. A clear mental model helps users to navigate and understand legislation.

2.46 The current scattering and undue complexity of the provisions relating to unconscionability and misleading or deceptive conduct illustrate how the existing legislation fails to help users develop a clear mental model. The development of a clearer mental model in relation to those provisions may be achieved through **Proposals C1–C3**.

Succinctness

2.47 Succinctness is an important means of ensuring the comprehensibility of legislation to its users. As discussed at the beginning of this chapter, it is particularly important that provisions concerning consumer protection and general regulatory obligations on financial service providers be capable of being understood by those entitled to their protection. Unnecessarily long provisions are anathema to this objective.

2.48 Succinctness can be achieved in numerous ways, including through consolidation, as discussed above. However, sometimes there is simply room to shorten the length of provisions, limit their prescriptiveness, or repeal them altogether. For example, in Interim Report A it was suggested that ss 961C and 961D of the *Corporations Act*, which define 'reasonably apparent' and 'reasonable investigation' for the purposes of the best interests duty on financial advisers providing personal advice, could be removed.[37] This is because they are they are verbiage that fails to 'provide any meaningful guidance'.[38] Most submissions that commented on this proposal supported removing ss 961C and 961D of the *Corporations Act*.[39]

---

37 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [13.152]. This suggestion appeared in Proposal A24.

38 Ibid.

39 Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) 2.

Aids to interpretation

2.49 As discussed in **Chapter 9** of this Interim Report, aids to interpretation can include any feature of legislation that helps to communicate the purpose, structure, and operation of legislation. Because of the need to ensure navigability and comprehensibility for a non-expert audience, aids to interpretation are particularly important for the provisions discussed in this chapter.

2.50 A good example of provisions that may benefit from aids to interpretation include those providing for a deferred sales model for add-on insurance in Part 2 Div 2 Subdiv DA (ss 12DO–12DZA) of the *ASIC Act*. Those provisions are complex and commence with technical definitions that a lay reader would find difficult to understand. Consumers encountering those provisions would have little likelihood of grasping the core requirements that are imposed for their benefit. A better way of commencing the subdivision may be through the inclusion of a simplified outline that explains the key function of the technical detail that follows. **Example 8.16** in **Chapter 8** of this Interim Report provides further detail about how the framing of these provisions may be improved.

2.51 Another example of provisions that may benefit from aids to interpretation are the design and distribution obligations in Part 7.8A of the *Corporations Act*. In particular, Part 7.8A may benefit from the inclusion of a simplified outline that rises above the prescriptive detail. Further, notes could be employed to refer users to where delegated legislation adds detail of significance. For example, a note below the definition of 'regulated person' could refer users to where regulations extend the meaning of that concept to include credit licensees and credit representatives, among other things.[40] These are variations of great significance to the regulatory scheme, but of which users are unlikely to be aware and may easily miss, unless they happen to be familiar with the voluminous *Corporations Regulations*. A good example of a 'visual aid' that could help users of the legislation is that devised by ASIC in Figure 1 of ASIC Regulatory Guide 274, which illustrates the coverage of the design and distribution obligations.[41]

2.52 As discussed in **Chapter 9** of this Interim Report, there is always a risk that aids to interpretation may add to complexity, rather than reduce it. Their usefulness will depend on the specific circumstances. The ultimate test of whether any particular aid should be included is whether it would help to ensure that the law's intention is clearly communicated to those affected.

Product intervention regimes

2.53 As noted above, in creating a new legislative chapter on consumer protection under **Proposal C1** it would be desirable to consolidate overlapping and duplicative

40 This is found in *Corporations Regulations 2001* (Cth) reg 7.8A.02(4).

41 Australian Securities and Investments Commission, *Product Design and Distribution Obligations* (Regulatory Guide 274, December 2020) 10.

provisions. A notable example of provisions that substantially overlap are those relating to the product intervention power ('PIP') regimes in the *Corporations Act* and *NCCP Act*.[42] These parallel regimes were introduced in 2019.[43]

2.54 A consolidated PIP regime could be introduced in the consumer protection chapter created under **Proposal C1**. That legislative chapter would cover financial products, including credit facilities, presently subject to Part 2 Div 2 of the *ASIC Act*. Consolidation of PIP provisions would create a regime similar to that for design and distribution obligations in the *Corporations Act*. The design and distribution obligations apply to credit products without the need for a duplicative regime in the *NCCP Act*.[44]

Background

2.55 The PIP regimes were developed in response to the Financial System Inquiry, which reported in 2014.[45] As introduced to the House of Representatives in 2018, the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) ('PIP Bill') included two parallel sets of PIP provisions that would amend the *Corporations Act* and the *NCCP Act*. The *Corporations Act* provisions adopted the term 'financial product' as defined in that Act. However, because that definition does not include 'credit facilities',[46] the PIP Bill needed to insert a similar regime into the *NCCP Act* so that credit, consumer leases, and other credit products were subject to a PIP regime.

2.56 In 2019, however, the Financial Services Royal Commission commented:

> It is not apparent why the powers should not extend, as ASIC has requested, to all financial products and credit products within ASIC's regulatory responsibility.[47]

2.57 In response to the Financial Services Royal Commission, the Australian Government agreed to extend the PIP regime to be enacted in the *Corporations Act* so that it would apply to the wider range of financial products covered by the *ASIC Act*.[48] This was given effect by amendments to the PIP Bill which adopted

---

42 *Corporations Act 2001* (Cth) pt 7.8A; *National Consumer Credit Protection Act 2009* (Cth) pt 6–7A.

43 *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth).

44 The design and distribution obligations have extended operation to cover *ASIC Act* financial products: *Corporations Act 2001* (Cth) ss 994AA, 994B(1); *Corporations Regulations 2001* (Cth) pt 7.8A div 2.

45 David Murray et al, *Financial System Inquiry* (Final Report, November 2014) 206.

46 *Corporations Regulations 2001* (Cth) reg 7.1.06; *Corporations Act 2001* (Cth) s 765A.

47 As the Financial Services Royal Commission noted in suggesting the use of the *ASIC Act* definition of 'financial product', there were some financial products that were regulated by neither the *Corporations Act* definition of 'financial product' nor the *NCCP Act* definition of 'credit contract': Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 294.

48 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) 40; *Corporations Act 2001* (Cth) s 1023B.

the *ASIC Act* definition of 'financial product'.[49] As explained in Interim Report A,[50] the *ASIC Act* definition of financial product is the broadest within the financial services regulatory framework. Importantly, it includes 'a credit facility (within the meaning of the regulations)'.[51]

2.58 The definition of 'credit facility' provided in the *ASIC Regulations* is broad. For example, it includes the 'provision of credit'.[52] A general definition applies to the term 'credit', which is also subject to numerous specific inclusions. Mortgages,[53] guarantees,[54] and leases,[55] are all specifically included.

2.59 Notwithstanding amendments to the *Corporations Act* PIP provisions, no amendments were made to the *NCCP Act* PIP provisions. As such, the PIP regime in the *NCCP Act* (which now appears in Part 6-7A of that Act) covers 'credit products' (defined to mean credit contracts, mortgages, guarantees, and consumer leases).[56] This means that the two PIP regimes now overlap, because 'financial product', as defined by the *ASIC Act*, captures a wide range of credit products regulated by the *NCCP Act*.

Considerations in consolidating regimes

2.60 Despite their substantial overlap, there are some potential differences between the PIP regimes that would need to be considered. Most notably, the PIP regime in the *Corporations* Act applies to 'retail clients',[57] whereas the *NCCP Act* regime applies to 'consumers'.[58] It may be possible that some people would be consumers under the *NCCP Act* but would not be 'retail clients' under the *Corporations Act*. This is because there are various exclusions from the definition of 'retail client', most notably in relation to 'sophisticated investors'.[59]

2.61 Additionally, if there is any doubt as to the coverage of the *ASIC Act* definition of financial product in relation to *NCCP Act* credit products, this would need to be addressed in consolidating PIP regimes. Consideration should also be given to any

---

49 These amendments were given effect by Government Sheet QQ100, which is is available on the Parliament of Australia website relating to the Bill: Parliament of Australia, 'Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019' <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6184>.

50 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.75]–[7.84].

51 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA(7)(k).

52 *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B(1)(a).

53 Ibid reg 2B(1)(f).

54 Ibid reg 2B(1)(g)–(h).

55 Ibid reg 2B(3)(b)(iv), (xiii).

56 *National Consumer Credit Protection Act 2009* (Cth) s 301D(1)(a). The *NCCP Act* defines credit contracts, mortgages, guarantees, and consumer leases by reference to the *National Credit Code* definitions: ibid s 5; *National Consumer Credit Protection Act 2009* (Cth) sch 1 ss 169, 204.

57 *Corporations Act 2001* (Cth) s 1023D(5).

58 *National Consumer Credit Protection Act 2009* (Cth) s 301D(5).

59 *Corporations Act 2001* (Cth) ss 761G(1), 761GA.

other differences in the scope of s 1023D of the *Corporations Act* and s 301D of the *NCCP Act*. For example, in providing the power to make product intervention orders to ASIC, s 1023D refers to 'issue, or for regulated sale', whereas s 301D refers to 'credit activity'. These differences may have implications for the way ASIC is able to exercise its powers to make product intervention orders.

2.62 Overall, a consolidated PIP regime would need to match the breadth of the existing PIP regimes in the *Corporations Act* and *NCCP Act*.

3. Disclosure

Contents

Introduction

3.1 In this chapter, the ALRC proposes restructuring and reframing provisions relating to financial product and financial services disclosure so that those provisions are easier to navigate and understand. The proposals are limited to disclosure provisions located in Chapter 7 of the *Corporations Act*, thereby excluding disclosure in relation to securities.[1]

3.2 This chapter explains how the principles for structuring and framing legislation, discussed in **Chapter 9** of this Interim Report, could be applied to the provisions relating to financial product and financial services disclosure. It emphasises the importance of grouping and prioritising provisions for users to create a new disclosure chapter in the *Corporations Act.* A new disclosure chapter would cover disclosure in relation to all financial services and financial products, but not securities, and would be structured and framed around core, generally applicable obligations and principles. Delegated legislation would contain the more detailed rules necessary to give effect to primary legislation provisions in different regulatory contexts. Overall, the legislation should be coherently and intuitively structured and framed to lead users to the provisions applicable to their circumstances.

1 *Corporations Act 2001* (Cth) ch 6D.

3.3 This chapter proceeds in four parts. The first part discusses the importance of structure and framing in the context of disclosure provisions. The second part explains how provisions could be restructured into a new chapter that provides a clear 'home' for disclosure provisions. The third part shows how a new chapter may be designed, based on the principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report. In the final part, the ALRC proposes reframing disclosure regulation by legislating an objective of promoting consumer understanding.

3.4 This chapter refers to the illustrative FSL Schedule in **Appendix D**. The FSL Schedule, explained in **Chapter 6** of this Interim Report, offers one avenue through which a broader restructure and reframing of financial services legislation could be undertaken. However, were the FSL Schedule not adopted, the reforms discussed in this chapter could nonetheless be implemented within the body of the *Corporations Act* as a chapter or part of a chapter.

3.5 This chapter also refers to elements of Prototype Legislation B, available on the ALRC website.[2] Prototype Legislation B exemplifies many of the design approaches discussed in this chapter, including in provisions related to disclosure regulation.[3] The Prototype highlights how the issues facing disclosure provisions — extensive prescription and tailoring of provisions introduced through complex legislative design approaches — can be addressed by restructuring and reframing provisions alongside reform of the legislative hierarchy.

Interaction with proposals in Interim Report B

3.6 Meaningful reform to financial product and financial services disclosure legislation requires consideration of the legislative hierarchy. Disclosure provisions make extensive use of delegated legislation in the form of regulations and ASIC legislative instruments. This delegated legislation often uses notional amendments and conditional exemptions to establish tailored disclosure regimes for particular persons, products, services, and circumstances.[4]

3.7 As explained in Interim Reports A and B, notional amendments and conditional exemptions are among the most complex legislative design approaches used by government.[5] The flexibility that notional amendments offer to law-makers and stakeholders can only be preserved by creating a well-designed legislative hierarchy. As discussed in Interim Report B, such a hierarchy would require moving prescriptive detail from primary legislation into delegated legislation and creating a generally

---

2 Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

3 Most provisions of Prototype Legislation B relate to disclosure regulation. See, for example, Chapter 7A of the Prototype Act and the entirety of the Prototype Rules.

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

5 Ibid [3.136]–[3.141], [10.52]–[10.67]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.33]–[6.39].

applicable Act-level architecture. Under this approach, notional amendments to provisions of the *Corporations Act* would no longer be required because textual amendments could be made in delegated legislation.

3.8 It is important to recognise 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. For example, implementing a revised structure without a reformed legislative hierarchy would still require notional amendments and conditional exemptions. Overly prescriptive disclosure provisions in primary legislation would continue to be tailored for particular circumstances. Similarly, provisions in regulations that cut across ASIC's legislative instruments would continue to be notionally amended by ASIC to implement regulatory relief or to create alternative regulatory regimes.

3.9 Similarly, while users would face disclosure provisions that had been simplified in a horizontal sense, it would remain difficult to navigate and understand provisions across the vertical structure of disclosure provisions.[6] This is because detailed regulatory requirements would still be found across the *Corporations Act* and delegated legislation. Further, this would be an issue regardless of whether the existing body of delegated legislation had been consolidated and restructured consistent with the principles in **Chapter 9** of this Interim Report.

3.10 Horizontal restructuring and reframing of disclosure provisions in the *Corporations Act* and delegated legislation should be accompanied by reforms that provide a more principled and predictable, and therefore more navigable, legislative hierarchy. In Interim Report B, the ALRC proposed a legislative model that would provide the foundation for a principled legislative hierarchy.[7] Prototype Legislation B shows how applying the proposed legislative model in relation to disclosure provisions would offer significant improvements on the current design of the legislation.

3.11 Importantly for the design of disclosure legislation, any reform to the legislative hierarchy of disclosure provisions would need to consider the roles of ASIC and the Minister, and the related powers to make delegated legislation. At present, large amounts of disclosure regulation appear in the *Corporations Regulations*, for which the Minister is responsible. Simply moving detail from the *Corporations Act* to regulations, and then restructuring and reframing the relevant regulations, would overlook the present need for ASIC to notionally amend, or conditionally exempt from, provisions in regulations.[8] A well-designed legislative hierarchy that recognises the

---

6 The concepts of 'horizontal' and 'vertical' structure are discussed in **Chapter 1** of this Interim Report.

7 The model comprises the following: a simplified Act focused on fundamental norms, obligations, and the imposition of significant penalties; exemptions and scoping provisions in a single legislative instrument known as the Scoping Order; and rules in a set of thematic rulebooks made as legislative instruments, such as for financial product disclosure.

8 ASIC must do this already when seeking to tailor provisions of the *Corporations Regulations*: *ASIC Corporations (Short Selling) Instrument 2018/745* (Cth) s 17; *ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070* (Cth) s 6(2); *ASIC Class Order — Technical Modifications to Schedule 10 of the Corporations Regulations* (CO 14/1252) (Cth) s 6.

realities of law-making in disclosure regulation is therefore a necessary complement to any restructure and reframing.

3.12 Nonetheless, the ALRC has sought, so far as possible, to propose a restructure and reframing of disclosure legislation that could be implemented alongside, or independently of, the proposed legislative model outlined in Interim Report B.

Why restructure and reframe?

3.13 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.[9] 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.

3.14 Parts 7.7 (financial services disclosure) and 7.9 (financial product disclosure) of the *Corporations Act* account for more than:

- 100 ASIC legislative instruments, more than 80 of which contain exemptions or exclusions;
- half of all notional amendments to the *Corporations Act*;
- 27% of the words in Chapter 7 of the *Corporations Act*; and
- 35% of the words in Chapter 7 of the *Corporations Regulations*.

3.15 As the ALRC noted in Interim Report A, finding and understanding disclosure provisions requires

> financial services providers to refer to multiple sources and, in many cases, to 'read in' notional amendments to provisions of the Act. 'Alternative regulatory regimes' are created by notional amendments and the imposition of conditions on exemptions …[10]

3.16 The structure of provisions often means that regulated entities face a collection of puzzle pieces that they must piece together to understand their obligations. As **Example 3.1** shows, the structure of the existing legislation does little to help users find the law that applies to their products, services, or circumstances.

---

9 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>.

10 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [9.4].

Example 3.1: Finding and understanding 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 PDS regime applicable to their circumstances.

Superannuation providers will have to find tailored obligations to give a PDS,[11] with customised content requirements,[12] additional application form provisions,[13] and dozens of regulations relating to fees and costs that have since been almost entirely (notionally) replaced by an ASIC legislative instrument.[14] 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.[15]

These problems stem in part from problems in the legislative hierarchy. However, they are also a product of poor structure in both the *Corporations Act* and related delegated legislation. The relevant superannuation provisions of the *Corporations Regulations* are not grouped together and developed in an intuitive flow. Instead, the structure of the *Corporations Regulations* attempts to reflect the order of provisions in the *Corporations Act*. Relatively few aids to interpretation, such as notes and outlines, are used to help readers identify the provisions that apply to them. However, Part 7.9 of the *Corporations Regulations* does helpfully use headings to provide hints as to the application of provisions to certain products and circumstances, such as superannuation. Nonetheless, this can merely serve to highlight the legislative puzzle facing PDS preparers, as relevant provisions are scattered throughout the Part.

3.17 The structure of the *Corporations Regulations*, as **Example 3.1** illustrates, is particularly problematic. The relevant regulations are the product of hundreds of piecemeal amendments, and often read like a laundry list. For example, Part 7.7 Div 2, relating to FSGs, contains 18 regulations that cover everything from when and how an FSG must be given to what it must contain, with no subdivisions. This structure makes it more difficult, and therefore more time-consuming and costly, for users to identify provisions that may be relevant to them.

---

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

12 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).

13 *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).

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

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

3.18 The way in which disclosure provisions are structured and framed also makes it difficult for users to understand the legislation once they have pieced it together. For example, s 1022B of the *Corporations Act* provides for civil liability for loss or damage in relation to breaches of various disclosure provisions. Section 1022B is 1,755 words long and contains over 150 cross-references to other provisions within the section and other provisions of the *Corporations Act*. The provision is complex and could be better structured as a division.

3.19 The regular failure to prioritise significant provisions also makes it more difficult to navigate and understand disclosure obligations, as **Example 3.2** demonstrates.

Example 3.2: Failing to prioritise information

As explained in **Chapter 9** of this Interim Report, an important way in which structure can enhance navigability and understanding is by prioritising information for readers. This means ordering provisions to help readers identify more significant obligations or provisions of the most general application. Existing disclosure provisions do not do this.

For example, s 1013E of the *Corporations Act* provides for a general obligation to include in a PDS any information that may have a material influence on a person choosing to acquire a financial product. This principled obligation is preceded by three sections that prescribe in detail the content requirements of a PDS. Prominence should be given to the overarching obligation in s 1013E by placing it before the prescriptive requirements.

Similarly, s 1013C of the *Corporations Act* outlines the general content requirements of a PDS. Subsection (1) includes a list of highly particularised content requirements, while sub-s (2) provides a significant limitation on the information that needs to be provided. Only at sub-s (3) is the core obligation articulated — that PDSs must be worded and presented in a 'clear, concise and effective' manner. The structure and framing of the provision do little to enhance users' understanding of their obligations. In prioritising the detail over the more principled outcome in sub-s (3), the structure of s 1013C may emphasise 'tick-a-box' compliance over a more thoughtful approach to preparing and presenting disclosure documents.[16]

Overall, disclosure legislation should enable users to come away with a clear understanding that the principles in ss 1013E and 1013C(3) are core obligations of the disclosure regime. However, the existing structure makes it easy to lose these obligations among the related detail.

16 As noted in the Financial Services Royal Commission, prescription may lead people 'to adopt a "tick a box" approach to compliance': Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 177.

3.20 As further discussed below, Prototype Legislation B prepared by the ALRC shows how small changes to the structure and framing of provisions can reduce their complexity, improve their comprehensibility, and foreground the context and purpose of obligations and related detail.

Providing a home for disclosure regulation

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.

3.21 The ALRC proposes grouping disclosure provisions so that users can easily locate and navigate the law that applies to disclosure. **Proposal C4** would see the creation of a single legislative chapter, bringing together all general disclosure provisions and tailored disclosure regimes in the *Corporations Act*, other than those applicable to financial advice.

3.22 As discussed further in **Chapter 6** of this Interim Report, **Proposal C4** would best be implemented as part of the broader restructuring and reframing contemplated by **Proposals C9** and **C10**.[17] However, **Proposal C4** could also be implemented as either a chapter or part within the existing *Corporations Act*. The following discussion focuses on implementing **Proposal C4** as a legislative chapter. However, the underlying analysis would apply equally if it were instead implemented as a part within a chapter.

Identifying relevant disclosure provisions

3.23 The *Corporations Act,* and corporations and financial services legislation more broadly, contains dozens of distinct legislative regimes requiring a person to prepare and provide disclosure documents, or otherwise to disclose information.[18]

17 In summary, **Proposals C9** and **C10** suggest the creation of a schedule to the *Corporations Act* (referred to in this Interim Report as the FSL Schedule) which would provide a 'home' for restructured and reframed financial services legislation.

18 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [9.2].

3.24 Submissions to the ALRC's Inquiry have suggested that the number of disclosure regimes could be reduced.[19] The Terms of Reference for this Inquiry preclude the ALRC from making recommendations that would eliminate whole disclosure regimes, and therefore change policy.[20] However, this chapter shows how existing disclosure regimes could be restructured and reframed so that they are easier to navigate and understand, and therefore comply with, while also providing a structure that would facilitate the evolution of disclosure regimes into the future.

The disclosure regimes in Proposal C4

3.25 In **Proposal C4**, the ALRC has sought to identify existing disclosure regimes that may appear in a single disclosure chapter. These disclosure regimes are selected on the basis that they are generally applicable or otherwise do not have a more appropriate location within the structure of Chapter 7 of the *Corporations Act* or the FSL Schedule.

3.26 Other regimes could meet these criteria, including new regimes that may emerge in future. However, the scope already captured in **Proposal C4** would provide a strong foundation on which to build a disclosure chapter, particularly if the legislative model proposed in Interim Report B were implemented. The use of 'rules', as contemplated in that legislative model, would allow for the organic reform and development of existing and new forms of disclosure.

Regimes not included in Proposal C4

3.27 A disclosure chapter should not include the following types of provisions:

- Disclosure regimes that have a more appropriate location: For example, **Proposal C4** deliberately excludes ongoing fee disclosure statements and SoAs.[21] These are better located within a chapter relating to financial advice, given their sole application to advice.[22]
- Regulatory regimes in which disclosure is only one element, and a relatively minor element: This includes the deferred sales model for add-on insurance,[23] in which consumers are given an information statement to commence the deferral period of four days.[24] The principal elements of this regime are the four-day deferral and limits on contact between product distributors and consumers.

---

19 Law Council of Australia, *Submission 49*; P Hanrahan, *Submission 36*; Australian Banking Association, *Submission 43*.

20 The ALRC has previously noted that policy changes would offer a path to even greater simplification: Australian Law Reform Commission, *Prototype Legislation B: Explanatory Note* (Interim Report B - Additional Resources, September 2022) [3], [15].

21 *Corporations Act 2001* (Cth) pt 7.7 div 3, pt 7.7A div 3.

22 Reform to financial advice provisions in the *Corporations Act* is discussed in **Chapter 4** of this Interim Report.

23 *Australian Securities and Investments Commission Act 2001* (Cth) pt 2 div 2 subdiv DA.

24 *ASIC (Information under the Deferred Sales Model for Add-On Insurance) Instrument 2021/632* (Cth).

- Provisions related to fundraising: Based on further analysis and stakeholder feedback, the ALRC proposes maintaining the existing separation between the disclosure regimes found in Chapters 6D and Part 7.9 of the *Corporations Act*. Disclosure in relation to fundraising has purposes, including to inform the market, that are not necessarily shared by Part 7.9 disclosure provisions in respect of financial products. Chapter 6D is also not subject to the same degree of complexity as Parts 7.7 and 7.9. However, there remains some blurring between disclosure regimes.[25] Overlap could be addressed as part of a reform process, though the exact disclosure regime in which a particular product should fall would ultimately be a policy choice.

The structure and framing of a disclosure chapter

3.28 This part discusses in detail how a disclosure chapter could be structured and framed. The aim of this structure and framing is to maximise the ease with which users, particularly preparers and providers of disclosure documents, can navigate and understand the law, and therefore comply with its requirements.

3.29 The first section discusses two overall design considerations relevant to establishing an architecture for disclosure regulation in primary legislation. The suggested architecture is intended to provide a flexible and lasting framework for creating or reforming disclosure documents and approaches. The second section suggests a legislative design approach that 'designs for difference'. This approach could supplement the creation of an overarching architecture, recognising the reality that disclosure requirements are often highly tailored for particular products, services, and circumstances.

3.30 The third section examines the creation of a macrostructure for disclosure obligations.[26] The fourth section identifies opportunities for consolidation of overlapping provisions within this macrostructure. The fifth section considers the structure and framing of the microstructure, with an emphasis on providing examples that highlight how the microstructure can better communicate the context, purpose, and effect of the law.

The architecture for disclosure regulation

3.31 A disclosure chapter in primary legislation should provide an architecture in which different disclosure documents and approaches can be implemented. A disclosure chapter should therefore be focused on establishing an architecture of obligations, principles, offences, and other penalties that are generally applicable to as many disclosure documents as possible. This reflects the common policy purpose for which different financial product and financial services disclosure

25 Stapled securities provide an example of this, as discussed in Property Council of Australia, *Submission 76*.

26 The concepts of 'macrostructure' and 'microstructure' are discussed in **Chapter 1** of this Interim Report.

regimes exist — principally to allow consumers to undertake confident and informed decision-making.[27]

3.32 The common policy purpose means that different disclosure regimes share similar provisions, such as an obligation to give a disclosure document or other information, accompanied by a requirement that disclosure not be defective, and related obligations such as reporting to ASIC. Prescriptive detail in relation to documents, such as form and content requirements, should not obscure the potential for a shared architecture across disclosure regimes in primary legislation.

3.33 The legislative design approach of creating a general 'architecture' for disclosure already appears, to a degree, in Parts 7.7 and 7.9 of the *Corporations Act*. For example, Part 7.7 Div 7 contains generally applicable offence provisions, such as for failing to give a disclosure document or for giving a disclosure document knowing it to be defective. These offences apply to all or most disclosure documents in Part 7.7, including FSGs, SoAs, and Cash Settlement Fact Sheets. The architecture of offence provisions therefore seeks to be agnostic as to the exact form that disclosure takes.

3.34 A generally applicable architecture for disclosure could be created more broadly across disclosure provisions in designing a new chapter. As discussed below, consolidation of overlapping obligations and other provisions between Parts 7.7 and 7.9 would be one step in creating a general architecture for disclosure.

3.35 A further legislative design approach would be to reframe a disclosure chapter at a higher level of generality. This was central to the approach taken in Prototype Legislation B. There, the Prototype Act made no references to PDSs or any specific forms of disclosure. Instead, it referred only to 'disclosure documents' and the general concept of 'information'. The exact name and form of a disclosure document was left to delegated legislation, though the Prototype Act contained 'core principles' for the form and content of disclosure documents in relation to financial products.[28]

3.36 For example, a new disclosure chapter could include a part relating to financial services disclosure. Instead of having multiple divisions listing triggers for when an FSG and Cash Settlement Fact Sheet must be given, a single division could list all triggers for giving any disclosure documents in relation to financial services, without linking these triggers to any specific type of disclosure document.[29] This would also allow the core principles to apply across all types of financial services disclosure documents, thereby reducing the overlap and duplication that exists between provisions such as ss 942B, 942C, and 948F of the *Corporations Act*. The concepts of FSGs and Cash Settlement Fact Sheets could be created in delegated

---

27 See, eg, *Corporations Act 2001* (Cth) s 760A(a).

28 See s 1125 of the Prototype Act in Prototype Legislation B. In the ALRC's proposed legislative model, delegated legislation takes the form of rules. See further Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.42]–[2.50]. See also ss 1125 and 1126 of the Prototype Act in Prototype Legislation B.

29 These triggers would reflect the existing scope of ss 941A, 941B, and 948C of the *Corporations Act*.

legislation, which would also contain any specific form and content requirements. New triggers for disclosure could be added to primary legislation without requiring disruption of the Act-level architecture and the need to create a set of duplicative and prescriptive requirements for any new type of disclosure document (as was done for Cash Settlement Fact Sheets, for example).[30] Having created the trigger, any specific requirements could appear in delegated legislation, framed by the core, generally applicable principles in primary legislation.

3.37 The above approach seeks to address two legislative features that cause complexity in existing disclosure legislation: notional amendments and alternative regulatory regimes created through conditional exemptions.[31] By framing the primary legislation architecture at a higher level, the need for tailoring those provisions is reduced. This is because delegated legislation may be used to specify more detailed requirements for particular persons, products, services, or circumstances. The combination of a principled Act-level architecture with necessary prescription in delegated legislation may also allay concerns as to an overly 'general' or 'high-level' legislative framework,[32] which may fail to appropriately distinguish between products, services, and circumstances.

3.38 However, it is important that the delegated legislation, and any tailoring in primary legislation, is structured and framed to help users navigate and understand the substantial volume of disclosure legislation. This leads to the concept of 'designing for difference'.

Designing for difference

3.39 Disclosure provisions are characterised by a high degree of prescription and differentiation between specific products and services. Tailored provisions are frequently created, such as for superannuation, margin loans, corporate collective investment vehicle ('CCIV') products, and insurance.[33] This approach to legislative design has been criticised,[34] and would be better replaced by consolidation where possible. However, any restructuring and reframing of the legislation must take account of the apparent preference on the part of law-makers for such prescription and tailoring in relation to disclosure.

3.40 Therefore, a disclosure chapter should be designed so it can help users navigate and understand the diverse requirements that apply to different products, services, and circumstances. In Prototype Legislation B, the ALRC showed how

30 *Corporations Act 2001* (Cth) pt 7.7 div 3A.

31 For a discussion of the concept of 'legislative features', see Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [8].

32 Medical Insurance Group Australia, *Submission 7*.

33 See, eg, *ASIC Corporations (Managed Investment Product Consideration) Instrument 2015/847* (Cth); *Corporations Act 2001* (Cth) ss 1013GA, 1013I, 1013IA. See also Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [9.105]–[9.117] (Table 9.6).

34 Law Council of Australia, *Submission 49*; Insurance Australia Group Limited, *Submission 73*.

this could be done through a 'choose your own adventure' approach to structuring provisions.[35] The idea of 'designing for difference' is informed by the principles in **Chapter 9** of this Interim Report, including the importance of creating an intuitive flow to the law and fostering mental models of how to navigate and understand legislation.

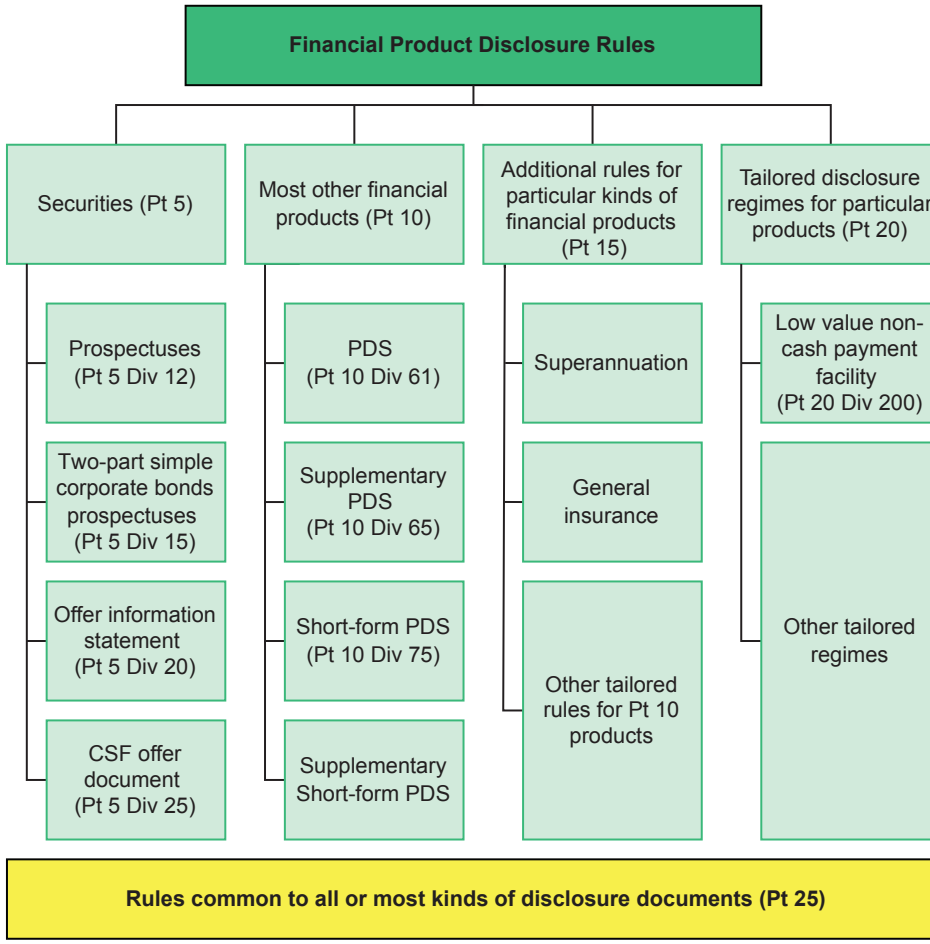
3.41 The Prototype Legislation B Rules, for example, were structured so that readers are led to, and through, relatively self-contained legislative silos, as illustrated in **Figure 3.1**. This Figure includes securities because the Prototype Legislation B Rules were drafted to show how broader consolidation of disclosure regimes could occur. However, as discussed above, the ALRC does not propose merging securities and other financial product disclosure.

3.42 The structure in **Figure 3.1** contrasts with that found in the *Corporations Regulations*, where requirements for different products and disclosure documents are spread throughout Part 7.9 of the *Corporations Regulations* and seven schedules.[36] The Prototype Legislation B Rules were designed to allow tailoring, but not to require it — rules of general application were still included in Part 25. These general rules often reflected an effort to consolidate overlapping requirements that would otherwise need to be restated or tailored in each legislative silo, namely Parts 5, 10, and 20 of the Prototype Rules in Prototype Legislation B.

35 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.11]–[2.12].

36 *Corporations Regulations 2001* (Cth) schs 10, 10A, 10BA, 10C, 10D, 10E, 10F.

Figure 3.1: Structure of the Rules in Prototype Legislation B



Setting clear scope for particular provisions

3.43 As explained in Interim Report A, Part 7.9 of the *Corporations Act* frequently includes or excludes financial products in specific provisions.[37] This is a result of the fact that Part 7.9 has no clear and consistent scope and application, which limits its ability to have an intuitive flow.

3.44 This problem could be avoided in a new disclosure chapter by using the approach of designing for difference, ideally in conjunction with a principled Act-level architecture. Two key elements of designing for difference are structuring provisions according to their scope and setting the scope of a provision at an appropriate level of generality.

37 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [9.64]–[9.72].

3.45 For example, this approach could mean that the part of a disclosure chapter relating to financial product disclosure does not include the following provisions that currently appear in Part 7.9 of the *Corporations Act*:

- Div 5A (Unsolicited off-market offers to purchase);
- Div 5B (Short sales); and
- Div 5C (CGS depository interests).[38]

3.46 These divisions each have a specific scope that is different to the general scope of Part 7.9 of the *Corporations Act*, which, for example, does not apply to securities. All three divisions apply to securities,[39] and Divs 5A and 5B apply to debentures, stocks, and bonds issued by government.[40] Division 5A also applies to contribution plans and products not issued in the course of a business of issuing financial products, which are otherwise excluded from Part 7.9.[41] Part 7.9 Div 6 of the *Corporations Act* also includes some provisions that apply to securities, such as s 1020B.

3.47 As highlighted by Part 4.5 of the illustrative FSL Schedule, the substance of Divs 5A, 5B, and 5C of Part 7.9 of the *Corporations Act* could be dealt with in a part providing for specific disclosure regimes. This would allow each disclosure regime to have a clear scope, that is neither carved in nor out of the scope of a higher-level provision.

3.48 Finally, it would be helpful to set the scope of provisions at a more useful level of generality, which reflects their actual potential scope. For example, the part of a disclosure chapter relating to financial product disclosure should not simply exclude securities, as in Part 7.9 of the *Corporations Act*. The current design of Part 7.9 means that a later provision specifically carves in securities in a CCIV for the purposes of PDS provisions in Part 7.9.[42] In the equivalent of Part 4.4 of the illustrative FSL Schedule, which covers financial product disclosure, it would be desirable to specifically exclude certain securities, thereby avoiding the need to specifically include CCIV securities. A more intuitive flow could be ensured by more narrowly drafted exclusions rather than inclusions. Provision-specific inclusions disrupt the generality of application provisions such as s 1010A of the *Corporations Act*, creating an inverted funnel in which users enter a narrowly scoped provision that then grows in scope as they read on.

Creating a high-level macrostructure

3.49 Chapter 4 of the illustrative FSL Schedule in **Appendix D** includes a high-level macrostructure for a chapter relating to financial products and financial services

38 This approach is demonstrated in Part 4.4 of the illustrative FSL Schedule in **Appendix D**, which relates to financial product disclosure.
39 *Corporations Act 2001* (Cth) s 1010A(1).
40 Ibid s 1010A(2).
41 Ibid ss 1010B, 1010BA.
42 Ibid s 1241Q.

disclosure. This section offers a summary of that illustrative chapter outline, as well as discussing how it implements the principles from **Chapter 9** of this Interim Report and the approaches discussed above.

3.50 In bringing together the core regimes for financial services and financial products disclosure, Chapter 4 of the illustrative FSL Schedule in **Appendix D** first implements the principle of grouping material for readers. This provides a single home for generally applicable disclosure regimes, as well as more tailored disclosure regimes that are not suitably located elsewhere in the illustrative FSL Schedule.[43]

Prioritising provisions and developing a logical flow

3.51 Having grouped provisions, the macrostructure in Chapter 4 of the illustrative FSL Schedule then prioritises provisions for users, and develops them in an intuitive flow based around five key parts, which should provide a flexible and lasting framework for developing disclosure provisions into the future:

- Part 4.1—Introduction;
- Part 4.2—General obligations and penalties;
- Part 4.3—Disclosure about financial services;
- Part 4.4—Disclosure about financial products; and
- Part 4.5—Specific disclosure regimes.

3.52 Provisions are prioritised for users across the illustrative chapter. For example, the core disclosure standards, such as the 'clear, concise and effective' standard, appear as the first substantive division of the chapter in Part 4.2. Similarly, the offences that underpin the regime, such as in relation to defective disclosure, could also appear in Part 4.2 of the illustrative FSL Schedule.

3.53 This structure would ensure that users have a clear sense of the main expectations imposed on them by the legislation: that disclosure, whatever its form, must meet certain standards, and must not be defective. These reflect central elements of the policy goals underlying disclosure. The outline of Chapter 4 of the illustrative FSL Schedule shows how they may be presented in a way that ensures they are not obscured by the more specific obligations and prescriptions that come later in the chapter and in delegated legislation.

3.54 This structure intuitively orders provisions based on two considerations. First, the structure reflects the application of provisions. The chapter goes from the most generally applicable in Part 4.2 to the most specific in Part 4.5. Financial services disclosure appears before financial product disclosure because anyone 'dealing' in a financial product will be providing financial services that will ordinarily require disclosure.

---

43 For the location of disclosure regimes elsewhere in the FSL Schedule, see the illustrative outline of a financial advice chapter in **Appendix C**, specifically Part 5.1 Div 3, Part 5.2 Div 1, Part 5.3 Div 2, and Part 5.4 Divs 4 and 5. The financial advice chapter is Chapter 5 of the illustrative FSL Schedule in **Appendix D**.

3.55 Secondly, the structure seeks to reflect the reality of commercial transactions. A person will generally provide financial services before dealing in a financial product that requires disclosure. For example, a financial services business may provide general or personal advice in relation to a financial product before then needing to provide disclosure when either issuing or, in the case of personal advice, recommending the product.

Thematic and conceptual coherence

3.56 The macrostructure of Chapter 4 of the illustrative FSL Schedule in **Appendix D** is also based around thematic and conceptual coherence. Within the four substantive parts, each provides for divisions that are thematically and conceptually clear. As discussed above, Part 4.2 provides for conceptually coherent divisions in which core obligations, offences, and other generally applicable obligations are developed. Similarly, both Parts 4.3 and 4.4 are based around three distinct divisions that seek to lead users through distinct themes in preparing and giving a disclosure document:

- Division 1—When disclosure document must be given;
- Division 2—Form and content of disclosure document; and
- Division 3—Further obligations.

3.57 Lastly, **Part 4.5** provides for a thematic provision covering specific disclosure regimes, which could then be divided into provisions covering conceptually distinct disclosure regimes, such as for certain short sales.[44]

Mental model of disclosure provisions

3.58 Implementing the approach discussed above would help users develop a mental model of how provisions are structured and where different types of provisions are located. This would make the law relating to disclosure easier to navigate and understand.

3.59 Aids to interpretation may also be used to lead users through the chapter and help them to develop and maintain a mental model of its operation. For example, decentralised tables of contents could be used within divisions for each of the five parts in Chapter 4 of the illustrative FSL Schedule. With careful framing of headings for disclosure provisions, such decentralised tables of contents would give readers a high-level sense of the key obligations in each division.

3.60 Decentralised tables of contents could be supplemented by simplified outlines for the chapter and for each part, giving readers a sense of core concepts and requirements in each provision. Notes could also lead users through the legislation, helping draw connections between provisions that can help to reinforce their core messages. For example, divisions relating to the form and content of disclosure documents could include a note referring readers to the ‘core disclosure standards’

44 *Corporations Act 2001* (Cth) pt 7.9 div 5B.

that would appear in the first substantive division of the chapter. This would again reiterate the fact that disclosure must be, for example, clear, concise, and effective.

3.61 Similarly, in Prototype Legislation B, the Prototype Act included a power for legislative notes to be inserted into the Act and related legislative instruments by delegated legislation in the form of scoping orders.[45] These notes could refer to scoping orders and describe their effect, thereby allowing the Act to draw readers' attention to exemptions and exclusions that may appear in delegated legislation.

Consolidating provisions

3.62 As explained in **Chapter 9** of this Interim Report, provisions should be designed in a way that minimises duplication and overlap. This requires a process of consolidation, or identifying overlapping provisions that serve the same policy purpose and considering whether they could be consolidated into fewer provisions that more effectively and clearly state the law.

3.63 Disclosure provisions offer a range of opportunities for consolidation in implementing **Proposal C4**, often because there are broadly similar provisions in Parts 7.7 and 7.9 of the *Corporations Act*. Many of these opportunities may involve policy choices, though the ALRC has found that some legislative differences between disclosure regimes have little basis in policy. This section identifies three examples of where consolidation could occur in relation to:

- offences for defective disclosure;
- offences for failing to undertake disclosure; and
- requirements as to how to undertake disclosure.

Offences for defective disclosure

3.64 All disclosure regimes share a common goal of ensuring the provision of accurate disclosure documents and information to consumers and investors. This goal is supported by the general prohibitions on misleading or deceptive conduct.[46] However, disclosure regimes often supplement the general consumer protections with prohibitions on 'defective' disclosure, which are generally offence provisions.[47]

3.65 Parts 7.7 and 7.9 of the *Corporations Act* include various prohibitions on defective disclosure in Div 7 of each Part. Civil liability can also result from the giving of a defective disclosure document under Parts 7.7 and 7.9.[48] This means that PDSs,

---

45 Prototype Legislation B, Act s 1097(6).

46 *Corporations Act 2001* (Cth) ss 1041E, 1041F; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12DB, 12DC, 12DF.

47 See, eg, *Corporations Act 2001* (Cth) pt 6D.3A div 4; ss 952B, 952D, 952E, 952F, 952G, 1021B, 1021D, 1021E,1021F; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [13.137], Table 13.3. In the context of securities disclosure in Chapter 6D of the *Corporations Act 2001*, s 728 effectively prohibits defective disclosure, though it does not use the concept of 'defective'.

48 *Corporations Act 2001* (Cth) pt 7.7 div 7 subdiv B, pt 7.9 div 7 subdiv B.

FSGs, Cash Settlement Fact Sheets, and SoAs are all subject to prohibitions on defective disclosure.

3.66 This section demonstrates how to create a single overarching defective disclosure regime that applies to disclosure documents and oral communications covered by Parts 7.7 and 7.9 of the *Corporations Act*. This could form a core element of a new disclosure chapter.[49]

The existing defective disclosure prohibitions

3.67 The defective disclosure prohibitions in Parts 7.7 and 7.9 of the *Corporations Act* operate in a similar manner. First, the concept of 'defective' is defined. There are currently four definitions in Parts 7.7 and 7.9 and they all adopt an identical design, with their content adapted to the documents and information to which they apply.[50] Defective is defined to mean:

- 'a misleading or deceptive statement in the disclosure document or statement'; or
- any omission from a specific disclosure document provided for in the definition, such as an omission from an FSG of material required by ss 942B or 942C of the *Corporations Act*.

3.68 The statement or omission must also be materially adverse from the point of view of a reasonable person considering whether to:

- in the case of financial services-related disclosure documents — proceed to be provided with the financial service concerned;
- in the case of advice-related financial services disclosure documents — act in reliance on the advice concerned; or
- in the case of advice-related financial product disclosure documents — proceed to acquire the financial product concerned.

3.69 Second, having defined 'defective', a range of offences are created depending on who is giving the disclosure document, to whom it is being given, and whether the giver knows the document or information to be defective.

Creating a single definition of 'defective'

3.70 In Prototype Legislation B, the ALRC showed how the defective disclosure prohibitions in Chapter 6D and Part 7.9 of the *Corporations Act* could be consolidated.[51] This provides a potential template for consolidating the defective disclosure provisions in Parts 7.7 and 7.9 of the *Corporations Act*, which could form the basis of a single, overarching set of prohibitions on defective disclosure.

---

49 Part 7A.2 Div 4 of the Prototype Act in Prototype Legislation B demonstrated how defective disclosure regimes for securities and other financial products could be consolidated into a single disclosure regime.

50 *Corporations Act 2001* (Cth) ss 952B, 953A, 1021B, 1022A.

51 Prototype Legislation B, Act ch 7A pt 7A.2 div 4.

3.71 In essence, s 1135 of the Prototype Act in Prototype Legislation B adopted a principled definition of 'defective'. It replaced the lists of specific omissions from disclosure documents in ss 1021B(1)(b)–(d) of the *Corporations Act* with a subparagraph providing that a document or communication will be defective if it 'does not include particular material required by a provision of this Part or of the financial services rules'.

3.72 Importantly, the definition in s 1135 of the Prototype Act in Prototype Legislation B preserved the requirement that the misleading or deceptive statement, or the failure to include particular material, must be materially adverse from the point of view of a reasonable person considering whether to acquire the financial product.

3.73 The approach taken in s 1135 seeks to preserve the existing policy settings, though on its face it appears to change the scope of the definition. The existing definitions of 'defective' exclude certain omissions unless they are 'misleading or deceptive'. For example, an omission will not be specifically defective in relation to a PDS if it relates to the requirements in ss 1013B or 1013G of the *Corporations Act*, which require that PDSs have titles and be dated.[52]

3.74 The definition of 'defective' in Prototype Legislation B does not include similar exclusions or limitations. Instead, the Prototype relies on the fact that a failure to include the date or the correct title is unlikely, by itself, to be materially adverse from the point of view of a reasonable person. Much of the prescription in ss 1021B(1)(b)–(d) of the *Corporations Act*, and similar provisions in s 952B(1), can therefore be replaced if greater emphasis is placed on the fact that omissions must be materially adverse. If thought necessary, the specific inclusions in ss 952B(1A), 953A(1A), 1021B(1A), and 1022A(1A) of the *Corporations Act* could be preserved,[53] though it would be helpful to consolidate and express them at a higher level of generality, rather than specifically in relation to PDSs and FSGs.

Consolidating defective disclosure offences

3.75 In Prototype Legislation B, the ALRC consolidated seven existing provisions in the *Corporations Act* (five offence provisions and two civil penalty provisions from Chapter 6D and Part 7.9) into four provisions in the Prototype Act (three offence provisions and one civil penalty provision).[54]

3.76 The ALRC suggests that it would be possible to consolidate the existing offences and civil penalties for financial services and financial products disclosure into a set of overarching offences and civil penalties that prohibit defective disclosure. The

---

52 *Corporations Act 2001* (Cth) s 1021B(1)(b).

53 These provisions were inserted by the *Financial Services Reform Amendment Act 2003* (Cth). The Revised Explanatory Memorandum to the Bill resulting in that Act explained that the provisions were 'proposed to provide greater certainty in relation to the interaction between' the requirements for disclosure documents to be 'up to date … and the meaning of "defective" within the criminal and civil liability provisions': Revised Explanatory Memorandum, Financial Services Reform Amendment Bill 2003 (Cth) [3.115], [3.146].

54 Sections 1136(1), 1137(1), and 1138(4), (6) of the Prototype Act in Prototype Legislation B would replace ss 728(3)–(4), 1021D(1)–(2), 1021E(5), (8), and 1021F(1) of the *Corporations Act*.

prohibitions in Parts 7.7 and 7.9 of the *Corporations Act* are often broadly identical. Consolidation could be based on offences similar to those found in ss 1136–1139 of the Prototype Act in Prototype Legislation B.

3.77 However, it would be necessary to reconcile some differences between the Part 7.7 and Part 7.9 offence provisions. For example, s 1021D of the *Corporations Act* provides an offence punishable by up to 15 years imprisonment where a person prepares and gives a Part 7.9 disclosure document knowing it to be defective.[55] In contrast, s 952D creates two offences punishable by up to 15 years imprisonment where an AFS Licensee or authorised representative give a Part 7.7 disclosure document knowing it to be defective.[56]

3.78 The s 952D offences are therefore somewhat different in scope compared to the s 1021D offence: they do not require a person to have prepared the disclosure document, and they specifically apply to only AFS Licensees and authorised representatives, rather than anyone preparing a disclosure document. Authorised representatives giving Part 7.9 disclosure documents that they know are defective (as opposed to Part 7.7 disclosure documents) are only subject to 5 years imprisonment under s 1021F of the *Corporations Act*, unless they prepared the disclosure document (in which case they would be liable under s 1021D).[57]

3.79 Consolidating these offence provisions may therefore involve a change to existing policy settings, and therefore the ALRC has not proposed that they be consolidated. However, government could consider consolidating offences and civil penalties as part of creating a single definition of 'defective' and a grouped set of defective disclosure prohibitions in a new disclosure chapter. This would also be consistent with Proposal B15 of Interim Report B, which proposed consolidating offences into a smaller number of provisions covering the same conduct.

Offences for failing to give disclosure

3.80 A core element of any disclosure regime is the imposition of a penalty for failing to provide disclosure documents or information by the time required in legislation. Parts 7.7 and 7.9 of the *Corporations Act* include various provisions that make failing to give disclosure an offence, as well as related defences.[58] Sections 952C and 1021C are the most generally applicable offences, and relate to failure to give an FSG, Cash Settlement Fact Sheet, and PDS, as well as some other disclosure documents and information.[59]

---

55 See *Corporations Act 2001* (Cth) sch 3.
56 Ibid.
57 Ibid.
58 Ibid ss 952C, 1021C, 1020AI(3)–(6).
59 See the definition of 'disclosure document or statement' in s 952B of the *Corporations Act*, which determines the scope of s 952C. Section 1021C of the *Corporations Act* also applies to information a person is required to communicate under s 1012G(3)(a).

3.81 In creating general obligations and penalties for disclosure,[60] it would be possible to consolidate these offences and make them generally applicable to financial product and financial services disclosure.[61] Importantly, ss 952C and 1021C of the *Corporations Act* attract the same penalties in Sch 3 to the *Corporations Act*. Both sections also create identical offences of strict and ordinary liability. The only substantive differences are the following:

- Section 1021C applies to oral information required by s 1012G(3)(a). This could be preserved in any consolidated provision, either by creating a general offence for failure to give oral disclosure or by retaining the existing specificity of ss 1021C(1)(a) and (3)(a).
- Section 1021C(5) provides for circumstances in which a person is taken not to have committed an offence. This could be preserved in a scoping order, which could provide an exclusion from the section based on the circumstances currently found in sub-s (5).

3.82 Similarly, offences for failure by AFS Licensees to ensure their representatives give disclosure documents may be restructured and reframed.[62] Sections 952H and 1021G of the *Corporations Act* could be consolidated into a generally applicable offence for financial product and financial services disclosure (placed in the equivalent of Part 4.2 of the illustrative FSL Schedule).

3.83 It is helpful to note that the ALRC did not include a general offence equivalent to ss 952C and 1021C in the Prototype Act in Prototype Legislation B. Instead, offences were included in the general obligations to prepare and give disclosure documents in ss 1111(5) and 1112(5) of the Prototype Act. The design of ss 1111 and 1112 in the Prototype Act has the effect that a failure to prepare and give a disclosure document in compliance with the Part and the financial services rules creates an offence.

3.84 Sections 1111 and 1112 of the Prototype Act produce a different outcome to that provided in ss 952C and 1021C of the *Corporations Act*. An offence under ss 952C and 1021C is only committed if a person fails to give a document that *purports* to be the required disclosure document. A person could therefore give a document that, for example, purports to be a PDS, but which completely fails to comply with the requirements of the *Corporations Act*. Such a document would probably be defective under ss 1021D or 1021E, but it would not breach s 1021C.

3.85 To preserve existing policy settings, the approach adopted in ss 1111 and 1112 of the Prototype Legislation could be adapted so that only a failure to give a document *purporting* to be a disclosure document is an offence. However, this would require restating the offence in relation to each obligation to give disclosure. While the ALRC has emphasised the visibility of offences and other provisions, a general offence placed near the beginning of a disclosure chapter, replicating the effect of

60 See Part 4.2 of the illustrative FSL Schedule in **Appendix D**.
61 See Parts 4.3 and 4.4 of the illustrative FSL Schedule in **Appendix D**.
62 *Corporations Act 2001* (Cth) ss 952H, 1021G, 1020AI(7).

ss 952C and 1021C of the *Corporations Act*, could be a better alternative to adapting the design of ss 1111 and 1112 in Prototype Legislation B.

Requirements as to how to undertake disclosure

3.86 A further core element of any disclosure regime is regulation of how disclosure documents or oral information must be given. Sections 940C and 1015C of the *Corporations Act* regulate how disclosure documents under Parts 7.7 and 7.9 must generally be given. These provisions could be consolidated in the disclosure chapter in primary legislation or, consistent with the ALRC's proposed legislative model,[63] they could be standardised and contained in delegated legislation related to financial products and financial services disclosure. For example, a standard provision could be developed and replicated in two rulebooks for financial products disclosure and financial services disclosure.

3.87 Sections 940C and 1015C of the *Corporations Act* are broadly similar in terms of the ways in which disclosure may be given. Some differences between the provisions have been corrected by delegated legislation. For example, s 940C(1)(a)(iii) provides that disclosure is given if it is 'otherwise made available to the client, or the client's agent, as agreed between the client, or the client's agent, and the providing entity'.

3.88 Section 1015C(1)(a) of the *Corporations Act* provides no equivalent in relation to PDSs. However, reg 7.9.02A of the *Corporations Regulations* provides for alternative ways of giving a PDS under s 1015C, which broadly replicate those found in s 940C(1)(a)(iii) of the *Corporations Act*.

3.89 Given the Australian Government's intention to make Treasury portfolio legislation more technology-neutral,[64] consideration could be given to creating a more principled requirement as to how disclosure documents and information must be given, which could then be applied to all disclosure documents given under a new disclosure chapter of the *Corporations Act*.

Structuring and framing the microstructure

3.90 This section discusses examples of how the microstructure of provisions relating to disclosure — for example, particular sections and subsections — could be better framed and structured based on the principles in **Chapter 9** of this Interim Report. The examples are not intended to be exhaustive. Instead, they highlight how existing provisions could be restructured and reframed to help people more easily navigate and understand the law, particularly its core requirements.

---

63 In Prototype Legislation B, s 1126(1)(k) of the Prototype Act provided that financial services rules could provide for how disclosure documents 'are to be *given* (including by means that do not involve personal delivery)' (emphasis added).

64 See, eg, Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023 (Cth).

3.91 **Example 3.3** illustrates how consolidation of disparate provisions can be accompanied by a careful focus on the microstructure of the consolidated provision, prioritising important information for users within both the macrostructure and microstructure.

Example 3.3: Consolidating and prioritising information within sections

Section 1125 of the Prototype Act in Prototype Legislation B highlights how sections can better prioritise information for users, and addresses many of the problems discussed in **Example 3.2**.[65] The section provides for the core principles applicable to the form and content of financial product disclosure documents.

The section begins by stating, in sub-s (1), the core principle applicable to disclosure documents: that they must be worded and presented in a clear, concise, and effective manner. This currently appears as s 1013C(3) of the *Corporations Act*.

Subsection (3) in s 1125 of the Prototype Act then provides for the three general requirements as to what a disclosure document must contain, subject to the limitation that the information is only needed insofar as a reasonable person would reasonably require it in order to decide whether to acquire the financial product. The substance of sub-s (3) is currently spread across four provisions of the *Corporations Act*,[66] and its importance is not clearly communicated to users.

In two subsections, s 1125 of the Prototype Act therefore communicates the three sources of information that must be contained in a financial product disclosure document, helping to frame the more detailed provisions that follow in s 1125 and in the chapter more generally. This is done in a succinct manner that also highlights the general limitations on the information that must be disclosed.

3.92 Some disclosure provisions of the *Corporations Act* use the concept of a 'parallel structure'. This allows for the expression of 'similar ideas in a similar form', without 'mixing conditions and exceptions, and not mixing "if" and "unless" clauses'.[67]

---

65 Section 1125 of the Prototype Act does not precisely reflect the existing design of Part 7.9 Div 2 of the *Corporations Act*. The reasonable person restriction in s 1013F of the *Corporations Act*, on which s 1125 of the Prototype Act is partly based, only applies to information required under ss 1013D or 1013E of the *Corporations Act*. This includes most information required by the *Corporations Act* and regulations, but excludes provisions such as ss 1013GA, 1013H, 1013I, and 1013IA of the *Corporations Act*. This means all the information in those sections must be given even if a reasonable person would not require it. Minor amendments to s 1125(3)(a) of the Prototype Act could preserve the existing effect of the law.

66 *Corporations Act 2001* (Cth) ss 1013C(1), 1013D(1), 1013E, 1013F.

67 Ian Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11(3) *Statute Law Review* 161, 167.

This can be helpful in relation to disclosure provisions, minimising the need for a single section to have a cascading set of conditions, such as for whether a person is an AFS Licensee or an authorised representative. However, **Example 3.4** highlights how parallel structures can be poorly executed, resulting in duplicative provisions that fail to highlight the core, generally applicable principles.

Example 3.4: Consolidating and designing for difference

Section 942B of the *Corporations Act* provides for the main requirements of an FSG when given by an AFS Licensee. Section 942C provides for the requirements when given by an authorised representative. The ALRC calculated that the two provisions are more than 80% identical, with dozens of subsections, paragraphs, and subparagraphs from s 942B being substantively unchanged in s 942C.[68]

It may be better to consolidate the duplicative elements of ss 942B and 942C into separate sections that apply to both AFS Licensees and authorised representatives, which could use the concept of a 'Core principles' section like that found in s 1125 of the Prototype Act in Prototype Legislation B. The tailored requirements could be dealt with in delegated legislation, as under the ALRC's proposed legislative model. Alternatively, and with reference to the illustrative FSL Schedule in **Appendix D**, the division on the form and content of disclosure documents could include three subdivisions — core principles, requirements for AFS Licensees, and requirements for authorised representatives. This division appears as Part 4.3 Div 2 of the illustrative FSL Schedule.

There are risks in creating duplicative provisions. For example, in creating duplicative elements of ss 942B and 942C of the *Corporations Act*, differences appear to have been inadvertently added to the provisions. Section 942B(3) provides for a limit on 'the level of information about a matter', whereas the equivalent s 942C(3) refers to 'the level *of detail* of information about a matter'. It may be simpler to apply a single general principle equivalent to ss 942B(3) and 942C(3), avoiding the risk of potentially confusing differences.

3.93 The key point from **Example 3.4** is that parallel structures should only be used for provisions of the law that have substantively different application to particular persons. As a general rule, they should not be used to restate, in relation to specific persons or circumstances, generally applicable principles. Ensuring the appropriate implementation of parallel structures in this way can then help users identify the elements of the legislation that truly differ between different persons or circumstances, while recognising generally applicable elements of the law.

68 See, for example, all provisions including and after sub-s (3), which are substantively identical in both ss 942B and 942C of the *Corporations Act*. Most provisions of sub-s (2) are substantively identical, with some adjustments to account for the different nature of the providing entity (an AFS Licensee or an authorised representative).

3.94 Offence and other penalty provisions, and any related remedies, are also important in the microstructure of an Act. Effective framing of these provisions is vital in helping people identify and understand significant legislative provisions, which are generally those that attract a penalty or remedies. Users should be able to quickly identify penalty provisions and applicable penalty amounts and remedies, as these provide an immediate sense of the seriousness of a contravention. **Example 3.5** shows how disclosure provisions could better frame remedies, offences, and other penalty provisions.

Example 3.5: Identifying remedies, offences, and other penalty provisions

Most disclosure-related remedies, offences, and other penalty provisions in the *Corporations Act* are found in divisions titled 'Enforcement'.[69] Such a heading suggests that ASIC is the main audience. These types of provisions could be more clearly framed, such as through headings like 'offences and civil penalties' and 'remedies'. The title for Part 6D.3 of the *Corporations Act*, relating to securities disclosure, provides an example of a helpful heading: 'Prohibitions, liabilities and remedies (other than for CSF offers)'.[70]

Offences and civil penalties are also not consistently and clearly identified in disclosure provisions.[71] As explained by ss 940D and 1010D of the *Corporations Act*, Div 7 of Parts 7.7 and 7.9 contains various disclosure-related offences. However, these divisions do not include all offences and some offences are only identified by legislative notes, though the offences are created by s 1311(1) of the *Corporations Act* in conjunction with Sch 3 to the Act. In any case, a person would need to review Sch 3 to identify the applicable penalty. Relatedly, offence provisions in Parts 7.7 and 7.9 inconsistently identify fault elements, with only some clearly stating any applicable fault elements. Most provisions do not state the applicable fault element and a person must apply the rules from the *Criminal Code*.

Similarly, civil penalties are only identified by legislative notes in Parts 7.7 and 7.9, and are created by s 1317E(3) of the *Corporations Act* (which appears near the end of the Act). Potential penalties are also not clear on the face of civil penalty provisions. **Chapter 10** of this Interim Report discusses many of these issues more generally.

69 *Corporations Act 2001* (Cth) pt 7.7 div 7, pt 7.9 div 9.

70 See also Part 7.5B Div 4 of the *Corporations Act*, titled 'Offences and civil penalties relating to manipulation of financial benchmarks'.

71 These problems are symptomatic of broader problems with how offences and other penalties are identified in the *Corporation Act*. For a discussion of how offences and other penalties are created in the *Corporations Act*, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.28]–[5.29]; Australian Law Reform Commission, 'Corporations Act Offence and Penalty Architecture' (September 2022) <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Corps-Act-offence-and-penalty-architecture.pdf>.

To better identify offences and civil penalties, any reframed and restructured disclosure provisions should implement **Recommendations 20–22** of this Interim Report.[72] **Recommendation 23** of this Interim Report should be implemented to consistently identify fault elements for offence provisions.[73]

Better framing of disclosure regulation

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'.

3.95 **Proposal C5** is intended to more clearly frame disclosure legislation around the objective of enhancing consumer understanding. It would see provisions such as s 1013C(3) of the *Corporations Act* amended so that they read something like the following:

> The information included in the Product Disclosure Statement must be worded and presented in a clear, concise and effective manner *and in a way that promotes understanding of the information*.[74]

3.96 **Proposal C5** could be implemented alongside **Proposal C4** or could be implemented within the existing framework of Parts 7.7 and 7.9 of the *Corporations Act*.

3.97 This part discusses the justification for, and potential implementation of, **Proposal C5.** The part first discusses Proposal A8 of Interim Report A, which suggested an outcomes-based standard of disclosure. It then briefly reviews the general objectives of disclosure, before considering how the objective of enhancing consumer understanding has come to be informally understood as an important purpose of disclosure documents, both in Australia and internationally. Finally, the part concludes by discussing the introduction of an outcomes-based standard for disclosure and the potential role of consumer testing.

Proposal A8 in Interim Report A

3.98 Interim Report A acknowledged the widely held view that disclosure legislation was overly complex, with core regulatory expectations lost among prescriptive

72 See **Chapter 10** of this Interim Report.
73 See **Chapter 10** of this Interim Report.
74 As part of implementing the higher-level disclosure architecture proposed in this chapter, the reference to 'Product Disclosure Statement' could be replaced 'a disclosure document'.

obligations. The ALRC sought stakeholder views on whether the obligation to provide financial product disclosure in Part 7.9 of the *Corporations Act* should be reframed to incorporate an outcomes-based standard for disclosure.[75]

3.99 Interim Report A suggested that 'implementation of this approach would be consistent with an outcomes-based approach to regulation' and 'would clarify, and encourage meaningful compliance with, the substance and intent of product disclosure obligations'.[76]

3.100 Submissions in relation to Proposal A8 overwhelmingly indicated that the current disclosure regime was not operating as intended. The majority of submissions expressed support or qualified support for an outcomes-based standard for disclosure.[77]

3.101 Consistent with the Terms of Reference and following stakeholder feedback in response to Interim Report A, the ALRC is seeking views on a revised proposal. The new proposal does not involve an alternative standard of disclosure or a shift 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 be worded and presented 'in a way that promotes understanding of the information'.

3.102 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. The amended standard would also help frame any future policy developments concerning disclosure.

3.103 As this part shows, disclosure legislation is already widely thought to require a focus on promoting consumer understanding, which is regarded as the desirable outcome of designing disclosure documents that are 'clear, concise and effective'.

The objectives of disclosure

3.104 The Financial System Inquiry, also known as the Wallis Inquiry, noted that 'the aim of regulation should be effective disclosure, not merely the production of information'.[78] The objective of disclosure is therefore to assist consumers in making choices about financial products and financial services. Accordingly, disclosure documents should convey a description of the products and services that allows consumers to assess their risks and benefits, discern the differences among

---

75 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [9.123]–[9.132].

76 Ibid [9.123], [9.125]. See also ibid [2.117]–[2.128]. For a discussion of the use of outcomes-based disclosure to enhance norms, see Andrew Godwin and Micheil Paton, 'Social Licence, Meaningful Compliance, and Legislating Norms' (2022) 39(5) *Company and Securities Law Journal* 276.

77 Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) [115]–[124].

78 Stan Wallis et al, *Financial System Inquiry* (Final Report, March 1997) 261.

competing products and services, and determine whether the products or services are suitable for the consumer.[79]

3.105 The obligation that information be worded and presented in a 'clear, concise and effective manner' was introduced by the *FSR Act*.[80] No explanation for the wording choice was provided in the Explanatory Memorandum, but Parliament's intent may be inferred from the Wallis Inquiry, which called for 'effective disclosure' and for clear statements containing relevant information in a form that enables comparison with similar products.[81] Similarly, the Corporate Law Economic Reform Program also called for a regime that facilitated the transfer of clear and comprehensible information.[82]

3.106 These goals are reflected in ASIC Regulatory Guide 168, which states that a PDS should help consumers compare and make informed choices about financial products.[83]

Understanding as an outcome of disclosure

3.107 Though not expressly stated in the *Corporations Act*, financial product and financial services disclosure is generally regarded as requiring a focus on enhancing consumer understanding.

3.108 The 'good disclosure principles' that ASIC has formulated in respect of PDSs include the principle that 'disclosure should promote product understanding'.[84] ASIC suggests that preparing disclosure documents to 'promote financial product understanding by consumers will help issuers comply with their obligation to present a PDS in a clear, concise and effective manner'.[85] ASIC makes similar comments in relation to SoAs and FSGs.[86] In relation to SoAs, ASIC emphasises that 'presentation requirements are as important as the content requirements in preparing' the disclosure document.[87]

3.109 AFCA considers the effectiveness of SoA disclosure with regard to consumer understanding. AFCA suggests that a failure to provide a 'clear, concise and effective' SoA may result in a finding that the consumer 'did not understand the advice' and

---

79 Andrew Godwin and Paul Rogerson, 'Clear, Concise and Effective: The Evolution of Product Disclosure Documents' in Shelley Griffiths, Sheelagh McCracken and Ann Wardrop (eds), *Exploring Tensions in Finance Law: Trans-Tasman Insights* (Thomson Reuters, 2014) 11, 17.

80 In relation to the PDS regime, see s 1013C(3) of the *Corporations Act*.

81 Wallis et al (n 78) 260–9.

82 Department of the Treasury (Cth), *Financial Markets and Investment Products: Promoting Competition, Financial Innovation and Investment* (Corporate Law Economic Reform Program, Proposals for Reform: Paper No 6, 1997) 108 ('*Financial Markets and Investment Products*').

83 Australian Securities and Investments Commission, *Disclosure: Product Disclosure Statements (and Other Disclosure Obligations)* (Regulatory Guide 168, July 2022) [RG 168.39].

84 Ibid [RG 168.76]–[RG 168.92].

85 Ibid [RG 168.76].

86 Australian Securities and Investments Commission, *Licensing: Financial Product Advisers—Conduct and Disclosure* (Regulatory Guide 175, June 2021) [RG 175.112]–[RG 175.213].

87 Ibid [RG 175.213].

therefore could not provide 'informed consent'.[88] AFCA also notes that disclosure will be 'effective' if it produces 'the intended or expected result', and that the information in an SoA should be designed so that it 'promotes understanding of the adviser's recommendations'.[89]

3.110 The Financial Planning Association Best Practice Standards also repeatedly emphasise the importance of client understanding.[90] For example, the standards provide that 'recommendations and information' should be provided in a way that helps clients *understand* the recommendations.[91] The standards also discuss the need to communicate arrangements 'in terms the client is likely to *understand*'.[92]

3.111 Overall, these sources of guidance confirm the relationship between the requirement that disclosure documents be 'clear, concise and effective' and the objective of promoting consumer understanding.[93] In view of this relationship, it is relevant to consider whether a requirement to promote understanding should be incorporated explicitly into the disclosure standard.

The need to emphasise promoting consumer understanding

3.112 Any disclosure regime must answer two key questions:

- what information should be provided (content); and
- how should information be presented in a way that promotes understanding (presentation)?

3.113 Experience suggests that the disclosure regimes for financial products and services do not always produce disclosure documents that promote consumer understanding. Rather, studies show that disclosure documents are complex and are not used as intended by consumers.[94] For example, research indicates that consumers engage with PDS documents differently based on how much and what type of information they find relevant and how that information is designed, including through visuals such as pie charts or tables.[95]

---

88 Australian Financial Complaints Authority, *The AFCA Approach to Adequacy of Statements of Advice* 5 <www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches>.

89 Ibid. AFCA also states that this approach is consistent with ASIC Regulatory Guide 175 and the Financial Planning Association's Code of Professional Practice.

90 Financial Planning Association, *FPA Best Practice Standards* (September 2022) standards 1.1, 1.2, 1.4, 1.10, 4.4, 4.13.

91 Ibid standard 4.13.

92 Ibid standards 1.2, 1.4 (emphasis added).

93 See also Gail Pearson, *Financial Services Law and Compliance in Australia* (Cambridge University Press, 2009) 153, citing *Corporations Act* s 1013C(3).

94 Australian Securities and Investments Commission and Dutch Authority for the Financial Markets, *Disclosure: Why It Shouldn't Be the Default* (Joint Report No 632, October 2019) 21, 42, 45–50.

95 Ibid 38–9.

3.114 To date, disclosure regimes have relied on the 'clear, concise and effective' standard to further the objective of promoting consumer understanding. Experience suggests, however, that those who prepare disclosure documents have tended to focus on complying with content requirements at the expense of presentation and understanding.

3.115 Academic commentary has highlighted the extent to which the provision of information is a necessary, but insufficient, step towards achieving the outcome of understanding. In the context of consumer lending, Professor Sovern has noted:

> Disclosure is an intermediate step on the path to comprehension. Consequently, if understanding is the goal, it makes sense to focus on that goal rather than an intermediate step that has proved to lead only imperfectly to comprehension and has permitted consumers to borrow unwisely …[96]
>
> In short, focusing on understanding rather than the mechanical task of supplying disclosures sharply increases the probability that the information will be understood.[97]

3.116 Introducing the objective of promoting consumer understanding into a disclosure standard could enhance the focus on how disclosure documents are presented, helping to frame the prescriptive content obligations with a clearer expectation for how that content should be presented to consumers. Moreover, a clearer focus on promoting consumer understanding would reflect international developments in disclosure regulation.

The international experience

3.117 Other jurisdictions have incorporated an express reference to consumer understanding in disclosure standards as they apply to financial products. As noted by Dr Godwin and Professor Ramsay:

> Some jurisdictions additionally link the disclosure standard to the ability of retail investors to understand. For example, in Hong Kong information should be disclosed 'in such manner as to be readily understood by the investing public'. In Singapore, information should be disclosed 'in clear and simple language that investors can easily understand'. Under the new regulation in the European Union, PRIIPS [Packaged retail and insurance-based investment products] are required to be 'written in language and a style that communicate[s] in a way that facilitates the understanding of the information'. And in Canada, '"plain language" means language that can be understood by a reasonable person, applying a reasonable effort'.[98]

---

96 Jeff Sovern, 'Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers' 71(4) *Ohio State Law Journal* 761, 823 (citations omitted).

97 Ibid 824.

98 Andrew Godwin and Ian Ramsay, 'Short-Form Disclosure Documents—An Empirical Survey of Six Jurisdictions' (2016) 11(2) *Capital Markets Law Journal* 296, 299–300 (citations omitted).

3.118 Studies have found that jurisdictions that emphasise an objective of promoting consumer understanding also appear to have more effective disclosure documents. For example, one study found that Canadian disclosure documents were considered by the overwhelming number of respondents to be the easiest to read.[99] This study compared disclosure documents in Australia, Canada, the European Union, Hong Kong, New Zealand, and Singapore.

3.119 The disclosure standard adopted in British Columbia in Canada is that information be presented 'concisely and in plain language'.[100] The term 'plain language' is defined as 'language that can be understood by a reasonable person, applying a reasonable effort'.[101] A relevant question is whether (and if so to what extent) the explicit reference to consumer understanding was an influential factor in the production of a disclosure document that was easy to understand.[102]

3.120 References to understanding as an outcome of disclosure arise in other regulatory contexts. For example, Article 10(1) of the European Union's *Regulations on Sustainability-Related Disclosures in the Financial Services Sector* (2019) provides as follows:

> The information to be disclosed pursuant to the first subparagraph shall be clear, succinct and *understandable* to investors. It shall be published in a way that is accurate, fair, clear, not misleading, simple and concise and in a prominent easily accessible area of the website.[103]

3.121 Further, the *Prospectus Regulation* (UK) provides that the prospectus summary must 'be written in a language and a style that facilitate the understanding of the information, in particular, in language that is clear, non-technical, concise and *comprehensible* for investors'.[104]

3.122 In its discussion paper entitled 'Future Disclosure Framework', the UK's Financial Conduct Authority ('FCA') stated that the

---

99 The document based on the approach in Australia was overwhelmingly considered by respondents to be the hardest to read: ibid 309, 313.

100 *National Instrument 81-101, Mutual Fund Prospectus Disclosure* (BC Reg 1/2000) form 81-101F3.

101 Ibid pt 1.1.

102 There are, of course, other factors that are relevant in this regard, such as length and whether the disclosure document serves as a substitute for the prospectus or as a summary document that exists alongside, and is considered to be part of, the formal disclosure document. For discussion, see Godwin and Ramsay (n 98) 316.

103 *Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector* [2019] OJ L 317/1, art 10(1) (emphasis added).

104 Financial Conduct Authority (UK), *FCA Handbook* PRR 2.1.4 (emphasis added). Note that the existing prospectus regime will change after the enactment of the Financial Services and Markets Bill 2023 (UK). HM Treasury has published a draft version of the new regulations: *Financial Services and Markets Act 2000 (Public Offers and Admissions to Trading) Regulations 2023* (UK).

> Consumer Duty, and its emphasis on outcomes-based regulation, will help us design a new disclosure regime which is similarly outcomes-focused and reduces rigidity and one-size fits all rules.[105]

3.123 In addition, the FCA stated:

> We want consumers to be given the information they need, at the right time, and presented in a way that they can understand …
>
> Further, we believe that the outcomes-based objectives of the Consumer Duty will complement our aims in the disclosure space and will provide a basis on which we can design a flexible regime that reduces detailed disclosure rules. We believe that outcomes-based regulations will support consumer decision making by allowing firms to optimise their disclosures.[106]

3.124 Accordingly, the UK is strengthening its outcomes-based disclosure requirements in respect of financial products.

Introducing an outcomes-based standard

3.125 The intention of **Proposal C5** is to make the objective of promoting consumer understanding clearer and more explicit for persons regulated by the disclosure provisions of Chapter 7 of the *Corporations Act*. The ALRC's proposal would not affect the extent to which detailed rules are provided alongside more principled obligations and objectives, though stakeholders have expressed differing views on the appropriateness of such detail.[107]

3.126 In contrast to the suggested wording for an outcomes-based standard in Interim Report A, **Proposal C5** does not incorporate an objective standard by reference to a 'reasonable consumer'. In other words, the ALRC does not suggest that the standard be amended to require that information 'be worded and presented in a clear, concise and effective manner and in a way that promotes the understanding of the information *by a reasonable consumer*', as suggested in Interim Report A.[108] The incorporation of an objective standard is less relevant in view of the way in which

105 Financial Conduct Authority (UK), *Future Disclosure Framework* (Discussion Paper No DP22/6, December 2022) [1.8].
106 Ibid [1.30]–[1.31].
107 See, eg, E Bant, *Submission 8*; P Hanrahan, *Submission 36*; Law Council of Australia, *Submission 49*.
108 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [9.127].

the proposed amendment is worded — to 'promote' understanding — and also the existence of the design and distribution obligations.[109]

Consumer testing

3.127 Interim Report A suggested that

> the types of steps required in relation to a novel or complex product might include consumer testing of a proposed disclosure approach and adaptation of that approach in response to findings from testing.[110]

3.128 The benefits of consumer testing in this regard have been highlighted by the Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre, and Super Consumers Australia:

> We consider consumer testing of disclosure should be part of any reform initiatives. Consumer testing is required to understand what kind of information will be useful for consumers, and when and how to present it for maximum effect. … As the ALRC continues its work on outcomes-based disclosure, we urge it to require consumer testing, mandate ongoing assessments, and incorporate incentives for firms as core to any regulatory reform.[111]

3.129 The ALRC suggests that consideration be given either to incorporating consumer testing into legislation (for example, as a safe harbour against breach of the disclosure requirements or as a matter to which courts should have regard in determining whether a breach of the disclosure requirements had occurred) or to incorporating consumer testing into regulatory guidance. The former approach would respond to the following concern expressed by the Financial Planning Association of Australia:

> We are also concerned that the focus on harsh penalties for some disclosure provisions have just perpetuated a tick-a-box approach to compliance and deliver no consumer benefit. The experience of the last 10 years shows that if the penalty for breaching consumer disclosure laws is too high, industry diverts resources to compliance and the resulting disclosure documents become even more unreadable and lengthy.[112]

---

109 The ALRC also notes the following submission by consumer groups in response to Proposal A8 in Interim Report A: 'We also raise concerns about the ALRC's framing of an outcome-based disclosure requirement, as involving "reframing the obligation as a requirement to take reasonable steps designed to ensure that a reasonable consumer would understand the key risks, costs and benefits of the product". Our particular concern is the concept of a "reasonable consumer" … As noted above, the effects of disclosure vary from person to person, and we consider that there is no "reasonable" consumer. Rather, consumers are heterogenous and experience and engage with information in varying ways'. See Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.

110 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [9.128].

111 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.

112 Financial Planning Association of Australia, *Submission 10*.

3.130 The importance of consumer testing of disclosure documents by both regulators and product issuers has been discussed in the UK for at least two decades.[113] In relation to implementation plans for the new Consumer Duty, the FCA has reported that some 'firms noted they are developing greater communications testing capability to support good customer outcomes'.[114] The FCA has also stated:

> Testing is an important part of the consumer understanding outcome. It builds on, and goes further, than the clear, fair and not misleading standard under Principle 7. It embodies the Duty's outcomes-focused approach by placing emphasis on what works in practice. We want firms to be able to demonstrate consumer understanding — because they have tested it and made improvements to their communications, where appropriate, to support good outcomes.[115]

3.131 In implementing **Proposal C5**, the Australian Government could consider a potential role for consumer testing of disclosure documents as a means for enhancing consumer understanding. However, such a step may implicate policy issues, and the focus of this chapter has been on better framing of disclosure provisions. Regardless of the role of consumer testing, amending the 'clear, concise and effective' standard to include reference to promoting understanding of the disclosed information would more clearly frame the prescriptive disclosure provisions that would likely remain in any disclosure regime, including those provisions subject to **Proposal C4**.

---

113 See Julia Black, 'Regulatory Styles and Supervisory Strategies' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015) 217, 240–241. Professor Black notes that 'the FSA [Financial Services Authority] started to "road test" disclosure documents as early as 2000'. See also Oxera, *Review of Literature on Product Disclosure* (Report for Financial Conduct Authority, 2014) 8: 'an important conclusion of this review is that disclosure materials should always be tested to make sure that they will actually be beneficial to consumer outcomes' and '[t]esting of disclosure is crucial, as poorly designed disclosure may actually lead to consumer detriment'.

114 Financial Conduct Authority (UK), 'Consumer Duty Implementation Plans' <www.fca.org.uk/publications/multi-firm-reviews/consumer-duty-implementation-plans>.

115 Financial Conduct Authority (UK), *A New Consumer Duty: Feedback to CP21/36 and Final Rules* (Policy Statement No PS22/9, July 2022) [8.11].

4. Financial Advice

Contents

Introduction

4.1 In this chapter, the ALRC proposes restructuring and reframing provisions relating to financial advice to make it easier for providers of financial advice ('advice providers'),[1] recipients of financial advice, and legal professionals to navigate and understand the legislation.[2] The reforms should also create a simpler legislative framework for those who distribute financial products through advice providers.

4.2 This chapter explains how the principles for structuring and framing legislation, discussed in **Chapter 9** of this Interim Report, could be applied to the provisions relating to financial advice. In particular, this chapter emphasises the importance of grouping and prioritising provisions for users. Applying those principles, the ALRC proposes that a new financial advice chapter should be created in the *Corporations Act*. The illustrative financial advice chapter in **Appendix C** to this Interim Report provides an outline of the potential structure and framing of a new legislative chapter.

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

2 This chapter 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 this chapter, 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].

4.3 The reforms discussed in this chapter should produce a flexible and adaptive macrostructure in which financial advice regulation can be developed,[3] and an approach to framing financial advice legislation that can be applied into the future. The reforms are therefore agnostic as to the policy settings for financial advice. They would not alter the obligations of advice providers or the rights of recipients of financial advice.

4.4 However, the ALRC has considered how existing legislation can be structured and framed to facilitate future reforms, such as any arising out of the Quality of Advice Review.[4] Implementation of substantive reforms to financial advice provisions may provide a platform for undertaking the restructuring and reframing proposed in this chapter.

4.5 This chapter uses the term 'financial advice provisions' to encapsulate those provisions that only apply to financial advice.[5] This excludes provisions that apply to financial services more generally, which may include the giving of financial advice. Proposals to restructure and reframe those provisions of more general application are discussed in other chapters of this Interim Report.[6]

4.6 This chapter proceeds in four parts. The first part discusses the importance of structure and framing in the context of financial advice. The second part explains how provisions could be restructured into a new legislative chapter that provides a 'home' for financial advice provisions. The third part shows how a new legislative chapter may be designed, based on the principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report. The final part briefly discusses Proposals A13–A15 of Interim Report A, which related to financial advice.

Why restructure and reframe?

4.7 The current structure and framing of provisions relating to financial advice in Chapter 7 of the *Corporations Act* present two particular problems. First, they make it hard for advice providers and recipients of financial advice to find the law. Second, they make the law harder to understand, by obscuring the broader context and purpose of financial advice provisions. As discussed below, these problems are caused by the provisions relating to financial advice being interspersed among more general provisions relating to financial services. These problems also complicate the tasks of statutory interpretation and legislative maintenance.

---

3 'Macrostructure' and 'microstructure' are defined in **Chapter 1** of this Interim Report.

4 Michelle Levy, *Quality of Advice Review* (Final Report, 2023).

5 Many other provisions of Chapter 7 of the *Corporations Act* apply to both advice providers and providers of other financial services. For example, most advice providers are subject to requirements to be licensed or authorised to provide financial services, as well as to general consumer protection provisions, such as those related to misleading or deceptive conduct.

6 See **Chapters 2**, **3**, and **5** of this Interim Report.

Finding financial advice provisions

4.8 How does an advice provider, recipient of financial advice, lawyer, policy-maker, or judge find the provisions of the *Corporations Act* that only regulate financial advice, or that specifically regulate personal advice or general advice? How could a person who does not provide financial advice know whether they can disregard provisions because they *only* apply to financial advice?

4.9 The present design of Chapter 7 of the *Corporations Act* does little to help users either find or disregard financial advice provisions. Instead, in searching for the law relating to financial advice, users must read through the substantive provisions of the Act to identify financial advice provisions, or look to ASIC regulatory guidance to address defects in the law's communicative power.[7] 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.[8]

4.10 Provisions regulating financial advice, and specific types of advice, are spread across Chapter 7 of the *Corporations Act*, with no hints as to where these provisions may be found. As **Figure 4.1** shows, provisions relevant only to financial advice can be found in four parts of Chapter 7. None of these four parts relates only to financial advice, and none of them indicates that they contain provisions solely related to financial advice. Financial advice provisions are therefore frequently located among provisions of general application to any financial service or provisions that may be unrelated to financial advice, as demonstrated in **Example 4.1**.

7 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).

8 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*.

Example 4.1: Difficulty finding the law

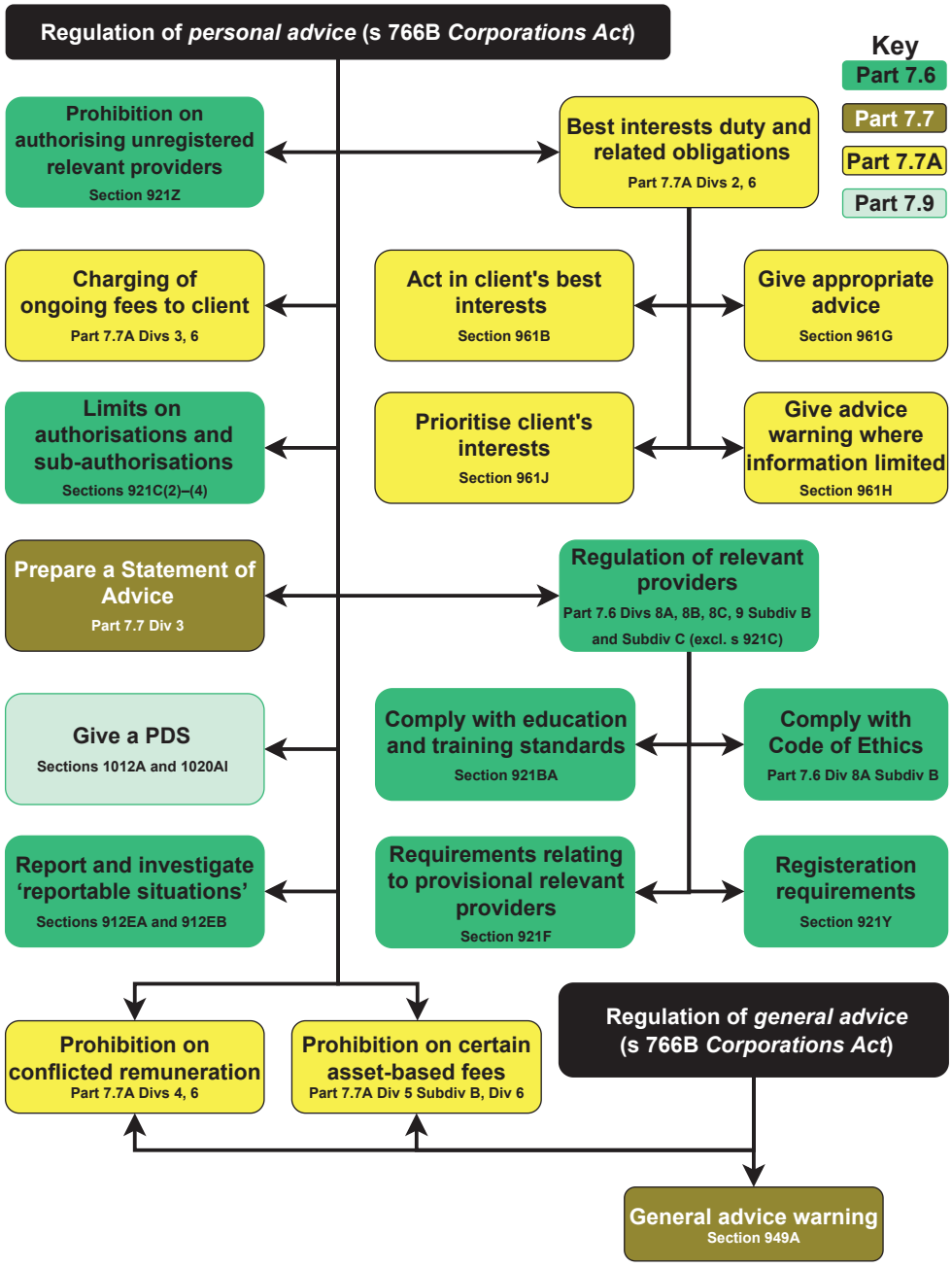
Part 7.6 of the *Corporations Act* is titled 'Licensing of providers of financial services'. The Part includes at least nine divisions applying to anyone providing a financial service. However, three divisions relate only to 'relevant providers', which means individuals providing most forms of personal 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 for 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.

4.11 In addition to the provisions identified in **Figure 4.1**, other provisions relate to financial advice but apply to persons who are not necessarily providing the advice. For example, s 912DAB of the *Corporations Act* applies to AFS Licensees who identify a 'reportable situation' in which a provider of personal advice is involved. Similarly, s 923C limits when the terms 'financial adviser' and 'financial planner' can be used, but the section applies to all persons.

4.12 As previously noted, and as discussed further below in relation to **Proposal C6**, the financial advice provisions that should be consolidated in a new financial advice chapter are those that only apply to financial advice. **Figure 4.1** illustrates the financial advice provisions of the *Corporations Act* that only apply to financial advice, and their existing structure within Chapter 7 of the Act.

Figure 4.1: The existing structure of financial advice provisions



Understanding financial advice provisions

4.13 The existing structure of financial advice provisions in Chapter 7 of the *Corporations Act* makes it harder for people to understand the law. 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.

4.14 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 a distinct area of regulation, and so too is personal advice regulated very differently from general advice.[9] **Figure 4.1** illustrates how financial advice provisions may be viewed as a coherent whole, making clearer the fundamental norms that are obscured by their present structure. Improving legislative structures can therefore enhance understanding of the context and purpose of individual provisions, which can be read together as seeking to achieve a set of fundamental norms, policy outcomes, and standards of commercial behaviour.

4.15 For example, the present structure makes it difficult for providers of personal advice to fully appreciate the more exacting standards to which they are held: act in the interests of your client; be educated, skilled, and competent; be ethical; communicate your advice in a manner for which you can be held accountable; and do not accept remuneration that puts your interests in conflict with your client's interests. There are exceptions to several of these norms, such as for remuneration received in relation to general insurance, but being able to see the full range of financial advice provisions makes the overarching norms of conduct more explicit — an outcome viewed as necessary by the Financial Services Royal Commission.[10] The present structure of Chapter 7 of the *Corporations Act* suggests that financial advice law is merely an eclectic collection of obligations and prohibitions.

4.16 The dispersal of financial advice provisions across Chapter 7 of the *Corporations Act* also complicates the task of statutory interpretation — or working out what obligations and prohibitions mean in practice. Statutory interpretation requires that in considering the 'text of a statute', a person must 'have regard to its context and purpose'.[11] Discerning the context and purpose of any one financial advice provision in Chapter 7 is made more difficult by their existing structure.

4.17 The existence of a comprehensive body of financial advice regulation provides important context for interpreting individual provisions. The best interests

---

9 Levy (n 4) 41.

10 For example, the Financial Services Royal Commission emphasised the need to expressly identify the 'rules about conflicts of interest and conflicted remuneration' as giving effect 'to the principle that when a person acts for another, the person must act in the best interests of that other': Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 494.

11 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 [14].

duty,[12] and its so called 'safe harbour',[13] are helpfully contextualised when it is made easier to recognise that most providers of personal advice are also subject to a Code of Ethics and education and training requirements, in keeping with their status as professionals. Similarly, the obligation to give priority to a client's interests in s 961J of the *Corporations Act* should be interpreted within the broader statutory context of a Code of Ethics and bans on conflicted remuneration, for which some exceptions are provided.

4.18 The present structure does not help to discern Parliament's intention in enacting the law. The fragmentary nature of financial advice provisions obscures 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.

A product of history

4.19 In brief, the absence of a clear structure for financial advice provisions in the *Corporations Act* can be attributed to the origins of Chapter 7 of the Act. The original Chapter 7 enacted by the *FSR Act* included almost no provisions specifically regulating financial advice. As noted above, Parliament has since undertaken reforms that have created a body of provisions specific to financial advice.

4.20 However, the legislation's structure has not been updated to reflect its changing substance. Both the Future of Financial Advice and Professional Standards of Financial Advisers reforms provided an opportunity to consider the broader framework in which amendments were being made.[14] Instead, a piecemeal approach has seen new financial advice provisions incorporated into the existing legislative structure as new parts or divisions. Financial advice provisions are therefore mixed with provisions that are more generally applicable or which do not apply to financial advice at all.

4.21 Overall, there has been little investment in achieving a coherent and navigable structure. Restructures may involve significant work but are worthwhile after an area of law has developed to such an extent that the old structure has become an obstacle to navigability and comprehensibility. This Inquiry, as well as other potential reforms to financial advice regulation, offer opportunities to reform the structure of financial advice provisions to better reflect and accommodate changes in the law's substance.

---

12 *Corporations Act 2001* (Cth) s 961B(1).

13 Ibid s 961B(2).

14 *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth); *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth); *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth).

A home for financial advice regulation

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.

4.22 The ALRC proposes grouping financial advice provisions so users can more easily locate and navigate the law that applies to financial advice. **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.

4.23 As discussed further in **Chapter 6** of this Interim Report, **Proposal C6** would best be implemented as part of the broader restructuring and reframing contemplated by **Proposals C9** and **C10**.[15] However, **Proposal C6** could also be implemented as either a chapter or part within the existing *Corporations Act*. The following discussion focuses on implementing **Proposal C6** as a legislative chapter. However, the underlying analysis would apply equally if it were instead implemented as a part within a chapter.

4.24 The ALRC's proposed restructure is informed by an awareness of the 'curse of knowledge' — people who regularly engage with the *Corporations Act* know that certain provisions only apply to financial advice. However, for new or infrequent users, the law should not (for example) assume any knowledge that 'conflicted remuneration' or 'best interests duty' provisions only apply to certain types of financial advice. The law's structure should communicate how it applies to specific persons, services, and circumstances.

15 In summary, **Proposals C9** and **C10** suggest the creation of a schedule to the *Corporations Act* (referred to in this Interim Report as the FSL Schedule) which would provide a 'home' for restructured and reframed financial services legislation.

Grouping the law

4.25 **Proposal C6** applies the principle that the law should be grouped to reduce the number of places users need to look to find legislation applicable to their circumstances. The proposed legislative chapter also reflects the principle that provisions of the law should have thematic and conceptual coherence — in this case, the theme would be provisions applicable only to financial advice. Applying these principles would make it easier for users to navigate and understand the legislation.

4.26 Implementing **Proposal C6** would require grouping all provisions of Chapter 7 of the *Corporations Act* that only apply to financial advice. At a high level, these provisions are identified in **Figure 4.1**. However, there are some specific sections within these parts and divisions that should not be included in a financial advice chapter.

4.27 For example, s 963K of the *Corporations Act* should not be included because it applies to persons not providing financial advice as well as advice providers. That section prohibits any person from paying conflicted remuneration. This could include, for example, an insurer or other financial product issuer who never provides financial advice. One objective of a financial advice chapter is to allow persons who do not provide advice to disregard the financial advice provisions. As such, given their general applicability, sections such as s 963K should not be located in a financial advice chapter. A financial advice chapter should be limited to provisions that specifically apply to advice providers and those who employ or authorise them.

4.28 Implementing **Proposal C6** would also necessitate a review of the *Corporations Regulations* to identify provisions that are only applicable to financial advice. Most of these would be made under the financial advice-specific provisions of Chapter 7 of the *Corporations Act*, such as regulations for conflicted remuneration or the best interests duty.[16] However, some regulations are made under generally applicable powers. For example, s 949B of the *Corporations Act* provides for other types of disclosure to be prescribed in certain circumstances. Regulations that apply to financial advice have been made under this provision.[17] If **Proposal C6** were to be implemented in isolation from the ALRC's proposed legislative model,[18] the structure of the financial advice regulations could broadly mirror the structure and scope of a new financial advice chapter. This would mean there should be one chapter of the *Corporations Regulations* relating to financial advice.

4.29 Grouping and consolidating provisions in accordance with **Proposal C6** offers just one, necessary step in creating a more navigable and understandable body of financial advice provisions. To ensure that the intent of the law is met and to

16 See, eg, *Corporations Regulations 2001* (Cth) pt 7.7A.
17 Ibid reg 7.7.20A.
18 For an overview of the ALRC's proposed legislative model, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) 52–6. The proposed legislative model does not provide a role for delegated legislation in the form of regulations: see ibid [2.80]–[2.85].

give effect to fundamental norms of behaviour, the design of any financial advice chapter should position users at its centre, and prioritise effective communication of fundamental norms, obligations, and legislative purpose.[19]

Designing a new chapter

4.30 This part examines the potential structure and framing of a new financial advice chapter. The discussion is based on the principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report. In particular, this part emphasises the importance of grouping and prioritising provisions for users. It also discusses consolidating obligations and making them clearer, creating an intuitive flow, communicating the law's effect and purpose, and fostering mental models.

4.31 The ALRC has explored two approaches to the design of a new chapter, with the approaches differing in the extent to which they prioritise each of the principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report.

4.32 The first approach is one that would more closely resemble the current thematic arrangement of provisions but bring them together in a single chapter. This would produce relatively self-contained parts and divisions focused on a particular theme — for example, conflicted remuneration or the best interests duty.

4.33 The second approach, which the ALRC suggests should be preferred, is highlighted by the illustrative financial advice chapter in **Appendix C**. Instead of having solely thematic parts, the approach in **Appendix C** seeks to lead users through conceptually and thematically framed parts that are designed to prioritise norms and principles. Details that are not appropriate for delegated legislation (such as regulatory powers) appear in later provisions of the illustrative financial advice chapter in **Appendix C**.

4.34 The illustrative financial advice chapter in **Appendix C** begins with three parts providing for all core obligations in relation to financial advice generally, as well as general advice and personal advice specifically.[20] A later part then unpacks, so far as necessary in primary legislation, the detail relevant to each obligation.[21] For example, the key prohibitions on conflicted remuneration are introduced near the beginning of the chapter. A later division on complying with the conflicted remuneration obligations only contains the detail as to the definition of conflicted remuneration and provisions about obtaining a rebate for banned conflicted remuneration. A structure such as this emphasises the importance of prioritising information for users, enhancing conceptual clarity, and providing a home for detail in a way that does not obscure the core requirements of the law.

---

19 See, for further discussion, **Chapter 9** of this Interim Report.

20 'General advice' and 'personal advice' are defined in s 766B(3)–(4) of the *Corporations Act*.

21 The allocation of material between primary and delegated legislation was the subject of Interim Report B: Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) chs 3, 4.

4.35 The illustrative financial advice chapter also seeks to provide a consistent structure and framing, and to present legislation using an intuitive flow based on the application of provisions to particular types of advice and persons.

Prioritising financial advice obligations

4.36 A new financial advice chapter, and any parts or divisions within it, should prioritise important aspects of the law for users. The principle of prioritisation is critical to designing a new chapter that clearly communicates the law's expectations of advice providers, and therefore enhances the law's communicative power. The legislative chapter could do so by prioritising the significant principles, standards, and obligations that apply to advice providers. As explained below, prioritisation can also offer an opportunity to clearly prioritise the important obligations that apply to specific types of financial advice and advice providers.

Creating the financial advice macrostructure

4.37 Applying the principle of prioritisation would result in a significantly different macrostructure from existing financial advice provisions. As **Example 4.2** shows, provisions that do not currently prioritise fundamental principles, standards, or obligations could be restructured to do so. The illustrative financial advice chapter in **Appendix C** also shows how this may be done.

Example 4.2: Prioritisation in ongoing fee provisions

Part 7.7A Div 3 of the *Corporations Act* imposes a range of requirements before a person can charge ongoing fees or continue to charge such fees.[22]

Division 3 is structured in a way that does not help users to easily identify the most important requirements of the law. Most notably, the obligation of an advice provider to obtain consent before charging fees is not introduced until Subdiv C, or 14 sections after the beginning of Div 3. Within Subdiv B, there is provision for an agreement to terminate if a person does not comply with Subdiv C.[23] However, this appears before the fundamental requirement of consent is introduced. This structure appears to have resulted from the manner in which amendments have been made to the legislation, by changing its substance without updating its structure.[24]

22 These provisions apply in relation to 'ongoing fee arrangements', a term defined in s 962A of the *Corporations Act*.

23 *Corporations Act 2001* (Cth) s 962FA.

24 The original Subdiv C was inserted by the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) and did not relate to consent requirements. Subdiv C was completely replaced by Sch 1 of the *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2020* (Cth) based on rec 2.1 of the Financial Services Royal Commission.

Division 3 fails to prioritise information effectively in other ways, such as by mixing detail with important standards and obligations. For example, detailed requirements as to fee disclosure statements precede or are interspersed with provisions relating to consent,[25] renewal and cancellation of fee arrangements,[26] and civil penalties.[27] Similarly, definitions precede the core obligations, which would be less problematic if the core obligations were more readily identifiable.

The illustrative financial advice chapter in **Appendix C** shows how Part 7.7A Div 3 of the *Corporations Act* could be restructured so the core principles and requirements would be placed at the beginning of the financial advice chapter in a part providing for all core obligations of providers of personal advice. Detailed requirements that would be appropriate for primary legislation would appear in another part later in the chapter, while most exemptions could be moved to delegated legislation. For example, the exemption in s 962A(4) of the *Corporations Act* could remain in the Act as structural in character,[28] whereas the exemptions currently located in reg 7.7A.10 of the *Corporations Regulations* could be relocated to a Scoping Order, if the ALRC's proposed legislative model were adopted.[29]

4.38 In essence, the suggested macrostructure seeks to lead users through the legislative framework by grouping and prioritising more important provisions. This approach should also enable users to identify provisions that apply to their circumstances. The illustrative financial advice chapter in **Appendix C** provides three parts for the obligations of persons providing financial advice:

- Part 5.1—General obligations of providers of financial product advice;
- Part 5.2—Obligations of providers of general advice; and
- Part 5.3—Obligations of providers of personal advice.

4.39 The principled obligations in these parts are then supplemented by a subsequent part on complying with specific obligations, Part 5.4. Importantly, notes could be used as an aid to interpretation to lead users to the detail relating to each principle. For example, the provisions banning conflicted remuneration could be accompanied by a note explaining that the definition of conflicted remuneration is

25 *Corporations Act 2001* (Cth) ss 962G, 962H, 962R, 962S.
26 Ibid ss 962M, 962N.
27 Ibid s 962P.
28 The ALRC's proposed legislative model would see non-structural exemptions and exclusions located in a Scoping Order. Structural exemptions are those that give effect to a core policy goal and which are sufficiently significant to warrant being included in primary legislation. Other examples of structural exemptions are discussed in Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.119].
29 For an overview of the ALRC's proposed legislative model, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) 52–6. The proposed legislative model does not provide a role for delegated legislation in the form of regulations: see ibid [2.80]–[2.85].

found later in the chapter, with a specific provision reference. The illustrative financial advice chapter in **Appendix C** helps ensure that more important provisions are not obscured by prescriptive detail.

4.40 Similarly, Part 5.3 in **Appendix C** demonstrates that restructuring and reframing provisions can also help clarify to whom obligations apply. Part 5.3 includes two divisions. Division 1 ('General obligations of providers of personal advice') contains obligations that may apply to both AFS Licensees and authorised representatives, including individuals. Division 2 contains obligations that only apply to individuals providing personal advice, which is indicated by the division's heading ('Obligations of individuals providing personal advice'). These include obligations to be registered as a 'relevant provider' and the associated professional standards for relevant providers.

4.41 The illustrative financial advice chapter in **Appendix C** therefore shows how provisions may be structured so users can more easily identify different parts based on function, application, and theme, while also prioritising material for users. In this way, it operates more like a flow chart. The structure of the illustrative financial advice chapter also allows procedural provisions or those that grant powers to ministers or regulators to be grouped near the end of the chapter, rather than within thematic parts and divisions.

Consolidation and clearer obligations

4.42 A financial advice chapter should frame provisions so that it is easier for users to understand fundamental obligations and the accompanying detail. This would supplement reforms that prioritise provisions within the macrostructure of a financial advice chapter.

4.43 The illustrative financial advice chapter in **Appendix C** emphasises the fact that significant elements of financial advice law are, or can be expressed as, principled obligations. Detail, carve-outs, or safe harbours may then supplement or shape those obligations. The structure in **Appendix C** seeks to prioritise those principled obligations — act in the best interests of your clients, do not accept conflicted remuneration, comply with the Code of Ethics — while recognising the significant amount of detail that exists in relation to each principle.

4.44 Consolidating and prioritising principled obligations would allow users to easily identify the financial advice chapter's key requirements. In this way, users would be equipped to conduct themselves according to Parliament's intentions. Obligations should be framed so that users complying with them would in effect be complying with the core requirements of the law — even if they overlooked all the related detail.

4.45 Many financial advice obligations operate relatively well as principled obligations. However, provisions could be drafted to separate the principles more clearly from the unfolding detail. The illustrative structure of a financial advice chapter in **Appendix C** to this Interim Report seeks to foster this separation, locating

obligations (Parts 5.1, 5.2, and 5.3) separately from any detailed provisions relevant to complying with those obligations (Part 5.4).

4.46 It is important to note that, consistent with the legislative model proposed in Interim Report B, detail in primary legislation should be limited to that which is not appropriate for delegated legislation. Rulebooks and the Scoping Order, key elements of the legislative model, would provide a home for prescriptive detail that is appropriate for delegated legislation. Combining the proposed legislative model with clear obligations in the Act would maximise the ease with which a person can navigate and understand the core requirements of the financial advice regime.

4.47 Consideration could be given to whether, in some cases, multiple existing obligations may be consolidated into a higher-level principled obligation. For example, the conflicted remuneration provisions create five different obligations not to provide or accept conflicted remuneration in different circumstances. These obligations may, for example, be reframed into one provision that expresses a more general prohibition on paying or accepting conflicted remuneration.

4.48 Provisions could also be ordered so that they helpfully frame each other. For example, s 921E of the *Corporations Act* requires compliance with the Code of Ethics, a legislative instrument,[30] for individuals providing financial advice. Consideration could be given to how obligations such as the one contained in s 921E — to comply with requirements in a particular rule or instrument — may be reframed. For example, it is possible legislation could impose an obligation to give 'good advice', as recommended by the Quality of Advice Review.[31] This obligation could help frame the more specific obligations on 'relevant providers'. Provisions could be structured so that the Code of Ethics is preceded by, and clearly linked to, the obligation to give 'good advice'. Users would then have a general sense of what the Code of Ethics contains — requirements that seek to ensure high quality, professional financial advice. Alternatively, consideration could be given to extracting and synthesising the core values and standards expressed in the Code of Ethics,[32] and using this synthesis to create a substantive obligation in the *Corporations Act* to frame compliance with the Code.

Separating obligations and detail can occur across the Act

4.49 The illustrative financial advice chapter in **Appendix C** includes provisions for imposing disclosure obligations in relation to financial advice. These provisions could include obligations on advice providers to give FSGs and PDSs to retail clients, in the circumstances currently required under Parts 7.7 and 7.9 of the *Corporations Act*.

4.50 The ALRC suggests that these obligations should be included in a financial advice chapter based on the principle of grouping provisions in the most coherent and intuitive way, as well as reflecting the needs of users. The detail for complying

30 *Financial Planners and Advisers Code of Ethics 2019* (Cth).
31 Levy (n 4) 88–91, rec 4.
32 *Financial Planners and Advisers Code of Ethics 2019* (Cth) s 5.

with the obligations — what an FSG or PDS must contain — could still appear in a specific disclosure chapter, as discussed in **Chapter 3** of this Interim Report. Notes under each of the obligations could guide users to those other detailed provisions found elsewhere.

4.51 To implement this approach, the following obligations in the *Corporations Act* could be included in a financial advice chapter:

- the requirement for a provider of financial product advice to give an FSG, based on ss 941A and 941B; and
- the requirement for a provider of personal advice to give a PDS, based on s 1012A.

4.52 Advice providers would still need to consider the other situations in which a disclosure document is required, such as when issuing a financial product or providing a financial service other than financial product advice. These would still appear as generally applicable disclosure provisions.[33]

4.53 An alternative design approach would see these obligations placed in a disclosure chapter, alongside the more generally applicable obligations to give FSGs and PDSs. This would prioritise grouping provisions based on one theme (disclosure) over another (financial advice). The ALRC suggests that grouping based on financial advice would prove more useful for advice providers, for whom (alongside recipients of advice) the obligations have the most significance. Doing so would help create a clearer home for financial advice regulation, even though other provisions of the *Corporations Act* would remain relevant to advice providers.

Intuitive flow

4.54 Aside from the need to prioritise important aspects of the legislation so that users understand its core requirements, a financial advice chapter should be structured to ensure provisions are presented in an intuitive way. One way of doing this is to group and order provisions based on when and to whom they apply.

4.55 To create an intuitive flow, a financial advice chapter could begin with parts of the most general application before provisions that have narrower application to particular persons or services. Provisions of the illustrative financial advice chapter in **Appendix C** are structured so that the material appears in the following general order of application:

- provisions of general application to all financial advice (for example, conflicted remuneration restrictions, and the prohibition on certain asset-based fees);
- provisions applying to general advice (for example, the general advice warning);

33 See s 1012B of the *Corporations Act* (PDS for issuing a financial product). Sections 941A and 941B of the *Corporations Act* would continue to apply to financial services other than financial advice.

- provisions applying to personal advice (for example, the best interests duty, and relevant provider framework); and
- provisions applicable to the narrowest group of people (for example, the process for becoming a relevant provider, and ministerial and ASIC powers, such as to make education and training standards).

Communicating the law's effect and purpose

4.56 Consistent with the objective of more navigable and comprehensible legislation,[34] a financial advice chapter should ensure that people can understand the effect of the law as easily as possible. Two particular reforms could enhance the law's communicative power: transparent identification of offences and civil penalties, and the use of an objects provision.

Offence and civil penalty provisions

4.57 As the ALRC identified in Interim Report B, offences and civil penalties are created and identified inconsistently in the *Corporations Act*.[35] Financial advice provisions are particularly problematic in this regard.

4.58 For example, most financial advice-related offences are created by s 1311 and Sch 3 to the *Corporations Act*. This means that the provision to which the offence applies only includes a note that failure to comply with the provision is an offence. However, some offence provisions are created more explicitly. For example, s 952J of the *Corporations Act* provides that a person 'commits an offence' if they fail to comply with certain requirements in relation to an SoA.

4.59 Similarly, just one financial advice provision in the *Corporations Act* clearly identifies the consequences of breaching a civil penalty or offence provision, whether that be in terms of penalty units or a period of imprisonment.[36] For the remaining provisions, users must review Sch 3 (for offences) and s 1317E (for civil penalties) to locate the applicable penalty.

4.60 Financial advice-related offence and civil penalty provisions should be reframed to clearly indicate that the provision is an offence or civil penalty provision, and to clearly communicate the applicable penalty. For further discussion of how this may be done, see the discussion of **Recommendations 20–22** in **Chapter 10** of this Interim Report.

4.61 Additionally, financial advice provisions could be reframed to enhance the visibility of civil penalties in other ways. For example, ss 961K and 961Q of the *Corporations Act* create civil penalties for breaches of the best interests duty and related obligations in ss 961B, 961G, 961H, and 961J. Sections 961K and 961Q

34 See **Chapter 9** of this Interim Report.

35 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.15]–[8.23] (Proposal B17).

36 *Corporations Act 2001* (Cth) s 922HC. Section 922HC is an offence provision and does not appear in Sch 3 to the Act, highlighting the inconsistent approaches to legislative design.

could be repealed and ss 961B, 961G, 961H, and 961J could be reframed to include the civil penalty within each provision.

4.62 Overall, civil penalties and offences sit at the heart of any regulatory framework and serve a critical function in communicating the importance of different obligations and requirements. They should therefore be easy to identify, and the consequences of breaching them should be clear.

Objects clause

4.63 Objects clauses, as explained in **Chapter 9** of this Interim Report, can serve an important function in framing provisions. They can make it easier for users to understand the law and to undertake the task of statutory interpretation, and can help ensure legislation is interpreted and applied in accordance with Parliament's intention.

4.64 Financial advice provisions would particularly benefit from an objects clause. As discussed above, the financial advice provisions have evolved into a self-contained regulatory framework that clearly pursues objectives distinct from those pursued in other areas of financial services legislation. However, these objectives are not clearly articulated. The creation of a financial advice chapter offers the opportunity to reflect on the purposes of financial advice regulation and to distil these into one or more objectives.

4.65 Such an objective or set of objectives could also help frame the future development of financial advice law, both in case law and legislation. As Treasury noted in its recent consultation on an objective for superannuation, clear objectives based on political and community consensus can give 'consistency and stability in the development' of policy and legislation in the future.[37] The superannuation objective is somewhat different from that contemplated in relation to financial advice — the superannuation objective seeks to clarify the objective and purpose of superannuation, rather than the objective of superannuation regulation. The objects clause discussed in this section seeks to clarify the objective of financial advice regulation, rather than the objective of financial advice itself. These two objectives may nonetheless be related.

4.66 Given the potential for policy developments around financial advice, the ALRC does not propose a specific objects clause. Nonetheless, development of an objects clause would likely require consideration of the dual objectives of people receiving both high quality and affordable financial advice. These can be in tension, and an objects clause may make this explicit or create a higher-level object that does not allude to such tensions.

4.67 Moreover, there are arguably different objectives for regulating personal and general advice. At present, personal advice regulation appears to aim for high

37 Department of the Treasury (Cth), *Legislating the Objective of Superannuation* (Consultation Paper, 20 February 2023) 8.

quality advice that is in the best interests of clients. General advice regulation, which lacks any statutory best interests obligations but still generally prohibits conflicted remuneration, appears to pursue a standard of advice that minimises the risk of harm to clients, such as through pressure sales motivated by conflicted remuneration.

Fostering mental models of the legislation

4.68 As explained in **Chapter 9** of this Interim Report, mental models are central to how people navigate and understand legislation. The creation of a financial advice chapter would be a significant step in helping users create a more useful mental model of financial advice provisions. A financial advice chapter should be designed so that it helps people build and maintain a mental model of financial advice legislation and its relationship to broader financial services provisions.

4.69 The general design approaches discussed above would help users build and maintain a mental model of the legislation. For example, grouping provisions based on the type of advice to which they apply would provide a clear framework for understanding the law as it develops into the future.[38] Similarly, separating core obligations from the related detail would help users predict how and where to find new laws as they were developed.

4.70 Consistent legislative design and the use of aids to interpretation — such as simplified outlines, headings, and legislative notes — can also be used to underpin effective mental models. These are discussed below.

Ensuring consistency

4.71 A financial advice chapter should help to ensure consistent approaches to legislative design. Consistency is essential to helping users develop and maintain a mental model of the legislation. Consistency would also minimise the number of adjustments users need to make to their mental model as they traverse the chapter.

4.72 For example, if the design approach demonstrated in the illustrative financial advice chapter in **Appendix C** were adopted, the design choices present in that approach should be implemented consistently in future reforms. This means it would be undesirable to simply insert a new part in that chapter which implemented a completely self-contained set of obligations and related detail for advice providers. This would be inconsistent with the design approach of prioritising obligations in one part,[39] and placing any relevant detail in a later part.[40]

38 See Parts 5.1, 5.2, and 5.3 of the illustrative financial advice chapter in **Appendix C**, which are structured according to the types of advice to which they apply.
39 See Parts 5.1, 5.2, and 5.3 of the illustrative financial advice chapter in **Appendix C**.
40 See Part 5.4 of the illustrative financial advice chapter in **Appendix C**.

4.73 Similarly, consistency should mean that offences and civil penalties are consistently identified in the same manner across the financial advice chapter, and ideally across the whole FSL Schedule and *Corporations Act*.[41]

Using aids to interpretation

4.74 Aids to interpretation can help users understand the design choices underpinning legislation, and thereby help to create a mental model of it.

4.75 Headings and legislative notes may help users understand the relationship between obligations and related detail. For example, headings could clearly identify 'Obligations' and detail for 'Complying with [an obligation]'. This would facilitate the design approach of prioritising obligations separately from prescription.

4.76 Legislative notes should ideally lead users from the obligations to the relevant detail, through to any relevant ministerial or ASIC powers. For example, an obligation requiring compliance with the Code of Ethics for Financial Advisers could include a note to the effect that 'the Minister may make the Code of Ethics under section [equivalent of s 921E(1) of the *Corporations Act*]'.

4.77 Leading users from the obligations to related detail, and through to any procedural provisions, such as for banning relevant providers, would be particularly important if an approach similar to the illustrative financial advice chapter in **Appendix C** were adopted. This approach emphasises grouping and prioritising obligations separately from related prescription and legislative powers.

4.78 A simplified outline could be used to give a sense of the overall architecture of the chapter and how it fits into the broader body of financial services legislation, such as the AFSL regime and disclosure provisions. Simplified outlines may also be helpful in other provisions of the chapter, such as for conflicted remuneration provisions. However, the restructured and reframed provisions may be simplified such that outlines add little value. For example, if the conflicted remuneration obligations were consolidated into a more general obligation and separated from the related detail, then the core requirement may be sufficiently clear without any simplified outlines. As discussed above, notes could still be used to direct users to the related detail and exemptions across the legislative hierarchy.

Proposals A13–A15 of Interim Report A

4.79 In Interim Report A, the ALRC made three proposals regarding financial advice-related definitions. Proposal A13 suggested the removal of the collective label of 'financial product advice' in favour of simply using the two concepts of 'personal advice' and 'general advice'.[42] Proposal A14 suggested that the concept

41 This helps minimise the number of adjustments users need to make to their mental model of the *Corporations Act* when reading the financial advice chapter.

42 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [11.45]–[11.51].

of ‘personal advice’ be removed from the definition of ‘financial service’ and Proposal A15 suggested that the term ‘general advice’ should be replaced by a more intuitive label.[43] The Final Report of this Inquiry will revisit these proposals taking into account the recommendations of the Quality of Advice Review and the Australian Government’s response.

43 Ibid [11.52]–[11.82].

5. General Regulatory Obligations

Contents

Introduction

5.1 In this chapter, the ALRC proposes restructuring and reframing provisions relating to the general regulatory obligations of financial services providers so that those provisions are easier to navigate and understand.

5.2 This chapter explains how the principles for structuring and framing legislation, discussed in **Chapter 9** of this Interim Report, could be applied to the general regulatory obligations of financial services providers.[1] In particular, this chapter emphasises the principle of grouping related provisions that are presently spread across Chapter 7 of the *Corporations Act* and structuring them to more clearly communicate their significance and scope of application. The structure and framing discussed in this chapter aim to provide an intuitive flow that better contextualises provisions and foster mental models of how the legislation is designed. Implementing these principles would help readers more easily navigate and understand the provisions relevant to their circumstances.

5.3 This chapter proceeds in three parts. The first part examines why provisions relating to the general regulatory obligations of financial services providers should be restructured and reframed. The second part explains how these general regulatory obligations could be restructured into two new chapters that provide clear 'homes' for general regulatory obligations of financial services providers. The final part shows how two legislative chapters could be designed.

5.4 This chapter refers to the illustrative FSL Schedule in **Appendix D**. The FSL Schedule, explained in **Chapter 6** of this Interim Report, offers one avenue through which a broader restructure and reframing of financial services legislation could be undertaken. However, were the FSL Schedule not adopted, the reforms

1 References to 'financial services providers' include any person providing 'financial services' within the meaning of Part 7.1 Div 4 of the *Corporations Act*, including those who do not hold an AFS Licence and representatives of AFS Licensees.

discussed in this chapter could nonetheless be implemented within the body of the *Corporations Act* as chapters or parts of a chapter.

Terminology

5.5 This chapter discusses how the 'general regulatory obligations of financial services providers' may be restructured and reframed. Those obligations have a narrower scope than the generally applicable consumer protection provisions discussed in **Chapter 2** of this Interim Report. At present, and as discussed in Interim Report A, narrower definitions of 'financial product' and 'financial service' in the *Corporations Act* give effect to the narrower scope of general regulatory obligations.[2] The focus of this chapter is therefore on the general obligations applicable to that narrower range of products, services, and regulated entities. By referring to 'general regulatory obligations', **Chapter 5** does not address the more specific disclosure, financial advice, and product distribution regimes that exist in the *Corporations Act*, as well as other more specific provisions of the Act.[3]

Why restructure and reframe?

5.6 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 AFS Licence and the obligation on AFS Licensees to provide their services 'efficiently, honestly and fairly'.[4] Such obligations also include prohibitions on hawking financial products and certain forms of remuneration.[5] Issues related to unsolicited contact and remuneration were central in many case studies examined by the Financial Services Royal Commission.[6]

5.7 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'.[7] Problems in structure and framing make it harder to appreciate the context and purpose of provisions, make statutory interpretation difficult, and can lead to legal uncertainty.

---

2 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.74]–[7.91].

3 See, eg, *Corporations Act 2001* (Cth) pt 7.6 divs 8A, 8B, 8C. Disclosure and financial advice are discussed in, respectively, **Chapter 3** and **Chapter 4** of this Interim Report.

4 Ibid s 912A.

5 See, eg, ibid pt 7.7A div 5 subdiv A, ss 963K, 992A.

6 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 1–2, 13–15.

7 Ibid 44.

5.8 Many of the problems in the structure and framing of general regulatory obligations are not inevitable, as **Example 5.1** shows. 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 for users are examples of unnecessary complexity. These 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.

Example 5.1: 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. As explained in **Example 8.7** in **Chapter 8** of this Interim Report, Part 7.6 of the *Corporations Act*, containing several key obligations of financial services providers, has become steadily less coherent over time. This declining coherence has complicated the task of navigating and understanding general regulatory obligations.

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'. The prohibition on hawking applies to any person offering financial products (as defined in the *Corporations Act*) and should therefore be prioritised for users of the legislation, compared with obligations that only apply to AFS Licensees.

Lastly, the present structure of regulatory provisions does not sufficiently separate core obligations from the related prescription and other detail. This means the obligations — and the norms to which they give effect — are often lost in the detail. For example, the requirement to hold an AFS Licence does not need to be grouped with the procedural rules about how a licence can be obtained or cancelled,[8] nor grouped with provisions providing for the establishment of registers relating to financial services.[9] Grouping similarly significant obligations, and locating them before related administrative or procedural requirements, would help users understand the core standards of the law. Regulatory provisions should ensure their context and purpose is clear, lest they become lost in detail.

5.9 **Example 8.4** in **Chapter 8** of this Interim Report further illustrates how the structure and framing of regulatory obligations often fail to prioritise the key messages of the law.

Two homes for general regulatory obligations

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.

5.10 **Proposals C7** and **C8** would result in the creation of two chapters relating to the general regulatory obligations of financial services providers. As discussed further in **Chapter 6** of this Interim Report, **Proposals C7** and **C8** would best be implemented as part of the broader restructuring and reframing contemplated by **Proposals C9**

8 *Corporations Act 2001* (Cth) pt 7.6 divs 2, 4.
9 Ibid pt 7.6 div 9.

and **C10**.[10] However, **Proposals C7** and **C8** could also be implemented as either chapters or parts within the existing *Corporations Act*. The following discussion focuses on implementing **Proposals C7** and **C8** as chapters. However, the analysis would apply equally if they were instead implemented as parts within a chapter.

5.11 **Proposals C7** and **C8** would also be most effective if implemented alongside **Proposal C1**, discussed in **Chapter 2** of this Interim Report. **Proposal C1** relates 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. **Chapter 7** of this Interim Report discusses implementation of the ALRC's proposed reforms more generally.

Grouping general regulatory obligations

5.12 As discussed above, the current structure of general regulatory provisions in financial services legislation often makes it unnecessarily difficult to navigate and understand the law, and particularly challenging to identify more significant obligations that give effect to fundamental norms.

5.13 **Proposals C7** and **C8** would see the creation of two chapters containing generally applicable obligations, and related detail not appropriate for delegated legislation, for financial services providers.[11] 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*. One approach to undertaking the restructure and reframing described in this chapter is demonstrated in the illustrative FSL Schedule in **Appendix D**, which includes the following chapters:

- Chapter 3—Obligations of financial services providers; and
- Chapter 6—Financial services licensees and representatives.

5.14 These chapters would apply to financial services providers presently regulated by reference to the definitions of 'financial services' and 'financial products' in the *Corporations Act*. This should be the case even if a single, broad definition of these terms were implemented across the *ASIC Act* and *Corporations Act*.[12] Exemptions and exclusions could be used to preserve the narrower scope of the chapters created under **Proposals C7** and **C8**, compared with the broader scope of consumer protections covered by **Proposal C1**.[13]

---

10 In summary, **Proposals C9** and **C10** suggest the creation of a schedule to the *Corporations Act* (referred to in this Interim Report as the FSL Schedule) which would provide a 'home' for restructured and reframed financial services legislation.

11 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].

12 See Proposal A3, discussed in Interim Report A: Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.74]–[7.91].

13 See **Chapter 2** of this Interim Report.

What provisions should appear in the two chapters?

5.15 **Proposal C7** would cover all general regulatory obligations of financial services providers for which a more appropriate thematic home is not available. The core principles applied in determining the scope of **Proposal C7** are coherence and intuitive flow. To ensure a coherent scope, the ALRC suggests **Proposal C7** should cover obligations that may apply to anyone providing financial services within the meaning of the *Corporations Act*, such as:

- the requirement to hold an AFS Licence or be authorised by an AFS Licensee;[14]
- restrictions on use of terminology;[15] and
- the prohibition on hawking of financial products and related remedies.[16]

5.16 The provisions covered by **Proposal C7** should also include obligations on AFS Licensees and representatives, such as the general obligations found in s 912A and Part 7.6 Div 3 more generally. The provisions of Part 7.8 that apply to Licensees and representatives should also be restructured and reframed as part of **Proposal C7**.

5.17 Specific, tailored regulatory provisions that do not have a more appropriate home, such as the provisions relating to insurance and margin loans,[17] should also be included as part of **Proposal C7**. However, the structure and framing of the chapter should help communicate their narrower application compared with more generally applicable provisions, such as s 912A of the *Corporations Act*. Simplified outlines could be used to explain the scope of the chapter.

5.18 As noted above, provisions should not be included in the chapters covered by **Proposals C7** and **C8** if they have a more appropriate thematic home. Accordingly, in the illustrative FSL Schedule in **Appendix D** the ALRC has separated provisions related to the following topics into separate chapters:

- disclosure about financial products and financial services, excluding securities covered by Chapter 6D of the *Corporations Act* (see Chapter 4 of the illustrative FSL Schedule); and
- financial advice (see Chapter 5 of the illustrative FSL Schedule).

5.19 Disclosure and financial advice have developed into substantial regulatory regimes, comprising a large volume of primary and delegated legislation. The ALRC has not identified other provisions regulating financial services providers that should be made their own chapter. For example, client money and property requirements are significant and relatively self-contained provisions. However, the Act-level provisions contain approximately 4,000 words and would be an anomalously short and isolated chapter of the FSL Schedule. The ALRC has therefore proposed including these requirements in the restructured and reframed chapter created under **Proposal C7**.

---

14 *Corporations Act* 2001 (Cth) ss 911A, 911B.
15 Ibid pt 7.6 div 10.
16 Ibid ss 992A, 992AA.
17 Ibid pt 7.8 divs 4, 4A.

However, in future, it may become more desirable to separate substantial and distinct regulatory regimes for financial services providers from the chapter created under **Proposal C7**.

5.20 **Proposal C8** is intended to create a chapter containing procedural and administrative provisions. For example, the obligation to comply with client money reporting rules could be contained in the chapter created under **Proposal C7**,[18] but the arrangements as to how the rules are created could appear in the chapter created under **Proposal C8**.[19] Similarly, the obligation to keep financial records in s 988A of the *Corporations Act* could appear separately from the detailed requirements as to how those records must be kept.[20] These detailed requirements may be more appropriately located in delegated legislation, with administrative arrangements in the chapter created under **Proposal C8**. However, if the procedural requirements as to the content of financial records were thought appropriate for primary legislation, then **Proposal C8** could provide a home for these provisions, without obscuring the more principled obligations in the chapter created under **Proposal C7**. Legislative notes may be used to direct readers from the principled obligations to the administrative and procedural requirements, whether in primary legislation or delegated legislation.

5.21 The chapter created under **Proposal C8** should not be a home for detail and machinery provisions that are more appropriate for delegated legislation. The ALRC's proposed legislative model, discussed in Interim Report B, seeks to provide clear homes for prescriptive detail appropriate for delegated legislation. For example, the key obligations and offences relating to preparing financial statements could appear in the chapter created under **Proposal C7**.[21] The detailed requirements contained in the *Corporations Act* and *Corporations Regulations* could then be located in a rulebook relating to AFS Licensing, rather than in the chapter created under **Proposal C8**.[22] The ALRC published draft *Guidance for Delegating Legislative Power* in Interim Report B.[23] To the extent consistent with

18 Ibid s 981M.

19 Ibid ss 981J, 981K, 981L. Section 981N provides for regulations to set up alternatives to civil penalties, such as infringement notices. As explained in Interim Report B, powers that allow regulators to take administrative action against members of a regulated community for breach or suspected breach of the law should be included in primary legislation. These penalty provisions could be located in the provision imposing the obligation, consistent with **Recommendations 20–23** and **Proposal C15**, discussed in **Chapter 10** of this Interim Report. As an alternative to locating the power to make client money rules in the chapter created under **Proposal C8**, the power could be included in a more general chapter relating to Ministerial and ASIC powers, such as Chapter 7 of the illustrative FSL Schedule in **Appendix D.**

20 *Corporations Act 2001* (Cth) ss 988B, 988C, 988D, 988E, 988F, 988G.

21 Ibid ss 989A, 989B, 989CA.

22 Ibid ss 989C, 989D; *Corporations Regulations 2001* (Cth) pt 7.8 div 6 subdiv B.

23 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) 274–8 (Appendix E).

that guidance, prescriptive, administrative, and procedural provisions should appear in delegated legislation.[24]

5.22 The goal of separating more important provisions from related administrative and procedural detail, and placing those details (where appropriate for primary legislation) in the chapter covered by **Proposal C8**, is to highlight the overarching context and purpose of the law. Specific obligations and regulatory requirements should be able to be read in context, rather than in isolation or as part of a disordered 'shopping list' of requirements. For example, the obligations to act 'efficiently, honestly and fairly', and to have available adequate resources, inform and frame the more specific regulatory requirements presently spread across Chapter 7 of the *Corporations Act*, such as obligations relating to client money and preparing financial statements.[25] The existing structure of Chapter 7 obscures this context and purpose, thereby complicating the task of identifying the fundamental norms and requirements of the law, and relating these to more specific obligations.

Designing the new chapters

5.23 This part examines the potential structure and framing of the two new chapters created under **Proposals C7** and **C8**. The discussion is based on the principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report. This part emphasises the importance of grouping and prioritising provisions for users and helping users to develop mental models. The principles of designing for coherence and an intuitive flow help inform how provisions are grouped and prioritised.

5.24 General regulatory provisions have less scope for consolidation without changes to policy. The focus of this part is therefore on restructuring and reframing individual provisions to make them easier to navigate and understand without requiring their text to be substantially redrafted. As noted in **Chapter 7** of this Interim Report, government could combine the process of restructuring and reframing regulatory obligations with policy reforms that may bring greater simplification or align with other policy programs.

---

24 There are circumstances in which it may not be appropriate for machinery provisions such as procedural and administrative provisions to appear in delegated legislation. For example, it would be inappropriate for the entirety of the 'fit and proper person' test in relation to granting AFS Licences (ss 913BA-913BB of the *Corporations Act*) to appear in delegated legislation. This is a significant element of the regulatory regime, and it appears appropriate for Parliament to determine the broad circumstances in which a person is suitable to hold a licence and therefore operate a financial services business. It may be appropriate, however, for some procedural and administrative elements of the test to appear in delegated legislation. For example, s 913BB of the *Corporations Act* lists matters to which ASIC must have regard in applying the fit and proper person test. The tenth item on the list is 'any other matter prescribed by the regulations', followed by 'any other matter ASIC considers relevant'. Parliament has therefore provided the core elements of the fit and proper person test, the administration of which may then be somewhat shaped by regulations and ASIC's discretion.

25 *Corporations Act 2001* (Cth) pt 7.8 divs 2, 6.

5.25 When referring to the FSL Schedule, this section assumes that its structure would reflect the outline of the illustrative FSL Schedule in **Appendix D**, which has been developed by applying the ALRC's proposed principles for structuring and framing legislation.

Grouping, prioritisation, and intuitive flow

5.26 Within the two chapters created under **Proposals C7** and **C8**, the principles of grouping, prioritisation, and intuitive flow should guide the structure of provisions. Chapter 3 of the illustrative FSL Schedule in **Appendix D** shows one way in which these principles can inform the structure of a chapter relating to the generally applicable obligations of financial services providers.[26]

5.27 At the highest level, Chapter 3 of the illustrative FSL Schedule is grouped around two main parts that bring together provisions of similar application:

- Part 3.2—General obligations of financial services providers; and
- Part 3.3—Obligations of financial services licensees.

5.28 Within these parts, the principles of coherence, prioritisation, and intuitive flow help shape the order and framing of provisions. Within Parts 3.2 and 3.3, provisions are ordered from the most significant and general to the more specific. This structure, along with a clear scope to each Part, aims to be coherent and intuitive for readers. As contemplated in Part 3.1 of the illustrative FSL Schedule in **Appendix D**, the structure could be succinctly communicated through a simplified outline.

Grouping and prioritising obligations of financial services providers

5.29 Part 3.2 of the illustrative FSL Schedule is structured and framed so that the most significant and generally applicable regulatory obligations appear first: the obligations on providers of financial services to either hold an AFS Licence or to be authorised by a licensee.[27] The detail in relation to these obligations, such as how a person can become licensed or authorised, appear in Chapter 6 of the illustrative FSL Schedule, which exemplifies the chapter created under **Proposal C8**.

5.30 Separating obligations from the administrative and procedural provisions that affect their operation allows the legislation to communicate its core requirements more clearly. A person could read all the obligations in Part 3.2 relatively quickly without being interrupted by administrative and procedural provisions. Being able to read the obligations together in this way helps users understand the context and purpose of the provisions, without being distracted by detail that is not critical to understanding the core requirements of the legislation.

5.31 These key obligations are then followed by more specific obligations, in relation to conduct, remuneration, and fees.[28] This structure also attempts to

26 See Chapter 3 of the illustrative FSL Schedule in **Appendix D**.
27 See Part 3.2 Div 1 of the illustrative FSL Schedule.
28 Part 3.2 Divs 2 and 3 of the illustrative FSL Schedule.

provide an intuitive flow for provisions, which should be easily understood based on the headings of each division and therefore understood from a table of contents. The conduct obligations in Part 3.2 Div 3 of the illustrative FSL Schedule include the hawking prohibition and restrictions on the use of certain words or expressions. These obligations apply to persons other than AFS Licensees and their representatives, and are therefore not placed in Part 3.3 of the illustrative FSL Schedule.

5.32 Part 3.2 Div 3 on remuneration and fees also highlights some of the tensions inherent in the application of the principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report. Division 3 includes obligations that apply to any person issuing or selling a financial product, including persons who may not hold an AFS Licence. These provisions are not appropriate for Part 3.3, which includes obligations only applicable to AFS Licensees and representatives.

5.33 However, Part 3.2 Div 3 also includes restrictions on volume-based shelf-space fees that apply to both AFS licensees and Registrable Superannuation Entity (RSE) licensees. Given the potential application of these fee-related obligations to persons other than AFS licensees, the provisions have been placed in the more generally applicable Part 3.2, rather than Part 3.3 of the illustrative FSL Schedule. In doing so, the ALRC has sought to balance the principles for structuring and framing legislation, partially compromising the principle of grouping licensing obligations so that the more generally applicable fee obligations are prioritised.[29]

Grouping and prioritising obligations of AFS Licensees

5.34 Part 3.3 of the illustrative FSL Schedule in **Appendix D** is similarly structured and framed so that provisions are grouped and prioritised across the entirety of the Part, in a manner that seeks to provide a coherent and intuitive flow. The headings of these grouped provisions in Part 3.3 give an immediate sense of the Part's flow and the way in which provisions are prioritised for users:

- Division 1—General obligations of financial services licensees;
- Division 2—Obligations to clients;
- Division 3—Restrictions on transactions;
- Division 4—Obligations to inform and assist ASIC;
- Division 5—Obligations in relation to financial records, statements and audit; and
- Division 6—Obligations in relation to specific products and services.

29 The obligations related to volume-based shelf-space fees could be placed in Part 3.3 of the illustrative FSL Schedule if government were satisfied that all Registrable Superannuation Entity licensees were AFS Licensees. This may be the case following reforms that made providing a superannuation trustee service a financial service: *Corporations Act 2001* (Cth) s 766A(1)(ec).

5.35 The above divisions group together provisions of similar theme, application, and significance, and proceed from the most general and significant to more specific obligations. The structure and framing also make it easy to adapt the provisions over time as obligations are added or removed. New obligations could be inserted into these broadly thematic divisions or, if necessary, new divisions could be added. However, the divisions are framed at such a level that most new obligations, such as to clients, could be added as subdivisions to existing divisions.

5.36 Part 3.3 Div 1 of the illustrative FSL Schedule contains the general obligations of AFS Licensees. This Division offers a platform for restructuring and reframing obligations so that provisions better communicate the norms they reflect. Highlighting core obligations and norms also helps frame the more specific obligations that follow in later divisions of Part 3.3.[30] In particular, s 912A(1) of the *Corporations Act* currently provides a 'shopping list' of obligations in a single subsection. The structure of these obligations implies they are all equally or similarly significant. However, these obligations have varying degrees of significance, prescription, and scope. These variations could be better reflected in how the obligations are structured and framed.

5.37 For example, the obligation on AFS Licensees to provide financial services 'efficiently, honestly and fairly' in s 912A(1)(a) of the *Corporations Act* is foundational and reflects several core norms of behaviour.[31] Its importance should be clearly highlighted and communicated to users. This could be done by converting s 912A(1)(a) into a section and placing it first in Part 3.3 Div 1 of the FSL Schedule.

5.38 The subsequent sections could be structured to highlight the core obligations of licensees more clearly. **Example 5.2** shows how the provisions that currently comprise s 912A of the *Corporations Act* may be more clearly structured and framed, with placeholder numbering included for readability.

30 This section assumes that all obligations in s 912A of the *Corporations Act* are retained in their current form. Proposal A20 of Interim Report A suggested restructuring and reframing 'efficiently, honestly, and fairly' in several ways. Similarly, Proposal A21 suggested removing several other obligations on the basis that they were unnecessary given the obligation to act 'efficiently, honestly, and fairly'. For discussion of these proposals, see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [13.43]–[13.107]. The restructure and reframing discussed in this section does not depend on either Proposals A20 or A21.

31 These include the norms to 'act fairly', 'provide services that are fit for purpose', and 'deliver services with reasonable care and skill', as contemplated by the Financial Services Royal Commission: Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 6) 8–9.

Example 5.2: Illustrative restructure of s 912A of the Corporations Act

912AA Obligation to act efficiently, honestly and fairly

Note: Equivalent to s 912A(1)(a)

912AB Obligation to comply with the law and licence conditions

Note: Equivalent to ss 912A(1)(b), (c), (ca), (cb)

912AC Obligation to maintain competence to provide financial services

Note: Equivalent to ss 912A(1)(e), (f)

912AD Obligation to maintain arrangements to manage conflicts of interest

Note: Equivalent to s 912A(1)(aa)

912AE Obligation to maintain adequate resources

Note: Equivalent to ss 912A(1)(d), (4)

912AF Obligation to maintain adequate risk management systems

Note: Equivalent to ss 912A(1)(h), (5)

912AG Obligation to maintain a dispute resolution system

Note: Equivalent to ss 912A(1)(g), (2)–(3)

5.39 Other provisions presently framed as general obligations in s 912A of the *Corporations Act* could be relocated to better communicate their theme and relative significance compared to the above regulatory obligations. For example, the obligation to comply with the Reference Checking and Information Sharing Protocol, presently contained in ss 912A(1)(cc), (3A)–(3G) of the *Corporations Act*, could be located in the chapter on financial advice suggested in **Proposal C6**.[32]

5.40 Subsequent divisions of Part 3.3 of the FSL Schedule could be structured and framed to also focus users on the core requirements of the law. The obligations in Divs 2–6 could be framed around clear obligations and standards of behaviour, with notes referring users to where any related detail about the obligation can be found. Such detail will generally be in delegated legislation, though some administrative or procedural provisions not appropriate for delegated legislation could be included in Chapter 6 of the FSL Schedule. This approach was discussed above in relation to client money reporting obligations and financial records, where prescriptive detail and procedural provisions can be helpfully separated from the core obligations.

5.41 Chapter 6 of the illustrative FSL Schedule in **Appendix D** is structured to similarly help users understand the relative scope and significance of procedural and

32 See **Chapter 4** of this Interim Report.

administrative provisions. Again, the part headings of Chapter 6 of the illustrative FSL Schedule give a sense of its general flow, which aims to be intuitive and coherent:

- Part 6.2—Representatives of financial services licensees;
- Part 6.3—When a licence can be varied, suspended or cancelled;
- Part 6.4—Banning or disqualification of persons from providing financial services; and
- Part 6.5—Australian financial services licences.

5.42 Significant provisions that may need to be consulted regularly would appear first in Part 6.2 of the FSL Schedule.These may include provisions about authorising representatives and liability in relation to such representatives. Significant provisions in relation to holding an AFS Licence and being banned from providing financial services appear in Parts 6.3 and 6.4. Finally, provisions relating to obtaining an AFS Licence, which are likely to be consulted infrequently or potentially only once, would appear in Part 6.5.

Mental models

5.43 The restructuring and reframing of general regulatory obligations proposed in this chapter is intended to help users of the legislation better develop mental models of how those obligations can be navigated and understood. As discussed in **Chapter 9** of this Interim Report, mental models give users a 'structure to the apparent randomness' of the law, which enables users to navigate and understand provisions more efficiently.

5.44 A clearer and more useful mental model of regulatory obligations would be provided by grouping and prioritising obligations in an intuitive flow so that users have a general understanding of where different types of provisions may be located. The structure and framing should ensure that users know that Chapter 3 of the FSL Schedule would contain all the generally applicable regulatory obligations that are not identified solely as consumer protections and which do not comprise a self-contained regulatory regime.[33] Aids to interpretation, such as tables of contents and simplified outlines, may help users develop and maintain a mental model of where regulatory obligations are located, both within and across chapters.

5.45 Additionally, consistent approaches to legislative design, and particularly the structuring and framing of regulatory obligations, can be important in helping users develop and maintain mental models. For example, it would be unhelpful to implement any new AFS Licensee obligation to retail clients outside the division titled

33 Consumer protection provisions appear in Chapter 2 of the illustrative FSL Schedule in **Appendix D**, and these have a broader scope of application compared to obligations in Chapter 3 of the illustrative FSL Schedule. See the discussion of terminology in **Chapter 2** of this Interim Report. Disclosure and financial advice regulation appear in Chapters 3 and 4 of the illustrative FSL Schedule.

'obligations to clients'.[34] A consistent approach to grouping and prioritising provisions should therefore be maintained over time.

5.46 Consistency has been a problem with the placement of general regulatory obligations since the *FSR Act* inserted Chapter 7 of the *Corporations Act* in 2001. Regulatory obligations have been introduced to multiple divisions of multiple parts of Chapter 7 of the *Corporations Act*, making it difficult for users to predict where such obligations may be found. The range of provisions covered by **Proposals C7** and **C8** demonstrates the inconsistent approaches taken to the location and structure of general regulatory provisions in Chapter 7 of the *Corporations Act*. A principled and consistent structure can be the foundation of a useful mental model, but its steady dilution over time by inconsistent design choices can quickly multiply the number of mental models users must maintain.

34 Part 3.3 Div 2 of the of the illustrative FSL Schedule in **Appendix D**.

6. A Financial Services Law

Contents

Introduction

6.1 In this chapter, the ALRC proposes that the legislative framework for financial services should be restructured and reframed by enacting a schedule to the *Corporations Act*, which may be known as the Financial Services Law. This chapter explains the coverage and potential design of such a schedule. In doing so, this chapter builds on **Chapters 2–5** of this Interim Report by showing how restructured and reframed provisions relating to consumer protection, disclosure, financial advice, and general regulatory obligations would fit within a broader restructure of the provisions of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*.

6.2 This chapter is informed by the problem analysis contained in **Chapter 8** and the principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report. This chapter explains how those principles could be applied to make the legislative framework for financial services easier to navigate and understand.

6.3 This chapter will also explain the design choices behind the ALRC's illustrative FSL Schedule contained in **Appendix D**. As discussed below, the ALRC seeks stakeholder feedback as to whether the structure of the illustrative FSL Schedule in **Appendix D** would help to produce a clearer, more navigable, and more coherent legislative framework.

6.4 The focus of this chapter is how the primary legislation regulating financial services may be restructured and reframed. However, this chapter will also explain how the ALRC's proposals in this Interim Report cohere with the ALRC's proposed legislative model discussed in Interim Report B.[1] **Chapter 7** of this Interim Report discusses in further detail how these reforms may be implemented.

---

1 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) ch 2.

Constructing a Financial Services Law

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).

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?

6.5 As **Chapter 8** of this Interim Report demonstrates, the current structure of Chapter 7 of the *Corporations Act* fails to prioritise key messages, does not help users find relevant law, and lacks coherence that would help users foster mental models of the legislation. The current distribution of similar provisions across different Acts,

including the *Corporations Act* and *ASIC Act*, creates further complexity.[2] Reform to the structure and framing of Chapter 7 of the *Corporations Act* would help to address these problems.

6.6 In summary, the ALRC proposes that the financial services-related aspects of Chapter 7 of the *Corporations Act* and the entirety of Part 2 Div 2 of the *ASIC Act* should be grouped in a single location. For the reasons discussed below, the ALRC suggests that location should be a schedule to the *Corporations Act*, in a similar manner to the *Australian Consumer Law*.[3] The schedule should be known as the Financial Services Law and is referred to throughout this Interim Report as the FSL Schedule.

6.7 The FSL Schedule could be enacted as Sch 1 to the *Corporations Act*. The *Corporations Act* has never contained a schedule numbered one.[4]

6.8 **Appendix D** contains the illustrative FSL Schedule. The illustrative FSL Schedule is an outline that shows how **Proposals C9** and **C10** could be implemented in accordance with the principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report. The illustrative FSL Schedule focuses on the macrostructure of a new FSL Schedule.[5] It 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.

6.9 The ALRC invites stakeholder feedback on the structure adopted in the illustrative FSL Schedule in **Appendix D** in response to **Question C11**. Several design choices that underpin the illustrative FSL Schedule are explained in this chapter.

Coverage of the FSL Schedule

6.10 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 this Interim Report. The FSL Schedule would also integrate and replace the consumer protection provisions contained in Part 2 Div 2 of the

2 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.85]–[7.88].
3 See below [6.17]–[6.24].
4 Upon enactment in 2001, the *Corporations Act* contained only Schedules 2–4. The earlier *Corporations Act 1989* (Cth) included a Sch 1.
5 **Chapter 1** of this Interim Report explains the concepts of 'macrostructure' and 'microstructure'.

ASIC Act.[6] **Proposal C9** and **Appendix D** outline the range of provisions that would form the FSL Schedule.

6.11 The grouping of provisions currently contained in Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* would be facilitated by enacting single definitions of 'financial product' and 'financial service', as contemplated by Proposal A3 in Interim Report A.[7] The ALRC will further discuss Proposal A3 and revisit other proposals relating to the definitions of financial product and financial service in the Final Report.[8]

6.12 The FSL Schedule is not intended to cover the regulation of financial markets (such as the licensing of market operators, and market supervision by ASIC) or the regulation of disclosure for securities.[9] This helps to promote grouping and coherence in the structure of the FSL Schedule. It also reflects the present structure of Chapter 7 of the *Corporations Act*, in which most financial markets provisions are grouped in Parts 7.2–7.5B, while financial services provisions follow in the latter parts of Chapter 7.[10]

6.13 Nonetheless, some generally applicable provisions of the FSL Schedule, such as the prohibition on misleading or deceptive conduct, will be relevant to market participants. Options for ensuring navigability between the FSL Schedule and the broader *Corporations Act* are discussed further below.[11] The potential for restructuring the financial markets-related provisions of Chapter 7 of the *Corporations Act* is also discussed further below.[12]

6.14 The ALRC does not propose that provisions of other Acts relevant to financial services be incorporated in the FSL Schedule.[13] Nonetheless, the reforms contemplated by the ALRC would provide an opportunity to consider incorporating or consolidating similar legislative provisions currently spread across different Acts, either simultaneously or as part of later reforms. This could include, for example, the

---

6 For further discussion, see **Chapter 2** of this Interim Report. Some stakeholder feedback received by the ALRC to date supports this approach. The Insurance Council of Australia, for example, supported 'consideration being given to the merger of at least Chapter 7 of the *Corporations Act* and Part 2 Division 2 of the *ASIC Act*, as mentioned in paragraph 4.54 of [Interim Report B]. This would bring together the core elements of financial services regulation into one piece of legislation, reducing the complexity, inconsistency and regulatory overlap that currently exists': Insurance Council of Australia, *Submission 52*.

7 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.74]–[7.84].

8 See Proposals A3–A6 discussed in Chapter 7 of Interim Report A.

9 Disclosure regulation is discussed in **Chapter 3** of this Interim Report.

10 Exceptions to this general structure include Parts 7.10 and 7.11 of the *Corporations Act*, which both relate to securities and financial markets.

11 See below [6.66].

12 See below [6.62]–[6.63].

13 These include, for example, the *NCCP* Act, *SIS Act*, and *Insurance Contracts Act 1984* (Cth).

consumer protection and licensing regimes relating to credit and superannuation, contained in the *NCCP Act* and the *SIS Act* respectively.[14]

6.15 Limiting the FSL Schedule in scope has the additional benefit of making its ultimate implementation more manageable. For example, it avoids concerns arising out of potential constitutional limitations relating to the separate referral of matters from the Australian States relating to the regulation of consumer credit in the *NCCP Act*.[15] **Chapter 7** of this Interim Report further discusses implementation of the reforms proposed by the ALRC, including in relation to the FSL Schedule.

Design choices in the FSL Schedule

6.16 This part discusses some of the design choices that underpin the illustrative FSL Schedule in **Appendix D**, and how those choices reflect the principles discussed in **Chapter 9** of this Interim Report.

A schedule to the Act

6.17 In considering how Chapter 7 of the *Corporations Act* may be restructured and reframed, a preliminary question is the form in which any restructured and reframed version should appear. As discussed in **Chapter 8** of this Interim Report, Chapter 7 of the *Corporations Act* is akin to 'an Act within an Act' and its current structure as a single chapter is problematic.

6.18 Several stakeholders have suggested to the ALRC that Chapter 7 of the *Corporations Act* should be removed from the *Corporations Act* and placed in a standalone Act.[16] Discussing the *Corporations Act* more generally, Professor Jordan has observed that unpacking the Act 'into separate statutes would promote a more obvious, and conceptually sound, characterisation of principles and issues'.[17] However, as discussed in the ALRC's Background Paper FSL4, enacting one or more standalone Acts would appear to be possible only by reforming the terms of the referral of matters from the States to the Commonwealth, which provides the

14 See Cindy Davies, Samuel Walpole and Gail Pearson, 'Australia's Licensing Regimes for Financial Services, Credit, and Superannuation: Three Tracks Toward the Twin Peaks' (2021) 38(5) *Company and Securities Law Journal* 332; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.85]–[7.88], [8.85]. See also Michelle Levy, *Quality of Advice Review* (Final Report, 2023) [4.1.2].

15 See Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [117]–[125].

16 See, eg, A Schmulow and S Dreyfus, *Submission 56*; Australian Banking Association, *Submission 61*; Insurance Australia Group Limited, *Submission 73*; MinterEllison, *Submission 74*. Other submissions have expressed support for separating those aspects of Chapter 7 of the *Corporations Act* that relate to financial services from other provisions that relate more closely to financial markets and corporations: see, eg, P Hanrahan, *Submission 36*.

17 Cally Jordan, 'Unlovely and Unloved: Corporate Law Reform's Progeny' (2009) 33(2) *Melbourne University Law Review* 626, 638.

constitutional basis for the *Corporations Act*.[18] In short, the terms of the corporations and financial services referral confer power on the Commonwealth to make only 'express amendments' (as that term is defined) to specific legislation (including the *Corporations Act*, the *ASIC Act*, and the *Corporations Regulations*).[19] The referral would not, however, empower the Commonwealth to enact other (standalone) primary legislation relating to the regulation of corporations and financial services.[20]

6.19 Other options for restructuring and reframing Chapter 7 of the *Corporations Act*, which would stay within the limitations imposed by the corporations and financial services referral, include:

- restructuring the provisions of Chapter 7 within that existing chapter, a new chapter (such as a 'Chapter 7A'), or multiple new chapters within the *Corporations Act*;
- removing Chapter 7 (in whole or in part) from the *Corporations Act* and enacting equivalent provisions within the *ASIC Act*, which may also involve integrating Part 2 Div 2 of the *ASIC Act*; or
- removing Chapter 7 of the *Corporations Act* (in whole or in part) and enacting equivalent provisions in a schedule to the Act, while also integrating Part 2 Div 2 of the *ASIC Act* in the same schedule.[21]

6.20 Among those options, the ALRC suggests that the third option, namely enacting a schedule to the *Corporations Act* dealing with the financial services-related aspects of Chapter 7 of the Act and Part 2 Div 2 of the *ASIC Act*, is the most readily implementable. This would be the effect of **Proposals C9** and **C10**. In doing so, care would need to be taken to ensure that the intelligibility and navigability of the *Corporations Act* was not compromised.[22] However, creating a schedule to the *Corporations Act* containing provisions that regulate financial services is preferable for the following reasons:

- Compared with other options, using a schedule allows the greatest flexibility to apply the principles for structuring and framing discussed in **Chapter 9** of this Interim Report, while causing the least amount of disruption to other parts of the *Corporations Act* or *ASIC Act*. As discussed below, schedules to Acts may be used for a number of purposes and, although it is relatively uncommon to use schedules for this purpose, other Commonwealth Acts use schedules in a similar way.[23]
- Relatedly, creating a new schedule would facilitate integrating Part 2 Div 2 of the *ASIC Act* more easily than would be possible under other options. This is

18 See Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [108]–[116], [168].
19 See ibid [106]–[116].
20 See ibid.
21 For an alternative legislative design approach, and one which considers how provisions of the *Corporations Act* outside of Chapter 7 may also be restructured, see P Hanrahan, *Submission 36*.
22 See, eg, Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [167].
23 See below [6.22]–[6.24].

because all levels of the macrostructure (from chapter level and below) could be used. Removing Part 2 Div 2 from the *ASIC Act* would also help to create thematic coherence in the *ASIC Act*, as discussed below.[24]

- Removing Chapter 7 from the *Corporations Act* and integrating it within the *ASIC Act* would require a greater degree of 'de-coupling' key concepts, such as financial product and financial service, from the *Corporations Act*. Retaining the substance of Chapter 7 in the body of the *Corporations Act* or as a schedule to the Act means that, where necessary, existing linkages with other parts of the *Corporations Act* can be maintained more easily.
- Compared with creating new chapters within the body of the *Corporations Act*, a schedule can be used to create a clearer legislative 'identity' for the regulation of financial services and to highlight common themes that traverse several chapters. Experience with the *Australian Consumer Law* suggests that this may help to promote public awareness of the legislation.[25]
- Any restructuring of the provisions of Chapter 7 of the *Corporations Act* would require renumbering. Using a schedule to the *Corporations Act* means that numbering can 'start afresh', without needing to adopt alpha-numeric numbering from its inception (as under most other options).[26] Gaps in numbering could also be used to facilitate later amendment.[27]

6.21 Schedules to Acts are versatile legislative tools. OPC guidance distinguishes between 'amending schedules' and 'non-amending schedules',[28] noting that amending schedules are the most common type.[29] According to OPC guidance, non-amending schedules 'are used for a number of different purposes', including 'to contain text that could be contained in the body of [a] Bill, Act or instrument as a section'.[30] UK drafting guidance advises that schedules 'can assist clarity by providing a home for material that would otherwise interrupt and distract from the main story you are trying to tell'.[31] That same guidance identifies the main downside to schedules, advising that 'relegating text to the end of [legislation] may not always help the reader'.[32]

---

24 See below [6.50].

25 Department of the Treasury (Cth) and EY Sweeney, *Australian Consumer Survey 2016* (2016) 21; Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Final Report, 2017) 82.

26 As part of any re-numbering exercise, a concordance table could be produced to show how provisions of the reformed legislation correspond to repealed provisions.

27 This would be consistent with a similar numbering style adopted in other legislation for that same purpose, such as the *ITA Act 1997* and Sch 2 to the *Corporations Act*. Prototype legislation (including the Prototype Scoping Order and Prototype Rules) developed by the ALRC also illustrates this approach: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

28 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [241].

29 Ibid [241]–[242].

30 Ibid [252].

31 Office of the Parliamentary Counsel (UK), *Drafting Guidance* (2020) [3.9.1].

32 Ibid [3.9.3].

6.22 The *Australian Consumer Law* provides an example of a regulatory scheme contained within a schedule to an Act. Like **Proposal C10**, the location of the *Australian Consumer Law* in a schedule was driven by the legislation's constitutional basis.[33] A review of the *Australian Consumer Law* in 2017 noted stakeholder feedback that a 'standalone version of the [*Australian Consumer Law*] that can be downloaded directly (rather than as a schedule to a much larger piece of legislation)' was desirable.[34] Such an approach could be adopted for the FSL Schedule.

6.23 Examples of schedules containing provisions that could also appear in the body of an Act include:

- the *Criminal Code*, in the schedule to the *Criminal Code Act 1995* (Cth). In this case, a schedule appears to have been used to, at least in part, help manage the staged implementation of legislative reform;[35]
- the *National Credit Code* in Sch 1 to the *NCCP Act*. In this case, a schedule was used because the National Credit Code largely replicated the pre-existing Uniform Consumer Credit Code, which formed part of earlier state legislation;[36] and
- the *Insolvency Practice Schedule (Corporations)* and *Insolvency Practice Schedule (Bankruptcy)* contained in, respectively, Sch 2 to the *Corporations Act* and Sch 2 to the *Bankruptcy Act 1966* (Cth). In these cases, schedules were used to increase harmonisation between the separate legislation regulating corporate and personal insolvency.[37]

6.24 A range of other Commonwealth Acts use schedules for substantive purposes.[38] In total, seven of the 14 longest Commonwealth Acts use schedules for substantive purposes, based on an analysis of ALRC DataHub data sets.[39]

Constitutional context

6.25 As discussed in Background Paper FSL4, constitutional issues may arise whenever substantial amendments are made to the *Corporations Act* and *ASIC Act*.[40] These issues relate to the scope of the 'amendment reference' provided by state

---

33 The *Australian Consumer Law* appears in a schedule so that it can be 'applied' as a law of each state and territory by legislation enacted in each jurisdiction. For further discussion, see Australian Government, *The Australian Consumer Law: A Framework Overview* (2003) 10–11; Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [126]–[128].

34 Consumer Affairs Australia and New Zealand (n 25) 83.

35 Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 1–3.

36 Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth) [8.1]–[8.3].

37 See, eg, Explanatory Memorandum, Insolvency Law Reform Bill 2015 (Cth) [8.3].

38 See, eg, *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) schs 2A, 2B, 3, 5; *Taxation Administration Act 1953* (Cth) sch 1; *Telecommunications Act 1997* (Cth) schs 1, 2, 3, 3A; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) sch 1.

39 Australian Law Reform Commission, 'DataHub' <www.alrc.gov.au/datahub/>. See the data set 'In force Commonwealth Acts'.

40 Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [166].

legislation giving effect to the corporations and financial services referral.[41] Ultimately, it would be prudent for the Australian Government to seek advice in the ordinary course to ensure the constitutionality of Bills that would give effect to reforms of the *Corporations Act* and *ASIC Act*.

6.26 Relevantly, the *Corporations Act* is already significantly different from the version that was first enacted in 2001.[42] Furthermore, Chapter 7 of the *Corporations Act* was not, in its present form, part of the original text of the 'Corporations legislation' as defined by each state's referral legislation.[43] Rather, the *FSR Act* repealed the then existing Chapters 7 and 8 of the *Corporations Act* and substituted the present Chapter 7.[44] Therefore, reforms that focus on Chapter 7 of the *Corporations Act* may raise fewer issues.

6.27 Nonetheless, uncertainty as to the scope and operation of the 'amendment reference' highlights the clear benefit of exploring the possibility of a new or revised referral. In Interim Report A, the ALRC noted that the current Inquiry

> presents an opportunity for the Commonwealth and states and territories to revisit [the existing] constitutional framework without the urgency to address constitutional uncertainty that existed in 2000, and with the benefit of 20 years' experience of the referrals in practice.[45]

6.28 Amending or re-stating the corporations and financial services referral would open up a range of other beneficial reforms to simplify the structure of corporations and financial services legislation. Even greater simplification could be achieved by simultaneously revisiting the separate credit referral that underpins the *NCCP Act*.[46] Implementing **Proposals C9** and **C10** would be consistent with, and would not foreclose, the possibility of future reforms under amended or re-stated referrals.

The macrostructure

6.29 Focusing on the macrostructure, this section explains how the principles discussed in **Chapter 9** of this Interim Report could be applied to restructure Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* in the FSL Schedule. When referring to the FSL Schedule, this section assumes that its structure would reflect the outline of the illustrative FSL Schedule in **Appendix D**.

---

41 Ibid [111], [136]–[162].
42 Ibid [166].
43 See ibid [81]–[88], [106]–[116].
44 *Financial Services Reform Act 2001* (Cth) sch 1 item 1. See also Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [81]–[86].
45 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.88].
46 See Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021) [117]–[125], [169]–[174]; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.85]–[7.88].

6.30 **Table 6.1** below provides an overview of the macrostructure, at chapter level, for the illustrative FSL Schedule in **Appendix D**.

Table 6.1: 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

Prioritisation

6.31 The illustrative FSL Schedule in **Appendix D** emphasises the principle of prioritisation. It does this by locating provisions of most general application and greatest significance to the legislative scheme early in the order of provisions. For example, the provisions that relate to important consumer protections would be given priority by appearing in Chapter 2 of the FSL Schedule.[47] This emphasises the importance of consumer protection as a policy objective that frames other aspects of financial services regulation. The provisions of Chapter 2 of the FSL Schedule would also be those of the broadest application.[48]

6.32 Following the generally applicable consumer protection provisions in Chapter 2 of the FSL Schedule, Chapter 3 would contain important general regulatory obligations of financial services providers.[49] Their location in Chapter 3 reflects their importance to the regulation of financial services and their potentially broad application to any person carrying on a financial services business. Most importantly, Chapter 3 would include the core obligations of the AFSL regime currently in Part 7.6 of the *Corporations Act*.

6.33 Chapters 3 and 6 of the illustrative FSL Schedule also demonstrate how provisions of Part 7.6 and Part 7.8 of the *Corporations Act* may be restructured to

47 As discussed in **Chapter 8**, reforms to consumer protection provisions could be undertaken as the first stage of creating the FSL Schedule, further emphasising their importance to the legislative regime.
48 See **Chapter 2** of this Interim Report.
49 See **Chapter 5** of this Interim Report.

prioritise the obligations placed on AFS Licensees (in Chapter 3 of the FSL Schedule) while placing more 'mechanical' provisions later in Chapter 6 (such as how to get a licence in Part 6.5 of the FSL Schedule).[50] Legislative notes in Chapter 3 of the FSL Schedule could be used to alert users to the existence of other potentially relevant provisions in Chapter 6.

6.34 Chapters 4 and 5 of the FSL Schedule would deal with disclosure and financial advice respectively. This reflects an intuitive order, with the disclosure requirements in Chapter 4 appearing after the more general obligations of financial services providers (including product issuers) in Chapter 3. The provisions relating to financial advice (which apply to a narrower group of persons) would then appear in Chapter 5, following the more general disclosure requirements in Chapter 4.

6.35 Chapter 7 of the illustrative FSL Schedule shows how provisions relating to Ministerial and ASIC powers may be located later in the schedule to prioritise other provisions that more directly affect consumers and the regulated population. This is justifiable on the basis that the provisions of Chapter 7 of the FSL Schedule would, in the ordinary course, be of primary concern only to the Minister and ASIC. As suggested in the illustrative FSL Schedule, legislative notes could be used as part of a guide to using the FSL Schedule to alert users to the existence and location of those powers.

Grouping and coherence

6.36 The principles of grouping and coherence underpin much of the macrostructure in the illustrative FSL Schedule in **Appendix D**. For example, Chapter 2 of the illustrative FSL Schedule demonstrates how the provisions relating to consumer protection currently spread across Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* may be grouped together. Those provisions would also be grouped together based on their common breadth of application.[51]

6.37 A further example of grouping in Chapter 2 of the illustrative FSL Schedule is the inclusion of the obligation to comply with a product intervention order in Part 2.3 Div 1. Currently, that obligation is contained in Part 7.9A of the *Corporations Act* alongside other provisions that relate to the making of product intervention orders. Including the obligation in Part 2.3 Div 1 of the illustrative FSL Schedule groups it with other significant obligations, such as design and distribution obligations. This also emphasises its importance (as an offence provision) in line with the principle of prioritisation. A legislative note could be included with the obligation to alert users to the location of later provisions that detail ASIC's power to make product intervention orders (in Part 7.2 of the FSL Schedule).

6.38 The separation of provisions relevant to AFS Licensees between Chapters 3 and 6 of the illustrative FSL Schedule in **Appendix D** illustrates a trade-off between the principles of grouping and prioritisation. The result is that AFS Licensees may

50 This would give effect to **Proposals C7** and **C8** discussed in **Chapter 5** of this Interim Report.
51 See **Chapter 2** of this Interim Report.

need to look in more than one place for provisions relevant to their status as a licensee. However, prioritisation and thematic coherence within Chapter 3 of the FSL Schedule would mean the provisions that most directly affect how licensees conduct their business are given priority. Compared to Chapter 3, the provisions of Chapter 6 of the FSL Schedule would include those that licensees or their advisers would likely consult less regularly.[52]

Intuitive flow

6.39 Wherever possible, the ordering of provisions in the illustrative FSL Schedule in **Appendix D** aims to facilitate an intuitive flow of information. For example, in Chapter 3 of the illustrative FSL Schedule, the obligation to obtain an AFS Licence appears before obligations that attach to being a financial services licensee. In general, provisions are also ordered from most general to most specific. For example, in Chapter 2 of the illustrative FSL schedule the general prohibitions on misleading, deceptive, and unconscionable conduct precede more specific obligations and prohibitions that apply in particular circumstances. In Chapter 3 of the illustrative FSL Schedule, the general obligations of a licensee precede more specific obligations.

Developing a mental model

6.40 Applying the above principles when designing the FSL Schedule, as well as applying them consistently, should produce legislation that helps users develop an effective mental model. For example, consistently applying the principle of prioritisation would enable users to become familiar with the location of the most important provisions near the start of the schedule or a provision of it (such as a chapter or part). Aids to interpretation, discussed in **Chapter 9** of this Interim Report, may also help users to develop and use a mental model. For example, using descriptive headings and sub-headings, such as 'Obligations of financial services licensees' and the sub-heading 'Obligations to inform and assist ASIC', would (alongside coherent grouping) help users form a mental model of the FSL Schedule. This, in turn, would make the legislation easier to navigate.

6.41 Explicitly identifying the design choices that help users to develop a mental model may give some further assistance. This could be done in an equivalent to Part 1.3 of the illustrative FSL Schedule in **Appendix D**, which is headed 'How to use the Financial Services Law'.[53] For example, a section in Part 1.3 could explain how provisions are arranged and identify other devices that aid users, such as legislative notes. Part 1.3 could also explain the existence, purpose, and structure of the Scoping Order and Rulebooks as delegated legislation made under the

---

52 These include, for example, the provisions relating to: applying for an AFS Licence; varying, suspending, or cancelling an AFS Licence; and banning or disqualification from providing financial services. The design of these legislative chapters is also discussed in **Chapter 5** of this Interim Report.

53 For discussion of the benefits of using more legislative guides and simplified outlines, see Andrew Godwin and Micheil Paton, 'Social Licence, Meaningful Compliance, and Legislating Norms' (2022) 39(5) *Company and Securities Law Journal* 276, 288.

FSL Schedule.[54] In this way, a provision such as Part 1.3 would help users to develop a mental model of not just the primary legislation, but the whole legislative framework as embodied in the FSL Schedule, Scoping Order, and Rulebooks.

Definitions in the FSL Schedule

6.42 In Interim Report A, the ALRC examined how the use of definitions in corporations and financial services legislation creates complexity and impedes navigability. The ALRC also explored ways to reduce the complexity of definitions and improve their navigability.[55] In particular, the ALRC recommended that there should be a single glossary for defined terms used in the *Corporations Act*.[56]

6.43 To implement the ALRC's recommendation, exposure draft legislation suggested creating 'a single glossary in section 9 that contains a complete list of all defined terms used in the main body' of the *Corporations Act*, but not terms defined only for the purposes of a schedule.[57] The exposure draft legislation applied 'six key principles to ensure a consistent approach' to implementing the recommendation.[58] Those same principles should guide decisions about the location of definitions for the purposes of the FSL Schedule.

6.44 Applying those principles, it is likely that several definitions would be located in a dictionary for the FSL Schedule. This is because s 761A of the *Corporations Act* currently defines numerous terms for the purposes of Chapter 7 of the Act. Similarly, s 5 and Part 2 Div 2 Subdiv B of the *ASIC Act* define several terms for the purposes of Part 2 Div 2 of that Act, which would form part of the FSL Schedule discussed above.[59]

6.45 Depending on the approach ultimately adopted in respect of the single glossary in s 9 of the *Corporations Act*, it may be appropriate for that glossary to cover the FSL Schedule, but not other schedules to the *Corporations Act*. Although this may create inconsistency as regards different schedules, it may be justified on the basis that existing schedules to the Act have a much more limited application than the

---

54 For discussion of the different elements of the ALRC's proposed legislative model, including the Scoping Order and Rulebooks, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.4]–[2.6], [2.15]–[2.56].

55 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) chs 4–6.

56 Ibid rec 7.

57 Exposure Draft Explanatory Materials, Treasury Laws Amendment (Measures for Consultation) Bill 2022: ALRC Financial Services Interim Report Recommendations [1.37], [1.39]; Exposure Draft, Treasury Laws Amendment (Measures for Consultation) Bill 2022: ALRC Financial Services Interim Report Recommendations sch 2 pt 1 div 1 item 1.

58 Exposure Draft Explanatory Materials, Treasury Laws Amendment (Measures for Consultation) Bill 2022: ALRC Financial Services Interim Report Recommendations [1.30].

59 Several definitions may become redundant or be rationalised into a single definition upon integrating Part 2 Div 2 of the *ASIC Act* into the FSL Schedule. Furthermore, integrating Part 2 Div 2 of the *ASIC Act* within the FSL Schedule may also help to resolve the complexity currently created by s 5(2) of the *ASIC Act*. For further discussion, see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.46]–[4.50].

FSL Schedule. Adopting this approach would mean, for example, that s 9 of the *Corporations Act* would contain a signpost for a term defined only for the purposes of the FSL Schedule.[60] As a result, readers of the FSL Schedule would be directed to the location of a definition regardless of whether they consulted s 9 of the Act or the dictionary provision of the FSL Schedule.

6.46 A dictionary provision for the FSL Schedule could be located either at the start or near the end of the schedule. The illustrative FSL Schedule in **Appendix D** demonstrates the latter approach.[61] A dictionary provision in the FSL Schedule should contain the definition, or signpost to the definition, of terms defined for the purposes of the schedule.

6.47 While few users may read legislation from start to finish, placing a long list of definitions at the start of a piece of legislation potentially delays users from getting to the most important information they seek. Locating a dictionary near the end of the FSL Schedule would therefore emphasise the principle of prioritisation — namely, that important information should be presented before matters of detail.

6.48 To assist users, a short provision similar to s 2-10 of the *ITA Act 1997* could be included near the start of the FSL Schedule to explain where the dictionary can be found and how defined terms may be identified (if, for example, underlining or asterisking of defined terms were adopted).[62] This approach would strike a balance between informing users without obscuring important substantive provisions. However, such an approach may also challenge users' existing mental models, particularly in respect of the *Corporations Act* which, as discussed above, is likely to contain a single glossary near the start of the Act.

Implications for the *ASIC Act*

6.49 As discussed in **Chapter 2** of this Interim Report, consolidating and grouping provisions that focus on consumer protection and setting conduct standards means that Part 2 Div 2 of the *ASIC Act* could be repealed and replaced by provisions of the FSL Schedule. This would improve navigability by reducing the number of places that users of financial services legislation must look to find the law.

6.50 Removing Part 2 Div 2 from the *ASIC Act* would also improve the thematic coherence of the *ASIC Act*. Aside from Part 2 Div 2, the majority of other provisions in the *ASIC Act* relate to the establishment of ASIC,[63] ASIC's functions, powers,

60 This is the approach adopted in respect of chapter-specific definitions by the exposure draft legislation that creates the single glossary in s 9 of the *Corporations Act*: see Exposure Draft Explanatory Materials, Treasury Laws Amendment (Measures for Consultation) Bill 2022: ALRC Financial Services Interim Report Recommendations [1.49]–[1.50].

61 Other Acts, such as the *ITA Act 1997* and the *Private Health Insurance Act 2007* (Cth), also illustrate this approach.

62 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) rec 10, [6.71]–[6.88]; Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [46]–[66].

63 *Australian Securities and Investments Commission Act 2001* (Cth) pt 2 div 1, pts 5, 6.

and business,[64] the establishment and proceedings of other bodies (such as the Takeovers Panel and the Companies Auditors Disciplinary Board),[65] and financial reporting.[66] These provisions share a common theme in that they relate to the frameworks for administering and enforcing compliance with the law's substantive obligations. Part 2 Div 2 of the *ASIC Act* is anomalous in that it creates obligations for regulated entities that apply regardless of anything done by ASIC,[67] and also creates rights and remedies for consumers.[68]

6.51 Integrating Part 2 Div 2 of the *ASIC Act* within the FSL Schedule may also help to resolve anomalies and simplify other parts of the legislation. For example, s 1317R of the *Corporations Act* confers a power on ASIC to require reasonable assistance from a person in connection with civil penalty proceedings brought by ASIC. However, the power in s 1317R applies only in respect of civil penalty provisions under the *Corporations Act*, and no equivalent power is available in relation to civil penalty proceedings commenced under the *ASIC Act*. There is no clear rationale for this distinction. By moving Part 2 Div 2 of the *ASIC Act* into the FSL Schedule, thereby grouping all civil penalty provisions together, s 1317R would apply so as to resolve the present anomaly.

6.52 Furthermore, s 13(1) of the *ASIC Act* currently confers on ASIC two separate, but similar, investigation powers:

- a power in s 13(1) in respect of suspected contraventions of the 'corporations legislation' (as that term is defined in the *ASIC Act*), excluding Part 2 Div 2 of the *ASIC Act*; and
- a separate power in s 13(6) in respect of suspected contraventions of Part 2 Div 2 of the *ASIC Act*.[69]

6.53 The distinction between these powers, based on the defined term 'excluded provisions' in the *ASIC Act*,[70] appears to have been unnecessary since the constitutional foundation of the *Corporations Act* and *ASIC Act* was reformed in

64 See, eg, ibid pts 3, 4, 6A, 7, 8.
65 See, eg, ibid pts 10, 11.
66 Ibid pt 12.
67 This can be distinguished from other obligations that arise because, for example, ASIC exercises its compulsory information-gathering powers: see, eg, ibid ss 30, 63.
68 While the initial placement of Part 2 Div 2 in predecessor legislation to the *ASIC Act* may have usefully signalled 'the transfer of consumer protection functions from the regulatory responsibility of the ACCC [Australian Competition and Consumer Commission] to ASIC' when first enacted, such signalling no longer seems necessary: see Explanatory Memorandum (House of Representatives), Financial Sector Reform (Consequential Amendments) Bill 1998 (Cth) [4.11]–[4.14].
69 Note that these powers use slightly different operative wording: s 13(1) empowers ASIC to 'make such investigation as it thinks expedient for the due administration of the corporations legislation', whereas s 13(6) provides that ASIC 'may make such investigations as it thinks appropriate'. Neither explanatory materials nor case law discuss the rationale or policy intent behind the differing formulations. Both formulations confer a wide discretion on ASIC, such that consolidating the provisions using either formulation should not materially alter the law.
70 *Australian Securities and Investments Commission Act 2001* (Cth) s 5.

2001.[71] These provisions, and other provisions of the *ASIC Act* such as ss 11 and 12A which also depend upon the distinction, could be simplified.

Horizontal and vertical coherence

6.54 This part explains how the restructuring and reframing contemplated by the ALRC would complement the proposed legislative model (which focuses on the 'vertical' structure of financial services legislation) discussed in Interim Report B.[72] As discussed there, the ALRC's proposed legislative model would comprise:

- simplified primary legislation (in the form of the FSL Schedule if **Proposals C9** and **C10** were implemented);
- a Scoping Order, being a single, consolidated legislative instrument containing the vast majority of exclusions and exemptions from the primary legislation, and other detail that is necessary for adjusting the scope of the primary legislation; and
- thematically consolidated rules, which may be known as Rulebooks, containing prescriptive detail suitable for inclusion in delegated legislation.[73]

6.55 A key theme of Interim Report B was 'finding the right home' for different aspects of the law, and in particular the prescriptive detail necessary to give effect to the financial services regulatory regime.[74] That same theme is relevant to Interim Report C.

6.56 Taken together, the FSL Schedule and better use of the legislative hierarchy would facilitate finding the right home for different provisions. For example, the illustrative FSL Schedule in **Appendix D** shows how prescriptive detail in the law that may not be appropriate for delegated legislation can be accommodated in a way that does not obscure the law's fundamental norms. This is made possible largely by applying the principle of prioritisation so that fundamental norms and obligations are prioritised in the legislative structure while other more specific or prescriptive obligations are located in later provisions. The ordering of provisions in Chapter 2 of the FSL Schedule, relating to consumer protection as discussed above, illustrates this type of prioritisation: the core prohibitions on misleading, deceptive, and

71 'Excluded provisions' were introduced by reforms to the *Australian Securities and Investments Commission Act 1989* (Cth) ('*1989 ASIC Act*') in 1998, albeit under different language. The term functioned to isolate powers conferred on ASIC under the consumer protection provisions and external legislation from the operation of the rest of the *1989 ASIC Act* and *Corporations Act 1989* (Cth). These provisions were among the last to be moved from State legislation into the *1989 ASIC Act* prior to the reforms of 2001, and it appears that they were first excluded from the 'national uniform law' definition for this reason. This dynamic was, unnecessarily, carried over into the modern *ASIC Act*: see Explanatory Memorandum, Australian Securities and Investments Commission Bill 2001 (Cth) [4.12]–[4.13].

72 The concepts of 'horizontal' and 'vertical' structure are explained in **Chapter 1** of this Interim Report.

73 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) ch 2.

74 Ibid [2.20]–[2.28], [2.35]–[2.38], [2.42]–[2.50]. See also Figures 2.3 and 2.4 in Interim Report B for examples of prescriptive detail in relation to financial products and financial services disclosure.

unconscionable conduct may be located early in the chapter, while more prescriptive obligations that appropriately belong in primary legislation (as opposed to delegated legislation) may be located later in Chapter 2 of the FSL Schedule.

6.57 Nonetheless, prioritisation should not be used to compensate for including unnecessary prescriptive detail in primary legislation or detail that may more appropriately appear in delegated legislation, as discussed in Interim Report B.[75] **Chapter 3** of this Interim Report further discusses the interaction between delegated legislation and the FSL Schedule in the context of disclosure.

6.58 The principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report would also help to structure and frame the Scoping Order and rules made under the FSL Schedule in three main ways. First, the thematic grouping of provisions in the FSL Schedule could be replicated in the Scoping Order. This would aid navigability by enabling users to easily locate exclusions and exemptions in the Scoping Order, consistent with the mental model they may have formed for the structure of the FSL Schedule.

6.59 A similar design philosophy underpins the present Chapter 7 of the *Corporations Regulations*, the structure of which is intended to match the structure of Chapter 7 of the *Corporations Act*. However, as the ALRC has previously observed, notional amendments mean that users cannot always rely on locating all of the relevant law by consulting the corresponding provision (such as a part) in the *Corporations Regulations*.[76]

6.60 Second, the thematic grouping of provisions in the FSL Schedule would give a ready guide for the creation of thematic Rulebooks. For example, as discussed in Interim Report B and illustrated by the Prototype Rules in Prototype Legislation B, there could be a Rulebook centred on disclosure for financial products (dealt with in Part 4.2 of the illustrative FSL Schedule in **Appendix D**).[77] Similarly, there may also be a Rulebook centred on disclosure for financial services (dealt with in Part 4.3 of the illustrative FSL Schedule) and financial advice (dealt with in Chapter 5 of the illustrative FSL Schedule).

6.61 Third, the principles for structuring and framing legislation could be applied to the Scoping Order and each Rulebook. In the case of Rulebooks, the most relevant principles would be grouping, coherence, and succinctness. The application of these principles can be seen in the Prototype Rules developed as part of Prototype Legislation B. In particular, the Prototype Rules show how grouping can be used to

---

75 For discussion of the types of matters that should appear in primary legislation and delegated legislation, see ibid [3.48]–[3.73].

76 See, for example, the various schedules to the *Corporations Regulations* that users must have regard to in understanding the PDS regime: Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 582 (Appendix C.11).

77 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.7]–[2.14], [2.48]–[2.50]. Prototype Legislation B is available on the ALRC website: see Australian Law Reform Commission (n 27).

create a 'choose your own adventure' structure, which focuses on how users of the legislation might engage with it.[78]

The regulation of financial markets

6.62 As discussed above, the ALRC suggests that the regulation of financial markets not form part of the FSL Schedule. This helps to promote grouping and coherence in both the FSL Schedule and the provisions relevant to financial markets that would remain in Chapter 7 of the *Corporations Act* after implementing **Proposals C9** and **C10**. While removing the financial services-related provisions from Chapter 7 of the *Corporations Act* would help to solve several of the problems discussed in **Chapter 8** of this Interim Report, there would still be scope for restructuring and reframing the provisions that regulate financial markets.

6.63 The principles discussed in **Chapter 9** of this Interim Report could be applied to restructure the remaining Chapter 7 of the Act or to implement a similar schedule relating to financial markets. For example, each of Parts 7.2, 7.3, 7.5A, and 7.5B of the *Corporations Act* contain separate licensing regimes which may be consolidated in several respects. It may also be possible to reorder provisions to better prioritise key obligations.

6.64 As noted above, some provisions of the FSL Schedule would still apply in relation to financial market participants. For example, when preparing prospectuses and issuing securities (as regulated by Chapter 6D of the *Corporations Act*), companies would have to comply with the consumer protections in Chapter 2 of the FSL Schedule — such as the prohibitions on misleading or deceptive and unconscionable conduct.

6.65 The continued application of these provisions reflects the breadth of the definition of 'financial service' in the *ASIC Act* consumer protections. Most relevantly, the definition includes dealing in a financial product, making a market for a financial product, and operating a financial market.[79] Moreover, the concept of 'dealing in a financial product' is broad. Any person dealing in a financial product, including on a financial market, would need to be aware of provisions of the FSL Schedule, including the consumer protection provisions.

6.66 The issue of provisions being spread across legislation is a more significant problem under the existing structure of the *Corporations Act* and *ASIC Act*. Provisions relating to financial markets and financial services can be found in various places in Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. Compared to the current legislation, implementing **Proposals C9** and **C10** would have the benefit of creating a single home for generally applicable provisions relating to financial services. Navigability between other potentially relevant provisions, such as

78 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.11]–[2.13]. See also **Chapter 3** of this Interim Report.

79 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAB(1).

Chapter 6D and the remaining provisions of Chapter 7 of the *Corporations Act*, could be maintained through the use of cross-references and legislative notes that alert users to the generally applicable provisions in the FSL Schedule. Simplified outlines or user guides could also be used to give an overall sense of where provisions related to financial markets are located in the FSL Schedule.

7. Implementation

Contents

Introduction

7.1 This chapter outlines how the reforms to financial services legislation proposed by the ALRC could be implemented. In particular, the chapter discusses:

- a high-level roadmap for implementing reforms;
- the ALRC's proposal that taskforces should be established to oversee the implementation of reforms; and
- the importance of post-legislative scrutiny to assess the reforms after implementation.

7.2 In part, the purpose of this chapter is to respond to stakeholders' desire for further detail about how the ALRC's proposals may be implemented.[1] Canvassing issues relating to implementation in this Interim Report provides an opportunity for further stakeholder feedback in advance of the Final Report.

1 See, eg, Financial Planning Association of Australia, *Submission 59*; Australian Banking Association, *Submission 61*; Financial Services Council, *Submission 66*; ANZ Banking Group, *Submission 67*; Law Council of Australia, *Submission 75*.

7.3 The implementation approach detailed in this chapter 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.[2]

7.4 In particular, the proposed reforms do not involve a rewrite of the *Corporations Act* or of Chapter 7 of the Act. Rather, the reform package comprises a series of self-contained reform pillars that would be implemented through a single legislative architecture. Each pillar would offer governments the opportunity to pursue their existing policy commitments. The reform roadmap and taskforces could also adjust as governments prioritise different reform pillars involving varying degrees of technical and policy reform.

7.5 This chapter also explores the challenges, costs, and benefits of reform, including by identifying the ways in which legislative complexity creates unnecessary costs for stakeholders.

The context for reform

7.6 Two key findings of the Financial Services Royal Commission provide important context for the present Inquiry and the ALRC's proposals for reform:

- First, the legislation that regulates financial services reflects fundamental norms of behaviour in only a 'piecemeal' way.[3] Instead, the law should clearly identify and express those fundamental norms.[4]
- Second, financial services legislation should be simplified so that the law's intent can be met, rather than its terms being merely complied with.[5]

7.7 Discussing reforms to address its findings more generally, the Financial Services Royal Commission observed that

> choices must now be made. The arrangements of the past have allowed conduct of the kinds and extent described here and in the Interim Report of the Commission. The damage done by that conduct to individuals and to the overall health and reputation of the financial services industry has been large. Saying sorry and promising not to do it again has not prevented recurrence. The time has come to decide what is to be done in response to what has happened. The financial services industry is too important to the economy of the nation to allow what has happened in the past to continue or to happen again.[6]

---

2 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* and the rewrite of the *Social Security Act 1947* (Cth) that resulted in the *Social Security Act 1991* (Cth).

3 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 9–11.

4 Ibid rec 7.4.

5 Ibid 44.

6 Ibid 4.

7.8 It is important to reiterate this context given the relatively long duration of this Inquiry and the passage of more than four years since the Final Report of the Financial Services Royal Commission. While many policy-oriented reforms have been implemented in response to the Financial Services Royal Commission, the ALRC's technical Inquiry has demonstrated that the legislative framework for regulating corporations and financial services remains unnecessarily complex and therefore less effective in promoting meaningful compliance.

7.9 Stakeholder feedback received by the ALRC to date recognises the problems identified by the ALRC and demonstrates a desire for reform. However, stakeholder feedback also reveals varying appetites as to the extent of reform and emphasises the importance of appropriately managing reform. This chapter responds to those issues.

The costs of inaction

7.10 This section discusses some of the ways in which the current complexity of financial services legislation creates costs for stakeholders.[7] This includes the unnecessary complexity created by poor structuring and framing, which is explored in detail in **Chapter 8** of this Interim Report. As the ALRC has sought to illustrate in this and earlier Interim Reports, many of the proposed reforms would substantially improve the navigability and comprehensibility of the legislative framework, which would in turn help to reduce these costs. As this section shows, even marginal improvements resulting from more targeted reforms could produce significant savings.

7.11 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.[8] Unavoidably, this increases the time and resources required to comply with the law.
- 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. 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

7 For a discussion of legislative complexity and its effects more generally, see Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021).

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

> 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, despite the existence of free processes for internal and external dispute resolution.

7.12 As discussed further in **Chapter 8** of this Interim Report, poor structure and framing also contribute to these costs by making it more difficult to understand the context and purpose of the law. The lack of context and purpose can obscure the intent of the law and thereby undermine the potential for meaningful compliance. It can also complicate the process of statutory interpretation for lawyers and judges seeking to understand and apply the law in a consistent and predictable way.

Costs of compliance

7.13 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.[9]

7.14 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,[10] reported that its 'total regulatory compliance spend' for the full year ending 31 March 2023 was approximately $1 billion.[11] **Figure 7.1** below illustrates the growth in Macquarie Group Limited's total regulatory compliance spend from the 2018 financial year to the 2023 financial year, representing a 19% compound annual growth rate.[12] In the case of Macquarie Group Limited and other similarly regulated entities, these costs would ultimately be borne by customers and shareholders.

---

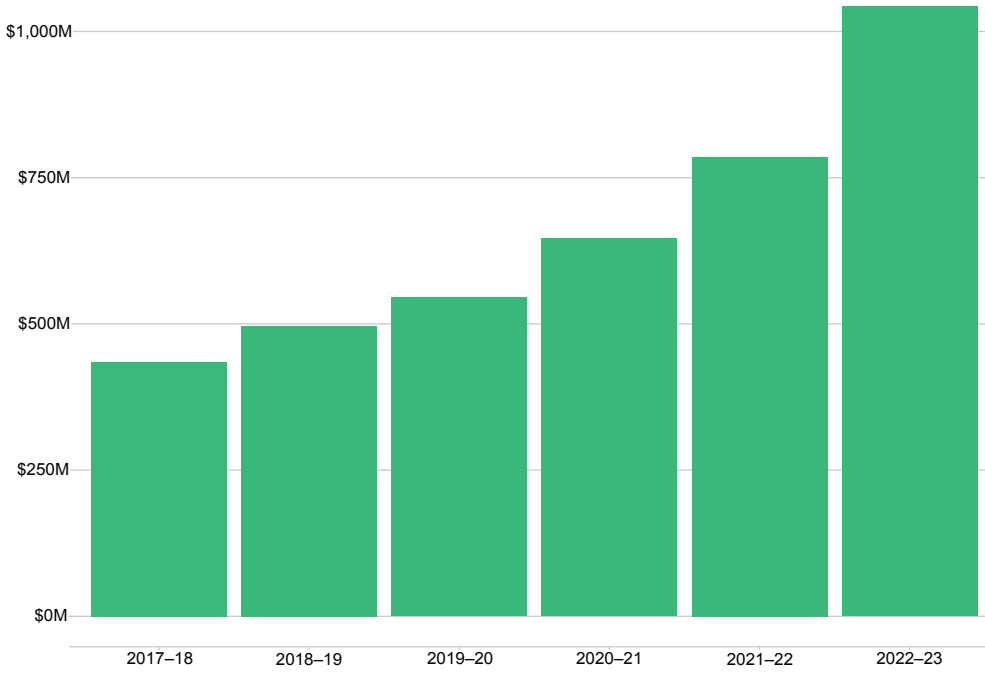
9 Ian Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14(4) *Sydney Law Review* 474, 478–9.

10 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>.

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

12 Ibid.

Figure 7.1: Total regulatory compliance spend — Macquarie Group Limited[13]



7.15 In submissions to the ALRC, numerous stakeholders have commented upon the costs of navigating the existing legislative framework for corporations and financial services. In respect of Chapter 7 of the *Corporations Act*, the Law Council of Australia, for example, noted that 'the time taken, and associated costs, to traverse [the legislative framework], will often be greater than should reasonably be expected'.[14] The Financial Planning Association of Australia observed that the 'findability' of notional amendments 'has a sizeable impact on the complexity of the financial advice regime and [adds] to the cost of providing financial services to consumers, especially retail clients'.[15] Commenting on stapled securities (a particular type of financial product), the Property Council of Australia observed that 'overlapping regulatory regimes' in the *Corporations Act* create 'complexity, inconsistencies and additional compliance costs' that are ultimately borne by investors or consumers.[16] As noted by scholars, simplification programs can be regarded as a 'microeconomic reform measure aimed at reducing deadweight losses in the economy',[17] thereby unlocking economy-wide benefits.

13 Ibid.
14 Law Council of Australia, *Submission 49*.
15 Financial Planning Association of Australia, *Submission 59*.
16 Property Council of Australia, *Submission 76*.
17 Binh Tran-Nam, 'Assessing the Tax Simplification Impact of Tax Reform: Research Methodology and Empirical Evidence from Australia' (2004) 97 *Proceedings: Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association* 376, 376.

Costs of enforcement and non-compliance

7.16 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'.[18] This view also underpins the Financial Services Royal Commission's recommendation that the law should be simplified so that its intent can be met.[19]

7.17 Failures to comply with the law also 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 contraventions are established, and instituting remediation programs for affected consumers.

7.18 Data produced by ASIC is informative in this regard. 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.[20] 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).[21] 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.[22] According to ASIC, this arose out of two reviews it undertook in 2016 and 2017.[23]

7.19 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.

---

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

19 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 3) 43–4.

20 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/>.

21 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/>.

22 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).

23 Ibid.

7.20 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 AFCA.[24] In the 2021–22 financial year, for example, complaints resolved through AFCA produced approximately $207 million in compensation and refunds.[25] 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.

7.21 As with compliance costs, even marginal gains in terms of improved compliance with less complex legislation could reduce enforcement costs and avoid consumer harm. Savings may be reflected not just in reported data, but also in other wrongdoing and consumer harm that may go undetected or unreported. For example, research in 2019 estimated that misconduct by financial institutions had cost Australian households approximately $201 billion over a period of five years.[26]

The pathway to reform

7.22 This part discusses a potential roadmap for reform. It focuses on implementation of the following **proposed reforms**:

- reforming the legislative hierarchy for Chapter 7 of the *Corporations Act*, to implement a legislative model comprising 'de-cluttered' primary legislation, a Scoping Order, and 'rulebooks' (**the proposed legislative model**);[27]
- restructuring and reframing the financial services-related provisions of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* (**restructured and reframed provisions**); and
- enacting the above reforms in **the FSL Schedule** (Sch 1 to the *Corporations Act*, as discussed in **Chapter 6** of this Interim Report), to provide a single home for provisions that are reframed and restructured alongside the proposed legislative model.

7.23 More targeted reforms proposed by the ALRC, such as the creation of a single definition of 'financial product' and 'financial service' across financial services legislation, could form part of the above proposed reforms. This part will explain

24 Australian Financial Complaints Authority, 'About AFCA' <www.afca.org.au/about-afca>.
25 Australian Financial Complaints Authority, *Annual Review: 2021–22* (2022) 39.
26 Christopher Breidbach et al, *FinFuture: The Future of Personal Finance in Australia* (University of Melbourne, 2019) 9 citing Christopher Breidbach et al, 'How Australians Feel about Their Finances and Financial Service Providers 2019' (Research Report, University of Melbourne, 2019).
27 See Proposals B1–B11 and B15, discussed in Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022).

how this could be done. Recommendations that the ALRC has already made are consistent with the proposed reforms and could be implemented alongside them.[28]

7.24 The ALRC will revisit all proposals made across Interim Reports A, B, and C in the Final Report, which will contain the ALRC's final recommendations for reform.

The core package of proposed reforms

7.25 The proposed legislative model, the restructured and reframed provisions, and the FSL Schedule could be implemented independently of each other. However, the greatest simplification of financial services legislation would be achieved by implementing them as a package of reforms.

7.26 It would be possible, for example, to restructure and reframe provisions of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* without also implementing the ALRC's proposed legislative model. Doing so would significantly simplify the primary legislation that regulates financial services. In this case, the delegated legislation relating to financial services would nonetheless require some reform. Such reform would include at least updating cross-references to the restructured and reframed Act provisions and restructuring the relevant provisions of the *Corporations Regulations* to reflect the structure of the Act.[29]

7.27 Similarly, it would be possible to undertake reforms within the existing structure of the *Corporations Act* or Chapter 7 of the Act. For example, consumer protection, financial advice, and disclosure provisions could be restructured and reframed, and reformed according to the proposed legislative model, as chapters of the *Corporations Act* or as parts in Chapter 7 of the Act. Similarly, the chapters detailed in the illustrative FSL Schedule in **Appendix D** to this Interim Report could become Chapters 7A, 7B, 7C, and so on, of the *Corporations Act*. The important benefits of restructured and reframed provisions and the proposed legislative model would still be realised in each chapter, but the benefits of a more coherent body of financial services legislation would be diluted.

7.28 More importantly, it would be a false economy to reform only the primary legislation regulating financial services without also reforming the use of the legislative hierarchy and departing from the practice of notional amendments. Problems in the legislative hierarchy of Chapter 7 of the *Corporations Act* are at

---

28 See, for example, Recommendations 7 (single glossary), 10 (drafting guidance to identify defined terms), and 18 (incorporating generally applicable notional amendments): Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021); Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022). Recommendation 18 recommends incorporating certain notional amendments into the provisions they notionally amend. In some cases, application of the legislative model and restructuring and reframing of provisions will supersede this recommendation.

29 At present, Chapter 7 of the *Corporations Regulations* generally reflects the structure of Chapter 7 of the *Corporations Act*. A corresponding part exists in the *Corporations Regulations* to almost every part in Chapter 7 of the Act, with some additions in the *Corporations Regulations* that do not exist in the Act (for example, Part 7.6B).

the core of its complexity.[30] The ALRC's proposed legislative model addresses that complexity, including by removing the need to make notional amendments and by consolidating hundreds of pieces of delegated legislation.[31] The benefits of restructuring and reframing the primary legislation regulating financial services would be reduced if the existing legislative hierarchy were not reformed. Moreover, the FSL Schedule proposed by the ALRC has many benefits, as detailed in **Chapter 6** of this Interim Report. These benefits include creating a coherent body of financial services legislation that structures provisions in a way that highlights their broader context and purpose.

7.29 Overall, implementing the full package of reforms proposed by the ALRC would involve a significant program of work. The Financial Services Royal Commission recognised that simplification would 'not be easy'.[32] However, and as noted above, the Financial Services Royal Commission was also alert to the problems of complexity and the benefits of reform, which were discussed above.[33] Moreover, the ALRC's reform roadmap seeks to minimise transition costs, allow for reforms to be aligned with government priorities, and target reform areas where the most benefits can be realised. In addition, it is not clear that any gap between the costs of implementing the full package of reforms and the costs of piecemeal reforms would be significant enough to justify a decision to implement only part of the reforms.

A reform roadmap

7.30 The ALRC has developed a reform roadmap based around six reform pillars, each of which is discussed in further detail below. This roadmap is illustrated in **Figure 7.2**. The first four pillars cover the provisions that were discussed in **Chapters 2–5** of this Interim Report. 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 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.[34]

30 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.112]–[3.144], [7.153]–[7.164]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.7]–[6.48].

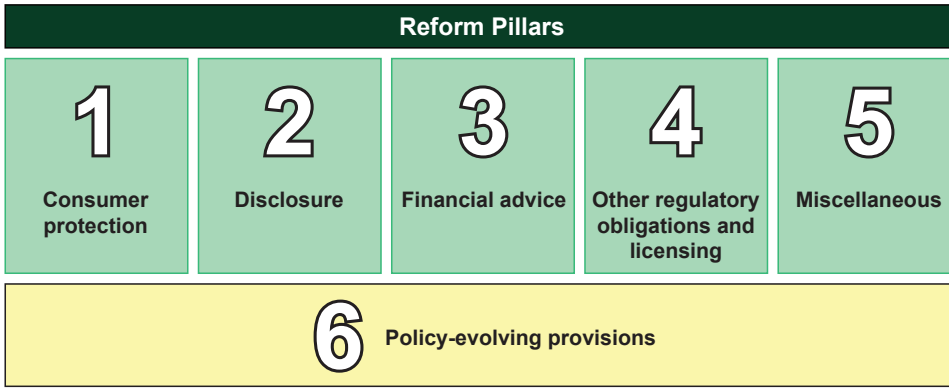
31 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [7.168]–[7.169]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.7]–[2.28], [2.42]–[2.50].

32 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 3) 496.

33 See also **Chapter 8** of this Interim Report for discussion of the problems of complex structure and framing.

34 See **Chapter 9** of this Interim Report.

Figure 7.2: Reform roadmap



7.31 At a high level, each reform pillar could be approached in a similar manner:

- Provisions covered by the pillar should be reviewed to identify provisions that appropriately belong in primary or delegated legislation, with provisions appropriate for delegated legislation allocated to either the Scoping Order or rules.[35]
- Depending on government priorities, possibilities for policy simplification could be identified that would result in additional benefits, such as through the removal of overlapping or duplicative obligations.
- Provisions covered by the pillar should then be restructured and reframed to make the legislation easier to navigate and understand, resulting in draft Act provisions, Scoping Order provisions, and rules.
- Rule-making and scoping order powers should be drafted based on the above analysis and redrafting from the earlier stages.
- After completing the standard exposure draft and consultation process, provisions should be enacted through amendments to the FSL Schedule (Sch 1 to the *Corporations Act*).

7.32 The suggested methodology for implementing the proposed legislative model set out in Interim Report B would assist in approaching these tasks.[36]

7.33 Pillar Six would be approached slightly differently depending on timing and whether existing provisions of the *Corporations Act* were being amended, or entirely new provisions introduced. For example, a new policy initiative (such as the design and distribution obligations introduced in 2018) could be implemented under Pillar Six in one of two ways. It could be introduced within the existing body of the *Corporations Act*, and later relocated into the FSL Schedule. Alternatively, depending

35 This process could be guided by the ALRC's proposed guidance on delegated legislation: Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) 247–78 (Appendix E).

36 See ibid [2.100]–[2.101].

on how developed the FSL Schedule is, the new measure could be enacted directly into the FSL Schedule. In both cases, new provisions should be structured and framed according to the principles proposed by the ALRC and implemented consistently with the proposed legislative model (if adopted).

7.34 The Australian Government would have ultimate responsibility for determining the order in which reforms should occur. Different governments may choose to prioritise different reform pillars. The reference to 'policy-evolving provisions', discussed further below, reflects the fact that government will continue to undertake new policy initiatives that may result in new or amended provisions. 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 as well as apply the proposed legislative model.

Learning from previous reform programs

7.35 In creating a reform roadmap, the ALRC has had the benefit of learning from previous efforts at regulatory reform and legislative simplification. Key lessons reflected in the proposed roadmap include:

- **Manageable commitments**: Some reform programs involved commitments that eventually proved difficult to maintain due to the scale of the project. For example, the tax legislation rewrite spanned multiple terms of government, and later governments appeared to lose interest and a sense of ownership in projects started by their predecessors. The ALRC's roadmap does not require any single Parliament or government to commit to all reform pillars.
- **Separable reforms**: Reform programs that span multiple Parliaments or governments may be more likely to succeed if they involve a series of separable reform packages. For example, this enabled the Corporations Law Simplification Program of the Keating Government to evolve into the Corporate Law Economic Reform Program of the Howard Government, with each program distinct in scope. Separability allows different governments to take a sense of ownership in reform packages, and to shape their project governance and the extent of policy reform they implement alongside technical simplification. The ALRC's reform roadmap identifies six separable reform pillars.
- **Prioritised reforms**: There is always a risk that reform programs are temporarily or permanently abandoned, including as unforeseen events such as financial crises or pandemics cause policy and legislative resources to be redirected. Reforms should be targeted and prioritised so that the greatest benefits are realised first, and designed so that partial implementation does not significantly undermine benefits already realised. The ALRC's reform roadmap emphasises three key areas — consumer protection, disclosure, and financial advice — in which significant and wide-ranging simplification benefits can be realised. For example, provisions relating to disclosure in Parts 7.7 and 7.9 of the *Corporations Act* account for more than half of all notional amendments to the Act. Reforming these three areas would achieve much of the benefits of the proposed reforms.

Providing the architecture for reform

7.36 To commence the reform program reflected in **Figure 7.2**, a 'skeleton' architecture could be enacted in Sch 1 to the *Corporations Act*. If **Proposals C9** and **C10** were adopted, this architecture would be known as the Financial Services Law and could reflect the chapter structure of the illustrative FSL Schedule in **Appendix D**. The 'skeleton' architecture would set out the FSL Schedule's macrostructure and form a legislative 'blueprint', to which substantive provisions could be added in implementing each reform pillar.

7.37 Enacting the schedule in advance of substantive reforms would allow users of legislation to understand, and prepare for, forthcoming reforms and to develop mental models accordingly. It would also enable them to anticipate and make changes to their internal systems and processes before reforms come into effect.

7.38 Moreover, even before completion of all reforms, Sch 1 could provide a navigability tool for users of the legislation. Simplified outlines could be used in each placeholder chapter to explain where the law is presently located, as illustrated by **Appendix E** to this Interim Report. For example, **Appendix E** shows how Chapter 2 of the schedule, relating to consumer protection, could contain a simplified outline explaining the location of consumer protection provisions in Part 2 Div 2 of the *ASIC Act* and various provisions of Chapter 7 of the *Corporations Act*. These simplified outlines would be repealed or updated as the substantive provisions of each reform pillar were added to the FSL Schedule.

7.39 The FSL Schedule is only intended to provide a legislative architecture — it should not limit the technical and substantive reforms government undertakes in relation to each reform pillar. The 'skeleton' architecture of chapters in the illustrative FSL Schedule in **Appendix D** to this Interim Report is designed to reflect this principle.

A framework for approaching reform

7.40 The ALRC has developed the reform roadmap by identifying and analysing four distinct types of provisions in Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act*. Each type of provision, outlined below, requires a different scale of, and approach to, reform.

- **Significant provisions**: Those provisions that are of most general application and legislative significance. These provisions make less use of delegated legislation and would largely require restructuring and reframing in the primary legislation. Pillar One of the reform roadmap, which covers consumer

protections, includes most significant provisions.[37] Additional significant provisions include definitions that set the regulatory perimeter, such as for 'financial product' and 'financial service'. These could be folded into Pillar One or dealt with as part of another pillar.

- **Complex provisions**: Those provisions that are most complex and would therefore benefit most from reform and the application of a clear legislative model. These provisions make extensive use of delegated legislation and prescriptive detail in the Act. Pillar Two of the reform roadmap, relating to disclosure for financial products and services,[38] covers the most complex provisions of Chapter 7 of the *Corporations Act*. Other complex provisions, such as client money requirements, appear in Pillar Four. Miscellaneous complex provisions could be dealt with in Pillar Five.
- **Policy-evolving provisions**: Those provisions that are subject to policy scrutiny and for which substantive reforms may be made. These provisions may share little in terms of problem analysis but would be subject to both substantive policy reform and technical change simultaneously. Pillar Three of the reform roadmap, relating to financial advice, provides an example of an area that may be policy-evolving. Pillar Six recognises that policy-evolving provisions may emerge at any stage of the reform process.
- **Minimal amendment provisions**: Those provisions that would require minimal reform to fit within the FSL Schedule and proposed legislative model. There are many provisions, which largely fall under Pillars Four and Five of the reform roadmap, that require only minimal amendments. These provisions include financial services licensing requirements, breach reporting requirements, external dispute resolution, and client property requirements. Design and distribution obligations and product intervention powers, which fall under Pillar One, would also require relatively little restructuring and reframing to bring them into the FSL Schedule and proposed legislative model.

7.41 Some provisions may fall into multiple categories. For example, if financial advice provisions cease to be subject to policy review and reform, they would still be significant provisions that require restructuring and reframing in primary legislation but make relatively little use of delegated legislation. Similarly, design and distribution obligations are both significant provisions and minimal amendment provisions. Understanding and appropriately applying these categories is important because, as noted above, each type of provision demands a different scale of, and approach to, reform.

---

37 **Chapter 2** of this Interim Report discusses reform of the consumer protection provisions. These would include Part 2 Div 2 of the *ASIC Act* and related provisions in the *Corporations Act* that presently rely on the definition of 'financial product' in the *ASIC Act*, including design and distribution obligations and product intervention powers. As discussed in **Chapter 3** of this Interim Report, disclosure for financial products and services is treated separately from consumer protection and as a discrete thematic area of regulation.

38 Discussed in **Chapter 3** of this Interim Report.

7.42 Reforming key definitions (such as 'financial product' and 'financial service') may be challenging as they cut across all categories and are particularly significant provisions. The Final Report will revisit the proposals for reform of definitions discussed in Interim Report A. Through its prototype drafting to date, the ALRC has shown that once reform choices are made, redrafting definitions is a relatively straightforward task.[39] Definitions could be dealt with in the first reform pillar adopted by government or could be reformed more gradually through multiple reform pillars. For example, financial advice-related definitions could be reformed under Pillar Two.

The six pillars in detail

7.43 This section examines the scope and implementation of each of the six pillars identified in **Figure 7.2** above.

Pillar One

7.44 Pillar One is focused on reforming consumer protection provisions,[40] which are significant provisions. Many of these provisions would be relatively straightforward to reform, given they rely little on delegated legislation. Restructuring and reframing these provisions, discussed in **Chapter 2** of this Interim Report, would be focused on consolidating overlapping provisions and providing a structure that better groups and prioritises the fundamental norms and standards of commercial behaviour.

Pillar Two

7.45 Pillar Two is focused on reforming financial product and financial services disclosure provisions of Chapter 7 of the *Corporations Act*. These are complex provisions. Reform of Parts 7.7 and 7.9 of the *Corporations Act* would be the core elements of Pillar Two. As noted in **Chapter 3** of this Interim Report, Parts 7.7 and 7.9 account for more than 100 ASIC legislative instruments, half of all notional amendments to the *Corporations Act*, over 27% of the words in Chapter 7 of the Act, and 35% of the words in Chapter 7 of the *Corporations Regulations*.

7.46 Reform to disclosure provisions could bring significant benefits to this area of law, which directly affects regulated persons, consumers, and investors. **Chapter 3** of this Interim Report discusses how primary legislation may be restructured and reframed. In the Explanatory Note accompanying Prototype Legislation B, the ALRC discussed how the proposed legislative model may be applied to disclosure provisions.[41] As suggested in that Note, these reforms could be broken intro tranches,

---

39 See, for example, Prototype Legislation A and B, which redraft the definitions of financial product, financial service, and retail client: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

40 **Chapter 2** of this Interim Report discusses what is meant by consumer protection provisions and how they may be restructured and reframed.

41 Australian Law Reform Commission, *Prototype Legislation B: Explanatory Note* (Interim Report B-Additional Resources, September 2022) [40]–[44].

based on establishing the Act-level architecture and legislating rules different types of disclosure documents (such as PDSs).

Pillar Three

7.47 Pillar Three is focused on reforming financial advice provisions.[42] These provisions are significant provisions that, at least at present, may also be regarded as policy-evolving provisions. Financial advice provisions use relatively little delegated legislation, and much of the reform would occur through restructuring and reframing provisions of the Act into a single legislative chapter, as discussed in **Chapter 4** of this Interim Report. The proposed legislative model would be applied to the delegated legislation that does exist, largely though moving exemptions and technical scoping provisions to the Scoping Order. If approached as policy-evolving provisions, the financial advice provisions would be subject to both substantive and technical reform, an approach discussed below in relation to Pillar Six.

Pillar Four

7.48 Pillar Four is focused on reforming general regulatory obligations and provisions comprising the AFSL regime.[43] Many provisions covered by Pillar Four are significant provisions or minimal amendment provisions, such as the obligation to hold an AFS Licence and the associated processes for obtaining a licence. Provisions covered by Pillar Four are discussed in **Chapter 5** of this Interim Report.

7.49 Reform to regulatory and licensing provisions would occur by restructuring and reframing the Act-level provisions and applying the proposed legislative model. Applying the legislative model would mean that exemptions and exclusions would be located in the Scoping Order and any prescriptive detail appropriate for delegated legislation would appear in rules, rather than scattered across regulations and ASIC legislative instruments as at present.

7.50 Some provisions covered by Pillar Four are complex provisions due to their extensive use of both primary and delegated legislation. These include client money requirements in Part 7.8 Div 2 of the *Corporations Act* and *Corporations Regulations*. Some of these client money requirements are already implemented through rules (the client money reporting rules).[44] However, many client money requirements are implemented through a mix of interconnected Act provisions,[45] regulations,[46] and ASIC legislative instruments that include notional amendments.[47]

---

42 **Chapter 4** of this Interim Report discusses reform of financial advice provisions and defines the scope of this concept.

43 **Chapter 5** of this Interim Report discusses reform to general regulatory obligations of financial services providers.

44 *ASIC Client Money Reporting Rules 2017* (Cth).

45 *Corporations Act 2001* (Cth) ss 981A–981P.

46 *Corporations Regulations 2001* (Cth) pt 7.8 div 2.

47 See, eg, *ASIC Corporations (NZD Denominated Client Money) Instrument 2018/152* (Cth); *ASIC Corporations (Client Money - Cash Common Funds) Instrument 2016/671* (Cth).

Pillar Five

7.51 Pillar Five is focused on reforming other provisions of the *Corporations Act* that are covered by **Proposal C9** and which are not dealt with by other pillars, including Pillar Six. The exact scope of Pillar Five would depend on how different governments scope other pillars and would require further consideration and consultation. For example, the advertising and cooling-off provisions in Part 7.9 Divs 4 and 5 of the *Corporations Act* could be dealt with under Pillars Three, Four, or Five, depending on their exact scope. Each pillar has core provisions, identified in **Chapters 2–5** of this Interim Report, but other provisions might be dealt with under various pillars, including Pillar Five.

7.52 The framework of working through complex provisions and minimal amendment provisions would assist in prioritising reforms and managing workflow within Pillar Five.

Pillar Six: Policy-evolving provisions

7.53 Pillar Six would involve identifying policy-evolving provisions of Chapter 7 of the *Corporations Act* to which the proposed legislative model and principles for structuring and framing could be applied alongside substantive policy reforms. This would be an ongoing element of the reform roadmap, which seeks to use opportunities for technical reform as substantive policy reforms emerge. Pillar Six would be implemented on an ongoing basis as and when substantive policy reforms are adopted. It would therefore proceed in parallel with other pillars of the roadmap.

7.54 Reforms that led to enactment of the *Private Health Insurance Act* illustrate how technical change aimed at simplifying the law may also be accompanied by policy change if desired by government.

Example 7.1: Technical reform accompanied by policy change

The *Private Health Insurance Act* resulted from the Australian Government's consideration of several options for reform of the private health insurance legislative framework. Option 3E aimed to 'clarify and simplify the existing legislative framework' in a way that would:

- maintain the Government's current policy thrust for private health insurance but recast the now higgledy-piggledy order of provisions into five broad themes covering insurance products, consumer protection, information, prudential supervision, and compliance;
- co-locate and consolidate provisions which address aspects of the same element of private health insurance business …;
- remove any redundant provisions, for example removing provisions which do not clearly express current policy … or provisions which are no longer operative; …[48]

Option 3F sought to achieve both policy and technical reform. Option 3F would adopt 'all of the amendments proposed under Option 3E … along with new regulation' to implement some changes to underlying policy.[49] Ultimately, Option 3F was recommended and adopted by the Bill.[50] The Government therefore implemented policy reform and legislative simplification in a complementary way.

Reform taskforces

Proposal C12 The Australian Government should establish a specifically resourced taskforce (or taskforces) dedicated to implementing reforms to financial services legislation.

7.55 To ensure appropriate leadership and oversight of the implementation of reforms arising out of this Inquiry, the ALRC proposes that reforms should be led by dedicated financial services reform taskforces. Reflecting the fact that different pillars of reform 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, which should include clear deliverables. The principal responsibility of the taskforces would

48 Explanatory Memorandum, Private Health Insurance Bill 2006 (Cth) [56].
49 Ibid [59].
50 Ibid [64].

be to oversee the implementation of reforms, including how to do so most efficiently. The taskforces should work across Treasury and the Australian Government more generally to avoid any existing departmental silos.

Taskforce membership

7.56 The taskforces should be led by Treasury and draw on expertise across government and regulators, most obviously in both OPC and ASIC. However, membership should be broader than government officials. A diverse membership is common to many Australian Government taskforces. Diverse memberships enable a range of stakeholders to meaningfully contribute, and for reforms to benefit from non-government and private sector expertise.

7.57 For example, the Australian Government's 'Strengthening Medicare Taskforce' has just four government members out of 17 total members. The Taskforce includes members from the Australian Medical Association, the Consumers Health Forum of Australia, the National Aboriginal Community Controlled Health Organisation, and academia, as well as individual general practitioners.[51] Similarly, the Australian Government's 'Strategic Fleet Taskforce' includes 'representatives from the shipping industry, major charterers, unions, Australian business representatives and the Department of Defence'.[52]

7.58 The membership of taskforces formed under **Proposal C12** may also vary based on the reform pillar being implemented. For example, the taskforce implementing Pillar Two (financial advice) might only include members representing perspectives relevant to that area of legislation, and not (for example) financial services firms that do not provide advice or distribute financial products through financial advisers. The taskforce implementing Pillar One (consumer protection) would likely have broader representation than in relation to Pillar Two.[53]

7.59 It is important to note that, although taskforces should be drawn from a range of stakeholders, legislation to implement any reforms should also be drafted by OPC based on instructions prepared by Treasury, ultimately reflecting government policy. The taskforces are intended to help guide and inform the reform process at a high-level — they are not intended to manage the day-to-day preparation or implementation of the reforms and they would not determine the policy implemented by the reforms.

---

51 Department of Health and Aged Care (Cth), 'Strengthening Medicare Taskforce' (28 April 2023) <www.health.gov.au/committees-and-groups/strengthening-medicare-taskforce>.

52 The Hon Catherine King MP, 'Strategic Fleet Taskforce launched' (Media Release, 20 October 2022) <https://minister.infrastructure.gov.au/c-king/media-release/strategic-fleet-taskforce-launched>.

53 For example, credit providers and advisers such as mortgage brokers may not provide financial advice but will be regulated by the consumer protections in the FSL Schedule.

Taskforce remit

7.60 As a starting point, the remit of each taskforce would be narrower than earlier reform taskforces, such as the Corporations Law Simplification Task Force,[54] in two main respects. First, the taskforces would be limited in their scope to those aspects of the *Corporations Act* and *ASIC Act*, and related delegated legislation, that would comprise each pillar of reforms. Second, their task would be limited to planning and implementing the package of reforms ultimately recommended by the ALRC and chosen for implementation by the Australian Government.

7.61 Nonetheless, governments may choose to give taskforces terms of reference that include more substantive policy reforms or technical reforms that go beyond those recommended by the ALRC. This reflects the adaptability of the ALRC's reform roadmap. The roadmap is not intended to strictly limit the reforms pursued by governments, but to provide a platform for simplification that can be shaped by the priorities of government.

7.62 Specifically resourced and dedicated taskforces would help to mitigate some of the challenges facing implementation, discussed further below.[55] In particular, the taskforces could consult with industry on how best to manage transition costs. Industry members of taskforces would be particularly important in this respect.

Commencement

7.63 As part of developing and implementing the reform roadmap, the reform taskforces would also be responsible for considering whether the reformed provisions (including both primary and delegated legislation) should commence upon completion of the entire reform project, sometimes known as the 'big bang' approach,[56] or in a staged manner.

7.64 Earlier simplification projects illustrate both approaches. Reforms that resulted in the *Social Security Act 1991* (Cth) and the *Private Health Insurance Act* adopted the 'big bang' approach, with the rewritten legislation being passed in one Act and commencing upon a single date.[57] In both cases, a primary goal of reform was to clarify and simplify the respective legislative frameworks without major changes to existing policy.[58]

---

54 Parliamentary Joint Committee on Corporations and Financial Services, *Report on the Draft Second Corporate Law Simplification Bill 1996* (November 1996) [1.1]–[1.4]. The Corporations Law Simplification Task Force was replaced on 4 March 1997 by the Corporate Law Economic Reform Programme: The Hon IDF Callinan AC KC, 'The Corporate Law Economic Reform Programme: An Overview' (Speech, Corporations Law Update Conference, 26 October 1998).

55 See below [7.74]–[7.82].

56 See, eg, Patricia Langenakker, 'The Tax Law Improvement Project' (Presentation, Tax Teachers Conference, 20 January 1995) 3.

57 *Social Security Act 1991* (Cth) s 2; *Private Health Insurance Act 2007* (Cth) ss 1–5.

58 Explanatory Memorandum, Social Security Bill 1990 (Cth), 'Outline and Financial Impact Statement'; Explanatory Memorandum, Private Health Insurance Bill 2006 (Cth) 2–3, 14–16.

7.65 The Tax Law Improvement Project ('TLIP') and progressive enactment of the *ITA Act 1997* illustrate the staged approach. Under this approach, several Bills were enacted and commenced in a staged manner. The 'first instalment of the rewritten law established the structure and framework' for the *ITA Act 1997*, which was amended by other reform packages in subsequent stages.[59] This approach was adopted because the 'income tax law [was] considered too large to rewrite and enact in a single stage'.[60]

7.66 The ALRC suggests that a staged approach to commencement of the FSL Schedule may be more desirable than the 'big bang' alternative. This would mean that each Bill comprising the reform package, and relevant delegated legislation, would commence after completion of that stage. Compared with a single, delayed commencement date, a staged approach would also be beneficial because parts of the law would not need to remain static and could be further amended before commencement of all reforms.

7.67 Although the ALRC's proposals relate to substantially shorter legislation than the income tax legislation considered by TLIP, the need to address both primary legislation and delegated legislation means the reform task is suited to being enacted and commenced in stages. In this way, both the primary legislation comprising the FSL Schedule and relevant delegated legislation (in the form of Scoping Order provisions and rules under the ALRC's proposed legislative model) could commence at or around the same time.[61]

7.68 In consultations and submissions, stakeholders have emphasised the importance of sufficient time to prepare for changes to the law by updating compliance systems.[62] Delaying commencement until after completion of the entire reform project would give the greatest length of time in this regard. However, the concerns of regulated entities may also be addressed through consultation as reforms are implemented and by allowing sufficient time between the passage of legislation and staged commencement dates.

---

59 Explanatory Memorandum, Tax Law Improvement Bill (No. 1) 1998 (Cth) 1.

60 Explanatory Memorandum, Income Tax Assessment Bill 1996 (Cth) 16.

61 The ALRC envisages that the preparation of the first ('principal') versions of scoping orders and rules would be led by the reform taskforces as part of the overall implementation process, with input from ASIC and other stakeholders. In formal terms, the principal legislative instruments would be enacted by one of the Minister or ASIC, after which time the power to amend those instruments could be exercised by either the Minister or ASIC. At each stage of implementation, this process could be repeated. For example, the Scoping Order could be developed by the reform taskforces, with input from ASIC, and made by the Minister to commence alongside (or shortly after) the first stage of the FSL Schedule (that is, the primary legislation). Similarly, the first principal rulebook could commence alongside the first tranche of primary legislation that requires rules.

62 See, eg, Law Council of Australia, *Submission 49*.

Assessing reform

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.

7.69 The ALRC's Background Paper FSL8 discusses the benefits of post-enactment review of legislation, with a particular focus on post-legislative scrutiny by Parliament.[63] The ALRC proposes that a requirement for post-enactment review should be built into the FSL Schedule.

7.70 As discussed in Background Paper FSL8, statutory review clauses typically require that the operation of legislation, in whole or in part, be reviewed within a specified time or on a periodic basis.[64] Review clauses vary as to whether the review must be undertaken by a parliamentary committee or another body, typically appointed by the relevant Minister.[65] Recent legislative practice suggests a trend towards the use of statutory review clauses in new, principal legislation.[66]

7.71 If the FSL Schedule were to be implemented in stages, the first review should occur within five to seven years of commencement. This would provide an opportunity to assess the reforms after they have been in operation for some time, but allow flexibility in exact timing in light of staged implementation.[67] The ALRC suggests that subsequent, 10-yearly reviews should be required to help ensure the legislative framework is properly maintained.

7.72 A 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). That assessment could be undertaken by reference to the overarching principles identified by the ALRC in Interim Report A.[68] Through consultation and submissions, a review could also consider the extent to which the anticipated benefits for stakeholders have been achieved.

---

63 Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, May 2023).

64 Ibid [53]. See also Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [5.26].

65 Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, May 2023) [56]–[57]. See also Department of the Prime Minister and Cabinet (Cth) (n 64) [5.26].

66 Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, May 2023) [55].

67 This could be given legislative effect by, for example, including a date by which a review must take place in provisions enacted as part of the first stage.

68 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [1.37]–[1.65].

7.73 The ALRC suggests that the statutory review should be undertaken by an independent review panel with expertise in legislative design, financial services, and public administration. Notwithstanding the importance of post-legislative scrutiny by Parliament, the ALRC suggests that an independent panel which includes expertise in legislative design would possess the appropriate skills to review the 'technical' (as opposed to substantive policy) reforms proposed by the ALRC. To ensure Parliamentary oversight, the Minister should be required to table a copy of the panel's report in Parliament within a prescribed time after receipt. Furthermore, any review of the FSL Schedule could supplement and be used to inform the ongoing work of the Parliamentary Joint Committee on Corporations and Financial Services in its oversight of corporations and financial services legislation.[69]

Challenges and costs of reform

7.74 This part discusses the challenges and costs of wide-ranging reform of financial services legislation. The difficulty in conducting a cost-benefit analysis of the reforms proposed by the ALRC is itself a challenge to reform. Any economic cost-benefit analysis would be a complex undertaking. This part does not attempt to perform such a quantitative analysis, but instead seeks to identify the most salient considerations for making an informed analysis of potential costs and benefits of reform.

7.75 One challenge facing reform is the need for committed resourcing over potentially multiple electoral cycles. As the ALRC noted in Interim Report B, an insufficient allocation of resources or sustained political commitment may result in reforms being only partly implemented.[70] Stakeholders have suggested, for example, that an implementation plan should aim to ensure 'the passage of each piece of legislation within a single term of government, so that there is sufficient political engagement to complete what is started'.[71] The ALRC's reform roadmap and proposed taskforces would help to mitigate these challenges and risks. In particular, the reform pillars discussed above are designed to be implementable within single terms of Parliament, and to deliver immediate benefits that maintain momentum and engagement.

7.76 Some stakeholders have suggested that government policy initiatives may present a challenge for technical reform. The Australian Banking Association suggested, for example, that a 'moratorium on further regulatory' change could aid implementation of reforms.[72] While this may aid implementation, it would not be a pre-condition to reform. As discussed above, policy-evolving provisions could be factored into a reform roadmap and present an opportunity for undertaking technical reform.

---

69 See *Australian Securities and Investments Commission Act 2001* (Cth) s 243.
70 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.103]–[2.104].
71 Law Council of Australia, *Submission 75*.
72 Australian Banking Association, *Submission 61*.

7.77 Relatedly, some stakeholders have also suggested that a particular challenge to technical reform is the risk of reopening settled debates about underlying policy. This risk could be mitigated by clear communication, and ideally consensus, between stakeholders — particularly government, regulated entities, and other representative groups — as to the scope and purpose of each pillar of reform.

7.78 Stakeholders have noted that there would be transition costs in adapting compliance systems to a reformed legislative framework, and these would need to be weighed against longer-term savings.[73] In consultations with the ALRC, some stakeholders suggested that although there would be costs, they would not be significant, particularly in light of the overall expenditure on regulatory compliance by large institutions. The sunk costs of more recent investments in compliance systems may also form part of this analysis. For example, Insurance Australia Group Limited observed that implementing changes in response to the financial services reforms of 2001, which applied in addition to other industry-specific regulation, cost it 'between $17 million and $20 million' over a two-year period.[74]

7.79 The reform taskforces discussed in **Proposal C12** may also specifically consider how smaller financial services firms, such as individual advice providers, could be supported. These firms may have different needs, and face different challenges, compared with their larger peers. They may have fewer 'sunk' compliance costs and may therefore more easily shift to a new legislative framework. However, they may also have fewer resources to initially navigate the reformed framework. Support from the Australian Government and ASIC, through public seminars on reforms and implementation of technological navigability tools,[75] would have particular benefits for these smaller firms. The TLIP reforms, for example, were accompanied by public seminars and booklets that engaged thousands of tax professionals and regulators.[76]

7.80 Overall, the role of the reform taskforces under **Proposal C12** should specifically include devising a reform roadmap that aims to appropriately manage transition costs for regulated entities and allows sufficient time for implementing changes to internal compliance systems.

7.81 Other costs of reform are less tangible and even more difficult to quantify than the costs identified so far. For example, some users of the *Corporations Act* have become familiar with its 'highways and byways'. Having to develop new mental models of restructured legislation may be daunting and expensive, particularly for regular users such as business and government. However, aids to interpretation

---

73 See, eg, Australian Financial Markets Association, *Submission 6*; ANZ Banking Group, *Submission 29*; Financial Services Council, *Submission 39*; Australian Banking Association, *Submission 61*.

74 Insurance Australia Group Limited, *Submission 73*.

75 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [111]–[170].

76 Australian Government, *Tax Law Improvement Project: Building the New Tax Law* (Information Paper No 2, April 1995) 3–4.

may help to mitigate these problems. Furthermore, these short-term costs may be outweighed by longer-term benefits.

7.82 The Australian Government may also incur opportunity costs in undertaking reform to financial services legislation. Such reform may require government to forgo other reforms that it could have undertaken with any diverted resources. However, these up-front costs may also be offset by longer-term efficiency gains in administering the legislation and by better outcomes generally. This is particularly relevant in the case of Chapter 7 of the *Corporations Act*, which has undergone frequent legislative amendment and necessitated the making of a considerable number of exemptions and notional amendments.[77] These efficiency gains may lessen the burden on the resources of Parliament, Treasury, and ASIC.

Specific implementation issues

7.83 This part briefly identifies specific implementation issues that should be considered as part of implementing the ALRC's proposed reforms. These include the potential to enhance the use of technologies and processes for better legislative design, and to bring reformed financial services legislation into greater compliance with existing drafting conventions. The part also notes the importance of simplifying particularly complex sections as part of broader reforms.

Enhanced use of technologies and processes

7.84 Further consideration could be given to enhancing the use of technologies and processes that may help reduce the complexity of corporations and financial services legislation, both in the drafting of reforms and into the future.

7.85 For example, there are a range of tools and techniques from the field of linguistics that may add greater objectivity to the assessment of legislative microstructure (sections and below).[78] These include data-driven metrics against which complex legislative provisions may be measured, such as lexical density.[79]

7.86 Programs such as the UAM Corpus Tool can be used to measure the number of levels of meaning readers must simultaneously hold in their mind in order to construct the meaning of a sentence.[80] Interpreting these measures may be informed by research into memory and learning, which could help identify sentences that are likely to interrupt readers' understanding of a provision. For example, research has

---

77 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.112]–[3.158].

78 A Schmulow and S Dreyfus, *Submission 56*.

79 'Lexical density' is defined to mean 'the number of lexical items as a ratio of the number of clauses': MAK Halliday, *Spoken and Written Language* (Deakin University Press, 1985) 67. See also Alina Buzarna-Tihenea, 'An Analysis of Written Texts in the Economic Field: Case Study' (2020) 20(2) *Ovidius University Annals, Economic Sciences Series* 259.

80 Mick O'Donnell, *UAM CorpusTool: Version 2.8 User Manual* (May 2012).

shown that people are generally only able to hold between five and nine items of discrete information in their active memory.[81]

7.87 The ongoing importance of reducing legislative complexity should also encourage further innovation in processes that identify complexity. For example, government could revisit the 'Complexity Flagging System' previously prescribed in an OPC Drafting Direction.[82] In light of new tools and practices available to help analyse textual complexity, there may be merit in redesigning or reintroducing this program. The ALRC's Final Report will further discuss the issue of identifying legislative complexity.

Existing drafting conventions

7.88 More consistently applying modern drafting conventions to provisions covered by Pillars One to Six of the reform roadmap would also help simplify the structure and framing of financial services legislation. Drafting conventions could also be used to inform the technologies and processes identified above.

7.89 As discussed in Interim Report B, there are many sources of drafting guidance in Australia at the Commonwealth level, with examples of best practice spread across multiple sources.[83] The ALRC has analysed various sources of drafting guidance documents for the purpose of identifying current drafting conventions. A list of some of these conventions is contained on the ALRC's website.[84] This list is not comprehensive as only a sample of guidance documents were reviewed. The list was compiled by identifying command-based phrases as distinct from expository text.

7.90 These drafting rules are not universally suitable, and will sometimes conflict with one another.[85] Nonetheless, the rules provide a useful starting point for addressing drafting inconsistencies or problems that make legislation more complex, such as outdated phrases and unclear sentence structures in legislation. The drafting conventions identified by the ALRC are particularly appropriate for implementation through the technologies and processes identified above. For example, compliance with several of the conventions relating to word use and sentence length can be reviewed technologically. Technology-supported visibility of non-compliance with drafting conventions, both in the existing body of legislation and amendments, could help reduce legislative complexity.

---

81 George A Miller, 'The Magical Number Seven, plus or Minus Two: Some Limits on Our Capacity for Processing Information' (1956) 63(2) *Psychological Review* 81.

82 Office of Parliamentary Counsel (Cth), Drafting Direction 4.1A, 'Complexity Flag System' (Document release 3.0, May 2013).

83 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.36]–[3.42], 242–6 (Appendix D).

84 Australian Law Reform Commission, 'Selection of OPC Drafting Rules' <www.alrc.gov.au/wp-content/uploads/2023/05/ALRC-FSL-C-Selection-of-OPC-Drafting-Rules.pdf>.

85 Avoidance of the use of pronouns is more likely to lead to 'abstraction' or 'nominalisation', that is, turning words that are not nouns into nouns. In order to maintain active voice in provisions without an active subject, string nouns are more likely to be used.

Simplifying particularly complex provisions

7.91 Chapter 7 of the *Corporations Act* includes dozens of excessively long sections and sub-provisions.[86] As part of other reforms to provisions of Chapter 7 of the *Corporations Act*, these sections and sub-provisions should be reviewed for consistency with the principles for structuring and framing discussed in **Chapter 9** of this Interim Report. Many of these sections would benefit from restructuring and reframing so that their content is easier to navigate and understand.

86 See, for example, the following provisions of the *Corporations Act*: ss 761EA, 764A, 766B, 769B, 901A, 903A, 911B, 912D, 912EB, 914A, 915B, 921C, 921K, 922Q, 923A, 923C, 940C, 941C, 952G, 953B, 963B, 992A, 994B, 994F, 994Q, 1012C, 1012DAA, 1012E, 1013D, 1017BA, 1017E, 1017F, 1018A, 1020E, 1021FB, 1041H, 1053, 1071B, 1072E, 1072H, 1074E, 1100M, 1100ZA, 1100ZG, 1100ZI, 1012C. The following subsections and subparagraphs of the *Corporations Act* are also excessively long: ss 769B(3) and (6), 793C(4A), 1012IA(2), 1012IA(4)(a), 1043J(1), 1043K(c), 1043L(3), (4) and (7), 1101B(4)(b).

PART TWO: THE IMPORTANCE OF STRUCTURE AND FRAMING

8. Unpacking the Problem

Contents

Introduction

8.1 This chapter argues that the way in which legislation is structured and framed has a critical impact on its complexity. This is because structure and framing substantially determine how easily legislation can be navigated and understood.[1] This chapter examines unnecessary complexity in the structure and framing of Chapter 7 of the *Corporations Act* that makes it harder for users to navigate and understand. These problems also flow through to the *Corporations Regulation*s, which largely mirror the structure of the Act.

8.2 In particular, the structure and framing of Chapter 7 of the *Corporations Act* do not enhance the law's communicative power.[2] Often, the structure and framing of Chapter 7 also make it difficult to identify the law's fundamental norms and important obligations. The inherent complexity of financial services regulation, often resulting from its underlying policy, makes it critical to reduce unnecessary complexity arising from the structure and framing of legislation.

8.3 This chapter proceeds in three parts by addressing the following questions:

- Why care about legislative structure and framing?
- Why undertake reforms to restructure Chapter 7 of the *Corporations Act*?
- Why undertake reforms to reframe Chapter 7 of the *Corporations Act*?

---

1 The concepts of 'structure' and 'framing' are defined in **Chapter 1** of this Interim Report.

2 The communicative power or expressive function of the law has been defined as 'the function of law in terms of identifying norms and influencing social action through a legal expression, or statement, about appropriate behaviour': Andrew Godwin, Vivienne Brand and Rosemary Teele Langford, 'Legislative Design – Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280, 287.

Horizontal and vertical design of legislation

8.4 This chapter focuses on the structure and framing of legislation in their 'horizontal' sense. As explained in **Chapter 1** of this Interim Report, 'horizontal' structure concerns the structure of particular pieces of legislation at one level, rather than between levels, of the legislative hierarchy.

8.5 The vertical structure of legislation, referred to as the legislative hierarchy, was the focus of in Interim Report B.[3] The vertical structure primarily relates to how law should be allocated between primary legislation and delegated legislation. The legislative model proposed in Interim Report B would see significant reforms to the vertical structure of Chapter 7 of the *Corporations Act*.[4] Together, the horizontal and vertical design of the *Corporations Act* provide its legislative architecture.

Wider problems with structure and framing

8.6 Many of the design problems with Chapter 7 of the *Corporations Act* discussed in this chapter appear more broadly in corporations and financial services legislation. Indeed, the overall design of the *Corporations Act* can no longer be said to have any meaningful coherence. The Act, based in large part on the *Corporations Act 1989* (Cth) and the later *Corporations Law*, is now many decades old. Most relevantly for this Interim Report, it is unclear why the *FSR Act* implemented its sweeping reforms through amendments to Chapter 7 of the *Corporations Act*, which had previously covered only securities.[5] Expediency and time limitations appear to have driven many decisions relating to the structure and framing of the *Corporations Act* and *FSR Act* when they were enacted in 2001.[6]

8.7 Hundreds of amendments since 2001 have resulted in significant inconsistencies in the structure and framing of the *Corporations Act*. Chapter 7 alone has grown from 134,000 words after commencement of the *FSR Act* in 2002 to more than 254,000 words in 2023. The structure of Chapter 7 has not sufficiently changed to accommodate the wide-ranging reforms it has undergone and approaches to framing have not developed to reflect modern drafting practices.

8.8 Fundamentally, the *Corporations Act* (particularly Chapter 7) and the *ASIC Act* lack blueprints or overarching design philosophies.[7] Existing legislation is therefore

---

3 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.49]–[1.59], chs 2, 3. For further discussion of what is meant by the term legislative hierarchy, see Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.133]–[2.162].

4 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) ch 2.

5 See the *Corporations Act* as originally passed by the Australian Parliament, prior to the enactment of amendments in the *FSR Act*.

6 For discussion of the origins of the modern *Corporations Act*, see Australian Law Reform Commission, 'Historical Legislative Developments' (Background Paper FSL4, November 2021).

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

a product of many different approaches to legislative design. The lack of an overarching design philosophy and the 'constraints of the system', common to many laws,[8] explain the poor structure and framing of corporations and financial services legislation.

8.9 Overall, problems in the existing structure and framing of the *Corporations Act* are products of history and wider developments in the legislative process.[9] When considering amendments to the Act, policy-makers and legislative drafters have been limited in their design choices by the pre-existing structure and framing of the *Corporations Act*. Moreover, as discussed in Chapter 9 of Interim Report A, legislative designers and legislative drafters often face an array of other constraints.[10] These include dealing with sometimes complex policy choices, as well as working to tight deadlines and with finite resources. Sir George Engle KCB QC, former First Parliamentary Counsel of the UK, also noted 'the impracticability of continuous redesign' that obstructs the achievement of ideal structure and framing.[11]

8.10 The present Inquiry offers an opportunity to step away from the constraints of existing design choices for the first time in at least two decades, and identify an appropriate structure and framing for Chapter 7 of the *Corporations Act*. But, as many readers may wonder, why do the structure and framing of legislation matter?

Why structure and framing matter

8.11 **Chapter 1** of this Interim Report provided a high-level summary of why good legislative design, including structure and framing, is important. This part offers a more detailed overview of the obstacles to navigability and comprehensibility created by poor structure and framing. The analysis in this part is underpinned by, and complements, the discussion of principles for structuring and framing legislation in **Chapter 9** of this Interim Report.[12]

8.12 Legislative structure and framing are core to the design of legislation. According to Engle, 'good design … is the essence of well-drafted' legislation.[13] GC Thornton, in his influential guide to legislative drafting, emphasised that good drafting requires 'greater attention to structure at all levels'.[14]

8 Daniel Greenberg (ed), *Craies on Legislation* (Sweet and Maxwell, 12th ed, 2020) 478.

9 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].

10 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.8]–[4.18].

11 Sir George Engle, '"Bills Are Made to Pass as Razors Are Made to Sell": Practical Constraints in the Preparation of Legislation' (1983) 4(2) *Statute Law Review* 7, 14.

12 In summary, those principles suggest that: duplication and overlap in provisions should be minimised (consolidation); related provisions should be proximate to one another (grouping); significant provisions should precede less important provisions or technical detail (prioritisation); legislation should follow a logical structure (logical flow); the structure and framing of legislation should help users develop mental models (mental models); and legislation should be as succinct as possible (succinctness).

13 Engle (n 11) 15.

14 GC Thornton, *Legislative Drafting* (Butterworths, 4th ed, 1996) v.

8.13 In this Interim Report, the ALRC argues that legislation must be capable of being navigated and understood as easily as possible, and that structure and framing are central to achieving this objective. As Thornton suggests, a legislative drafter must 'develop an obsession to draft so as to be readily understood. [The drafter's] task is not only to determine the law, but also to communicate it'.[15]

8.14 While no provision will ever have just one audience or group of readers,[16] structure and framing will have an impact on all potential users of legislation. This is because structure and framing substantially determine how easily legislation can be navigated and understood. In contributing to the readability of legislation, structure and framing have legal implications. As Susan Krongold notes:

> Readability is a legal issue. One of the primary goals of drafting any document, including a statute, should be that its ultimate readers will be able to understand it.[17]

8.15 Good structure and framing therefore not only help readers — they also help ensure that the law achieves its goals. By contrast, poor structure and framing that fails to communicate effectively can complicate statutory interpretation, hinder compliance, and undermine the ability of people to exercise their rights under law. As Greenberg argues, if

> the meaning of a law is not sufficiently clear for it to be possible to assume that the same meaning will be ascribed to it by each of its likely readers, the law cannot be said to be in a state of certainty.[18]

8.16 Moreover, there is clear evidence that poorly structured and framed legislation can increase the time it takes a person to read and understand legislation.[19] Adding unnecessarily to the time it takes people to understand the law has real costs.[20] The Federal Register of Legislation received seven million unique visitors in 2021–22, who visited the website 14 million times and viewed over 36 million pages.[21]

8.17 Reducing by even one minute the time it took each website visitor to understand the legislation they were reading would free up a total of 25,000 days.[22] Shaving just 1% off the compliance budgets of regulated entities by making legislation easier to navigate and understand could save tens of millions of dollars across the financial sector, with consequential benefits for investors and consumers.[23]

---

15 Ibid.

16 For discussion of the problem of identifying 'users', see Stephen Bottomley, 'Corporate Law, Complexity and Cartography' (2020) 35(2) *Australian Journal of Corporate Law* 142, 159.

17 Susan Krongold, 'Writing Laws: Making Them Easier to Understand' (1992) 24(2) *Ottawa Law Review* 495, 499.

18 Greenberg (n 8) 479.

19 Krongold (n 17) 503.

20 See also **Chapter 7** of this Interim Report.

21 Office of Parliamentary Counsel (Cth), *Annual Report 2021–22* (21 September 2022) 19.

22 This was determined by dividing 36 million by 60 (for the number of minutes in an hour), and then dividing the quotient of this by 24 (for the number of hours in a day).

23 For further discussion of the potential economic benefits of simplification, see **Chapter 7** of this Interim Report.

8.18 The number of visitors to the Federal Register of Legislation also demonstrates that a broad range of users are accessing legislation. Several non-lawyer consultees have told the ALRC that they read provisions of the *Corporations Act*. In this context, structure and framing matter even more for ensuring that non-lawyers can better navigate and understand legislation.

8.19 The increasing use of the Federal Register of Legislation and other online platforms, such as AustLII, highlights the range of different ways in which people access legislation. These platforms, and the physical printed editions that persist, often present legislation in different ways. For example, AustLII uses hyperlinks for defined terms and cross-references,[24] while commercial providers can mark-up case citations or provide annotations. Legislation will therefore not be accessed through a single platform.[25] This context is relevant to considering how legislation should be structured and framed. For example, it would be unhelpful to structure legislation on the assumption that cross-references would be hyperlinked. The macrostructure and microstructure of legislation should be technology neutral.

8.20 The diverse ways people access legislation also underscores the importance of focusing on those elements of legislation that are within the control of those who design, draft, and enact legislation — including the way it is structured and framed. Good structure and framing can bring benefits to readers regardless of the platform used to access legislation, helping readers find provisions of interest without hyperlinks or annotations, for example.

8.21 Better structure and framing may also reduce the need for 'soft law' such as ASIC guidance. This guidance often seeks to compensate for the poor structure and framing of legislation. For example, the comprehensive set of guidance maintained by ASIC in relation to financial advice is necessary,[26] at least in part, because such provisions are difficult to identify and navigate in the *Corporations Act*.[27]

8.22 But what does bad design look like? Consider the structure and framing of the provision from the fictional *Milk Act* in **Example 8.1**. The fictional provision is deliberately drafted to highlight a number of poor design choices — thankfully, no legislative provision would be drafted so as to suffer all these problems simultaneously.[28]

---

24 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [52]–[54].

25 The Federal Register of Legislation nonetheless provides the authoritative version of the legislation, as determined by the *Legislation Act 2003* (Cth).

26 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).

27 **Chapter 5** of this Interim Report includes proposals to address problems in the structure and framing of financial advice provisions.

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

Example 8.1: 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.

8.23 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.

8.24 The structure and framing of s 20 of the *Milk Act* in **Example 8.1** make it difficult to read, understand, and act upon. The provision's complexity comes largely from its structure and framing. Consider how much simpler the provision is when restructured and reframed below, using similar wording.

Example 8.2: 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***).

Good legislation requires deliberate structuring and framing

8.25 The task of a drafter, as a former Parliamentary Counsel of Western Australia has argued, is both to 'state the message accurately and to communicate it effectively'.[29] The case study of s 20 of the fictional *Milk Act* highlights the importance of structure and framing for ensuring that legislation is capable of being easily navigated and understood. Moreover, the improvement in structure and framing necessitated no reduction in the precision of the legislation. Indeed, **Example 8.2** shows how precision is also dependent on good structure and framing that develop the context and purpose of each provision with headings and an intuitive flow.

8.26 Poorly structured and framed legislation means that users do not know where to start when reading, cannot develop a mental model of the legislation, and are less likely to discern its key messages. These problems mean that understanding the law takes longer, and imposes costs on consumers, businesses, and taxpayers.

8.27 Poor structure and framing also mean that the law's fundamental norms — the standards it seeks to impose — can become lost in a morass of detail, whether or

29 Garth Thornton, 'Plain Language and Statute Law' (Conference Paper, 9th Commonwealth Law Conference, Auckland, New Zealand, 1990) 185, cited in Krongold (n 17) 502.

not the norms are expressly stated.[30] Good structure and framing can ensure that, regardless of the amount of detail, legislation communicates the fundamental norms, standards, and obligations that it contains clearly and prominently.

'Begin at the beginning … and go on till you come to the end'[31]

8.28 Unlike Lewis Carroll's King in *Alice's Adventures in Wonderland*, users of legislation rarely have the luxury of reading it from beginning to end. For example, based on average reading times, reading the *Corporations Act* from cover to cover would take the average reader more than 56 hours. A good structure can support readers in 'jumping into' legislation and finding the information that they need in long and complex legislation like the *Corporations Act*. As JC Redish argues,

> documents should be organised to help the most likely reader find what they need without undue effort. Legislation is, after all, read to get information, and not for pleasure. So, from a reader's point of view, good writing enables readers to get information as efficiently as possible. No matter how clearly individual sentences are drafted, if there is bad organisation, finding relevant information can be as difficult as finding a needle in a haystack. Good organisation is therefore essential.[32]

8.29 Grouping thematic provisions is one way to allow users to identify relevant provisions. For example, the part headings 'Requirements for environmental approvals',[33] 'Age pension',[34] and 'Core provisions'[35] immediately help users looking for certain information. The framing provided by simplified outlines can also help explain where to find information in an Act, chapter, or part.[36] Such outlines are far more useful if the structure is consistent and based on a sound design philosophy.

Mental models

8.30 Mental models provide the foundation for how humans understand and navigate the world.[37] Without such models, humans would have to rediscover gravity every time they fell or dropped an object — a laborious and painful process. The same is true of legislation. Helping users develop useful mental models of legislation or particular provisions within it can make understanding and navigating it less laborious and painful.

---

30 For a discussion about how norms might be communicated, see Andrew Godwin and Micheil Paton, 'Social Licence, Meaningful Compliance, and Legislating Norms' (2022) 39(5) *Company and Securities Law Journal* 276.

31 Lewis Carroll, *Alice's Adventures in Wonderland* (Princeton University Press, 2015) 98.

32 JC Redish, 'The Plain English Movement', in Sidney Greenbaum, *The English Language Today* (Pergamon Press, 1985) 132, cited in Law Reform Commission (Ireland), *Statutory Drafting and Interpretation: Plain Language and the Law* (Consultation Paper No 14, 1999) [5.47].

33 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ch 2 pt 3.

34 *Social Security Act 1991* (Cth) ch 2 pt 2.2.

35 *Income Tax Assessment Act 1997* (Cth) ch 1 pt 1-3.

36 See Godwin and Paton (n 30) 288.

37 Stanislas Dehaene, *How We Learn: The New Science of Education and the Brain* (Penguin, 2021) 5.

8.31 Effective and consistent structure and framing can enhance such mental models and reduce the number of models that users must maintain. For example, if every chapter and part of an Act adopts its own design philosophy towards structure and framing, users must establish and maintain a different mental model for each chapter or part. Some chapters or parts may so completely lack an effective structure that developing a mental model is impossible — users become like goldfish who must forget their previous experience and constantly relearn how each new section works and fits with other provisions. Overall coherence in legislative design is therefore essential.

8.32 It is often not possible to create a single approach to structure and framing across an entire Act, particularly one as large and diverse in subject matter as the *Corporations Act*.[38] In this context, however, it is still helpful to foster mental models for particular chapters, and to minimise unnecessary differences in structure and framing between chapters. Moreover, legislation should clearly communicate the different design choices made in Acts, chapters, and parts. Doing so can help users adapt their existing mental models or quickly foster new ones when reading provisions. Clear structure and framing are therefore key to helping readers develop and maintain useful mental models.

8.33 As explored in **Chapter 9** of this Interim Report, which examines principles for good structure and framing, the importance of overall legislative coherence is recognised by Australian legislative drafters. Reflecting on his Office's approach to drafting, former Commonwealth First Parliamentary Counsel, Ian Turnbull KC, emphasised that 'words and sentences in a Bill may be clear, but if the provisions are not properly arranged, the Bill will be more difficult to understand'.[39]

8.34 The creation and communication of 'meta-rules' — overarching rules for how legislation is made — that determine how to structure legislation can provide a short-cut for users. Instead of having to read the legislation to discern its patterns and structures, these meta-rules immediately provide the foundation for a mental model of the legislation. But such meta-rules are only possible if legislation has deliberate and effective structure and framing.

Communicating key messages

8.35 The Victorian Law Reform Commission has argued that 'proper organisation' enables users of legislation to 'grasp the writer's message more quickly'.[40] Placing core norms and obligations at the end of an Act or chapter, preceded by detail or administrative provisions, makes it difficult to communicate the main messages of the legislation.

---

38 As discussed below, Chapter 7 of the *Corporations Act* is akin to an Act within an Act.

39 Ian Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11(3) *Statute Law Review* 161, 170.

40 Victorian Law Reform Commission, *Plain English and the Law: The 1987 Report Republished* (2017) 98.

8.36 Legislation can also become more complex if its structure and framing do not help to communicate its key messages. The OPC Guide to Reducing Complexity in Legislation notes:

> Poorly structured legislation can be a cause of complexity. If the important concepts in a legislative measure are not stated as its central elements, but are obscured by other material such as procedural detail, overly complex provisions are likely to result. Adopting a clearer and more logical structure is a useful step in reducing that complexity.[41]

8.37 The Financial Services Royal Commission concluded that, as a result of its design, financial services legislation failed to communicate the 'fundamental norms of behaviour [that] are being pursued when particular and detailed rules are made about a particular subject matter'.[42] In failing to communicate fundamental norms, the structure and framing of legislation may undermine compliance and the potential for the law's intent to be realised.

Problems with the structure of Chapter 7

8.38 The current structure of Chapter 7 of the *Corporations Act* is problematic. This part provides examples of problems in both the macrostructure and microstructure of Chapter 7 of the Act. The concepts of macrostructure and microstructure are defined in **Chapter 1** of this Interim Report.

Problems with the macrostructure

8.39 This section examines the overall structure of Chapter 7, which lacks coherence and does not have an intuitive flow. The section then discusses examples of how the structure of particular parts and divisions of Chapter 7 have failed to prioritise key messages and help users find relevant law.

Chapter 7 is an Act within an Act

8.40 Chapter 7 of the *Corporations Act* is anomalous in its current form. By regulating financial products, services, and markets together, Chapter 7 appears to be thematically consistent. However, thematic consistency at such a high level is unhelpful, and has resulted in a chapter longer than all but nine Acts of the 1,220 principal Acts of Parliament currently in force.[43] The chapter covers a wide range of topics, from the regulation of financial benchmarks, the licensing of financial markets, and the transfer of securities, through to the registration of personal financial advice providers and the prescribing of disclosure documents for dozens

41 Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [36].

42 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 496.

43 This is based on analysis of the statute book as in force on 12 December 2022. For the original data, see the 'As made Commonwealth Acts' data set on Australian Law Reform Commission, 'DataHub' <www.alrc.gov.au/datahub/>.

of financial products and services. In Interim Report A, the ALRC's data analysis found that Chapter 7 was far more structurally intricate than any other chapter of the *Corporations Act*, and that its parts were also on average far more structurally intricate than parts elsewhere in the Act.[44]

8.41 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.

8.42 Why does it matter that Chapter 7 does too much? First, it makes it difficult to impose an intuitive flow and to prioritise provisions based on who they apply to and their general importance. Choices become too fine-grained, particularly as the structure has to grapple with the relationship between markets and financial services provisions, and the challenge of prioritising messages between these subject matters.

8.43 Second, as Professor Hanrahan noted in her submission to Interim Report A, Chapter 7 of the *Corporations Act*

> mixes up apples and oranges and should be broken into its different parts. This is not just a question of navigability — it is needed to address the problem of concepts and rules from one domain leaking into another. A particular problem has arisen from blurring the line between financial consumers and retail investors, and mixing the (quasi-prudential) regulation of market operators and intermediaries with the consumer protection laws.[45]

8.44 Third, there is no clear audience of users for the chapter, because almost everyone is a user of the chapter. While legislation may never have just one audience,[46] it is unhelpful that Chapter 7 of the *Corporations Act* has so many audiences, which limits the possibility of devising a structure that benefits a group of users (such as financial services providers and consumers, or market operators and participants).

8.45 **Chapter 6** of this Interim Report shows how splitting out market provisions and other provisions less directly related to financial products and services can provide the basis for a more logical and coherent structure.

Failing to prioritise key messages

8.46 Chapter 7 of the *Corporations Act* is structured such that it is difficult to identify and understand the core requirements of the legislation. **Examples 8.3**,

---

44 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.72]–[3.73]. The structural intricacy was measured by counting the number of provisions at the level of section or below (for example, subsection and paragraph).

45 P Hanrahan, *Submission 36*.

46 For discussion of the problem of identifying 'users', see Bottomley (n 16) 159.

8.4, and **8.5** highlight three particularly problematic instances where obligations expressing fundamental norms are obscured by their location in Chapter 7 of the *Corporations Act*.

Example 8.3: The prohibition of unconscionable conduct

Part 7.8 of the *Corporations Act* is titled 'Other provisions relating to conduct etc. connected with financial products and financial services, other than financial product disclosure'. It includes Div 7, titled 'Other rules about conduct'. This division includes one of the core consumer protections in financial services legislation: the prohibition on unconscionable conduct by AFS Licensees in s 991A. The provision applies to all AFS Licensees.

Given its importance to both providers and consumers, s 991A could have been better prioritised for readers, and grouped with similar provisions. Alternatively, as discussed in the context of **Proposal C2**, s 991A of the *Corporations Act* could be consolidated with other provisions relating to unconscionable conduct to improve the expressive power of the law.[47] The prohibition of unconscionable conduct is more than just another 'rule about conduct' as the title to Part 7.8 Div 7 suggests.

Example 8.4: The hawking prohibition

Part 7.8 Div 8 of the *Corporations Act* is titled 'Miscellaneous'. It similarly includes two important provisions for regulating financial services: the prohibition on hawking of financial products (s 992A) and the right for people to return hawked financial products (s 992AA). The hawking prohibition applies to any person who offers a financial product to a retail client. The critical message and obligation communicated by s 992A, and the right to return in s 992AA, is therefore located towards the end of a division that itself appears towards the end of Chapter 7.

Example 8.5: False, misleading, and dishonest conduct

In addition to the above to provisions, readers seeking out the fundamental norms of financial services legislation would also need to be aware of provisions such as ss 1041E, 1041G, and 1041H in Part 7.10 of the *Corporations Act*. Section 1041E creates an offence for giving false or misleading statements in certain circumstances. This provision, which also has broad application, loses its communicative force by being located in Part 7.10 and not being co-located with provisions such as ss 991A and 992A, which set important standards of commercial behaviour.

47 See **Chapter 2** of this Interim Report.

8.47 Offences and other penalty provisions, though critical to the functioning of any regulatory regime, are also often difficult to identify and understand in Chapter 7 of the *Corporations Act*. This illustrated by **Example 8.6**.

Example 8.6: Offences and civil penalties

The fact that an obligation is subject to an offence or civil penalty for breach generally indicates that it is a more important provision than others that do not attract a penalty. The level of the penalty also helps communicate the importance of the obligation, and therefore the centrality of its message to readers. However, the consequences for breaching an obligation in the *Corporations Act*, whether in the form of penalty units or a term of imprisonment, are often not clear from the text of the provision in which the obligation appears. Moreover, almost all civil penalties are subject to the same penalty, which dilutes their communicative power.[48]

8.48 More generally, the failure to group provisions that are similar or have a similar theme and application obscures the key requirements that apply in particular areas. For example, most markets-related provisions appear in the first half of Chapter 7 of the *Corporations Act*. This includes Part 7.2A, relating to the supervision of financial markets, which contains the obligation to comply with the ASIC market integrity rules.[49] However, various key obligations on participants in financial markets appear towards the end of Chapter 7 of the *Corporations Act*, in Part 7.10. These include provisions giving expression to fundamental norms, such as the bans on market manipulation and insider trading.[50]

8.49 Locating provisions in this manner obscures the fact that they often form part of a single coherent regulatory scheme.[51] By doing so, it complicates attempts to understand the context and broader purpose of each provision, thereby hindering the processes of statutory interpretation and understanding provisions.

Failing to help users find relevant law

8.50 Provisions in Chapter 7 of the *Corporations Act* are frequently neither grouped together nor prioritised in a way that helps people understand whether the law applies to their circumstances or not. This often means users must read their way through

48 See Nicholas Simoes da Silva and Matt Corrigan, 'Civil Penalties in Financial Services Law' in Deniz Kayis, Eloise Gluer and Samuel Walpole (eds), *The Law of Civil Penalties* (Federation Press, forthcoming).

49 *Corporations Act 2001* (Cth) s 798H.

50 Ibid ss 1041A, 1043A.

51 This issue is particularly obvious in relation to financial advice provisions, which can be located in many provisions of Chapter 7 of the *Corporations Act*. For discussion, see **Chapter 4** of this Interim Report.

the text of provisions to determine whether they may be relevant, with little help from the structure of provisions.

8.51 For example, the location of the hawking prohibition, discussed in **Example 8.4** above, highlights a particular problem with the current structure of Chapter 7 of the *Corporations Act* — it has no helpful home for provisions that can apply to any person, rather than just an AFS Licensee or representative of an AFS Licensee. These generally applicable provisions can impact a significant range of people, and yet those people would have to look through all the parts and divisions of Chapter 7 to be sure that they do not contain relevant provisions. This in part reflects the failure of Chapter 7 to utilise a structure that helps people develop a coherent mental model of the chapter. As **Example 8.7** shows, even provisions that should have a relatively clear scope and content may be less coherent than they first appear.

Example 8.7: The declining coherence of Part 7.6

Since its introduction in 2001, the structure of Part 7.6 of the *Corporations Act* has been problematic. Despite appearing to cover the 'Licensing of providers of financial services', Part 7.6 also covers other areas of regulation.

For example, Part 7.6 Div 10 includes important obligations on persons providing financial services in relation to the use of certain words and phrases. These obligations apply regardless of whether a person is licensed. Placing these provisions in a part related to licensing makes it more likely that they are overlooked by persons who know they do not need an AFS Licence.

Since 2001, amendments to Part 7.6 have further diluted its communicative power and structural consistency. For example, Part 7.6 now includes a scheme for regulating 'relevant providers', which includes most persons providing personal financial advice to retail clients. Given their narrow application and the significant obligations they include, the new Divs 8A, 8B, and 8C may have been better located in a thematic part on financial advice or in a standalone part separate from Part 7.6. The sections in these divisions could also have been structured better to enhance their communicative force. For example, s 921E, which requires compliance with the Code of Ethics, could have been prioritised over other obligations. Within s 921E, the obligation to comply with the Code of Ethics could have been stated first rather than after the Ministerial power to create the Code.

8.52 **Example 8.8** highlights how Chapter 7 of the *Corporations Act* is structured in a way that makes it difficult for financial advice providers and recipients to identify the law that applies to financial advice.

Example 8.8: The regulation of financial product advice

Where would providers of personal and general financial product advice go to find the law regulating them in Chapter 7 of the *Corporations Act*? Much of the chapter does not apply to financial advisers, large parts apply to financial advisers in addition to other persons, and some provisions only apply to financial advisers. This last category includes the prohibition on conflicted remuneration, the duty to act in a client's best interests, requirements to give SoAs, and obligations relating to registration and compliance with a Code of Ethics, all introduced since 2012.[52] However, these provisions are spread among multiple parts and no indication is given beyond the provisions themselves that those parts apply to advisers.

The reforms to financial advice since 2012 underline the need to update the structure of the law to reflect changes in the law's substance. Today, only readers already familiar with the law would be aware that the prohibition on conflicted remuneration, the best interests duty, and the 'relevant provider' provisions apply to financial product advice. As a general rule, the law should not assume that people will have knowledge of how provisions apply. Instead, legislation should group and prioritise provisions so that readers can more readily navigate to the most relevant provisions.

8.53 The structure of Chapter 7 of the *Corporations Regulations* also makes it difficult for users to find relevant law. For example, reg 7.1.08A notionally amends the definition of 'making a market' to provide an exclusion. The exclusion only applies for the purposes of Part 7.6, but the regulation appears in Part 7.1 of the *Corporations Regulations* (headed 'Preliminary').[53]

Problems with the microstructure

8.54 This section examines particular problems in the microstructure of Chapter 7 of the *Corporations Act*. The microstructure was defined in **Chapter 1** of this Interim Report, and includes the structure of sections and their components, such as subsections and individual sentences.

Structure of sections

8.55 Many sections of Chapter 7 of the *Corporations Act* are structurally complex. The complexity of particular sections has also increased since 2001 as amendments have reduced the structural integrity of provisions. As demonstrated through data analysis in Interim Report A, many of the provisions of the *Corporations Act*

52 See, eg, *Corporations Act 2001* (Cth) pt 7.6 divs 8A–8C, pt 7.7 div 3, 7.7A divs 2, 4.
53 Structural issues in the *Corporations Regulations* are also discussed in **Example 3.1**.

have been steadily packed with more detail since their original enactment.[54] The data also showed that Chapter 7 contains the most intricate microstructure in the *Corporations Act*.[55]

8.56 Sections are often structurally complex because they try to do too many things. This means they can lose thematic and functional consistency. **Example 8.9** shows how s 761G of the *Corporations Act*, which defines 'retail client' and 'wholesale client', tries to do too much and makes it more difficult to navigate.

Example 8.9: The definition of retail client

Subsections (1)–(7) of s 761G of the *Corporations Act* prescribe the circumstances in which a person is either a 'retail client' or 'wholesale client' for the purposes of Chapter 7 of the Act. The subsections are dense and detailed, and could have been enacted as a standalone section. However, sub-ss (8)–(12) were also included in s 761G. Subsection (8) provides that, in offence proceedings, a defendant bears the evidential burden in relation to certain matters. Subsection (9) creates a presumption in non-criminal proceedings that a person is a retail client in certain circumstances. Subsections (10)–(10A) provide for matters to be prescribed by regulations, while sub-s (11) provides rules applicable where a general insurance product is bundled with other financial products.

Section 761G could be broken into multiple thematically and functionally consistent sections within a division or subdivision. First, one section could prescribe the definitions of 'retail client' and 'wholesale client' — this provision would have both thematic and functional consistency. Second, a section could provide for how the definition applies to bundled products. Third, a section could provide for how the definitions are to be applied in the context of criminal and other proceedings. Finally, a section could provide additional powers to make delegated legislation relating to the definition. In Prototype Legislation B, available on the ALRC website,[56] the ALRC showed how the retail client definition could be replaced by various more targeted exemptions in the Act and delegated legislation (the Scoping Order).[57]

54 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.87].

55 Ibid [3.71]–[3.73].

56 Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

57 See, for example, s 1116 of the Prototype Act and subdiv 35-A of the Scoping Order in Prototype Legislation B.

Following the alternative structure above could help users find the law relevant to their circumstances. Headings in the table of contents would direct readers to provisions for applying the definitions to people, or to bundled products, or to provisions relating to delegated legislation. Instead, readers must traverse approximately 1,500 words in s 761G to identify each of these functions.

8.57 At other times, following successive amendments, a broadly thematically and functionally consistent provision can become too long or fail to prioritise information effectively. The number of sections in Chapter 7 longer than 500 words has doubled since the *FSR Act* commenced in 2002, reaching more than 100 sections in 2021. While it is impossible to put a hard limit on the length of sections, it is clear that many sections in Chapter 7 are too long and that this affects users. OPC's Plain English Manual, for example, recommends at least two section headings per page, which implies a maximum section length of between 200–300 words.[58]

8.58 **Example 8.10** shows how the length of s 911A of the *Corporations Act* has made the section unnecessarily complex, compounded by design choices in relation to the placement of penalty provisions.

Example 8.10: The obligation to hold an AFS Licence

Section 911A is eight pages and over 2,200 words long, making it the longest non-definitional section in Chapter 7 of the *Corporations Act*. It has been subject to 10 amendments since 2001. It contains over 180 subsections, paragraphs, subparagraphs, and sub-subparagraphs.

The provision is very complex in its structure. Section 911A(2), which includes dozens of exemptions, lacks any headings for readers. This subsection could be broken into multiple sections or at least subsections. These could be ordered and given headings based on their respective theme, such as 'Superannuation exemptions' and 'Financial product advice exemptions'.

The significant exemption for authorised representatives in s 911A(2)(a) could be more effectively highlighted by separating it from the broader 'shopping list' of exemptions.

The provision also includes exemptions from exemptions, such as in ss 911(3)–(5A). Several of these provisions could have been better located with the exemption they override. For example, s 911A(3) appears hundreds of words away from s 911A(2)(f)(ix), the provision it overrides. Creating separate sections for thematic exemptions could support consolidating detail, such as exemptions from exemptions.

58 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [113].

Lastly, the civil penalty for failure to comply with s 911A(1) appears in s 911A(5B), or 2,000 words and dozens of exemptions away from the obligation it covers. The civil penalty could have appeared as 911A(1A), immediately after the obligation to which it relates.

Interim Report A also discussed the complexity of s 911A, and the ALRC's Prototype Legislation A illustrated how many of these structural problems could be addressed.[59]

Structure of sentences

8.59 The *Corporations Act*, in large part due to its age and amendment history, contains long and complex sentences that are largely avoided in modern drafting. Simplifying structurally complex sentences is essential to communicating the law effectively.[60] As the UK Government notes, the complexity of policy or legislation 'does not justify excessively long or complex sentences'.[61]

8.60 The ALRC has identified several dozen sentences longer than 90 words in Chapter 7 of the *Corporations Act*,[62] and other chapters of the Act have sub-provisions as long as 166 words.[63]

Problems with the framing of Chapter 7

8.61 The framing of Chapter 7 of the *Corporations Act*, and particular provisions within it, often does little to help readers navigate and understand the legislation. Aids to interpretation, also referred to as 'aids to readability' or 'aids to understanding',[64] are generally little used in Chapter 7. Those that are used, such as headings, are often not implemented in the most effective manner.

Headings and notes

8.62 Legislative headings and notes are common to modern drafting. Headings can 'help readers of legislation find what they need to know faster, and understand it more easily when they find it'.[65] Notes are 'aimed at giving the reader extra help in understanding particular provisions', and can help guide readers around the structure of legislation, such as by directing them to relevant definitions, related sections, or

59 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.117]–[10.120].
60 Greenberg (n 8) 510.
61 Ibid 475.
62 See, eg, *Corporations Act 2001* (Cth) ss 1012IA(4)(a), 1043K(c), 1043L(4), 1101B(4)(b).
63 See, eg, ibid s 585(b).
64 See, eg, Peter Quiggin, 'A Survey of User Attitudes to the Use of Aids to Understanding in Legislation' [2011] (1) *The Loophole* 96, [14].
65 Nick Horn, 'Legislative Section Headings: Drafting Techniques, Plain Language, and Redundancy' (2011) 32(3) *Statute Law Review* 186, 186.

applicable delegated legislation.[66] Notes can also 'be used to highlight the location and relevance of norms that have already been expressed in the legislation, rather than introducing new norms into the legislation'.[67] As **Examples 8.11**, **8.12**, and **8.13** show, Chapter 7 of the *Corporations Act* often makes minimal or ineffective use of headings and notes.

Example 8.11: Unhelpful headings

Part 7.8 Div 9 of the *Corporations Act* is headed 'Enforcement'. The heading therefore suggests that the division contains powers for ASIC or another person to enforce obligations in the part. However, the division includes several offence provisions that apply to Part 7.8 (but not all relevant offences, as the overview in s 993A notes). Similarly, several divisions of Chapter 7 are also headed 'Enforcement' but contain only offences and civil penalties.[68] These headings seem to regard ASIC as the primary audience. A simpler and more direct heading may have been 'Offences' or 'Offences and other penalties', as the case required.

A further unhelpful heading appears in Part 7.8A of the *Corporations Act*. Section 994M, which creates civil liability for breach of design and distribution obligations, appears in a division headed 'Miscellaneous'. Section 994M is a key provision that could be highlighted more prominently through headings and location.

Example 8.12: Lots of notes, doing a small number of things

Chapter 7 of the *Corporations Act* contains 878 legislative notes. However, 228 of these notes alert the reader that a provision is an offence, 93 identify a civil penalty provision, 86 note the imposition of an evidential burden, and 29 direct readers to the *Criminal Code* to understand the term 'strict liability'. This means that almost half of all notes are generic and are not tailored to help users understand and navigate particular provisions.

66 Hilary Penfold KC, 'When Words Aren't Enough: Graphics and Other Innovations in Legislative Drafting' (Conference Paper, Language and the Law Conference, University of Texas, 6–8 December 2001) [12].

67 Godwin and Paton (n 30) 288.

68 See *Corporations Act 2001* (Cth) pt 7.7 div 7, pt 7.8 div 9, 7.9 div 7.

Example 8.13: Notes should not be used to fix poor design

The notes that identify a provision in the *Corporations Act* as a civil penalty or offence provision are necessary only because of the design choice not to expressly identify these provisions in the text of the section itself. This design choice was discussed in Interim Report B,[69] and **Chapter 10** of this Interim Report recommends a design approach that would eliminate these notes. Ideally, notes should be used for enhancing understanding and navigability, and not for fixing deeper problems in how the effect of legislation is communicated.

Outlines, guides, and other aids to interpretation

8.63 Aids to interpretation such as simplified outlines and legislation guides, which provide a brief outline of an Act, chapter, part, division, or subdivision, can help users of legislation in several ways. As further discussed in **Chapter 9** of this Interim Report, such tools can:

- concisely communicate the central purpose of the Act or provision they are describing, and draw important norms, standards, obligations, and rights to a user's attention; and
- communicate the structure of the Act or provision they are describing, at a level more conceptual than a table of contents and less detailed than the provisions themselves.

8.64 Aids to interpretation can therefore help users more quickly develop mental models of the legislation, offering a short-cut to clearer understandings of the law's structure and purpose.

8.65 Chapter 7 of the *Corporations Act* makes minimal use of aids to interpretation that have become common across the Commonwealth statute book, as **Example 8.14** explains.

69 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.15]–[8.23].

Example 8.14: Chapter 7 lacks simplified outlines and guides

Simplified outlines and legislation guides have become more common since the *Corporations Act* and the *FSR Act* were enacted in 2001. Almost all principal Acts longer than 10 pages passed in 2020, 2021, and 2022 used some combination of Act and provision-specific simplified outlines.[70] Chapter 7 contains an 'Outline of Chapter' in s 760B, as well as two simplified outlines and four 'Overviews' for other provisions.[71] Other chapters of the *Corporations Act* make more use of simplified outlines or overview provisions, particularly in relation to takeovers and securities disclosure.[72]

Overall, however, the *Corporations Act* makes minimal use of guides and simplified outlines compared to modern Acts or other large Acts, such as the *ITA Act 1997* (over 200 guides and several overviews and simplified outlines), the *Social Security Act 1991* (Cth) (12 outlines and one overview provision), and the *Competition and Consumer Act 2010* (Cth) (13 outlines and two overview provisions). The *Personal Property Securities Act 2009* (Cth), which is about a third of the length of Chapter 7 of the *Corporations Act*, contains 50 guides. These guides cover the Act, particular chapters and parts, as well as particular sets of sections.

8.66 The few outlines and guides that are contained in Chapter 7 of the *Corporations Act* are generally unhelpful. This is partly the product of problems with the macrostructure of Chapter 7, which makes writing outlines or guides difficult. It is challenging to distil into outlines and guides chapters and parts as diverse in their subject matter and purpose as those found in Chapter 7.

8.67 Simplified outlines in this context risk becoming a mere shopping list that fails to communicate the thematic or functional content of a provision and which cannot highlight the many diverse obligations and requirements in a provision. Writing simplified outlines for Parts 7.6 and 7.8 of the *Corporations Act*, for example, would be challenging given the underlying structural flaws in these parts. Breaking these parts up would make writing simplified outlines easier. A simplified outline for a separate part on the regulation of relevant providers (currently contained in Part 7.6) would be easier to write and more helpful to users. Example **8.15** illustrates the challenge of creating useful guides or outlines for Chapter 7 of the *Corporations Act*.

---

70 Excluding Acts related to appropriation, supply, and the imposition of levies and charges. These Acts appear to never use simplified outlines or guides. The ALRC reviewed all principal Acts other than the excluded Acts and found that 18 of the 20 used Act-level simplified outlines, and 16 used provision-specific simplified outlines. Guidance from OPC encourages the use of simplified outlines in all new principal Acts: Office of Parliamentary Counsel (Cth), Drafting Direction 1.3A, 'Simplified outlines' (Document release 1.2, November 2016) [9].

71 *Corporations Act 2001* (Cth) ss 762A, 952A, 993A, 1021A, 908AA, 1100E.

72 Ibid ss 632, 634, 717; pt 6D.2 div 1.

Example 8.15: The outline of Chapter 7 of the *Corporations Act*

The 'Outline of Chapter' that appears in s 760B of the *Corporations Act* is unhelpful, in part because it is given the almost impossible task of imagining Chapter 7 can be summarised. The outline is more akin to a list or table of contents than a substantive outline found in more modern Acts.

The outline has also been poorly maintained, despite some amendments. For example, the summary for Part 7.6 does not note that the part contains a significant scheme for regulating providers of personal financial advice. The generality of the description for Part 7.7A also gives no meaningful indication of its scope, which is limited to financial product advice.

8.68 The structural problems described earlier in this chapter complicate the task of creating aids to interpretation such as simplified outlines. Nonetheless, financial services legislation often lacks simplified outlines where they would be relatively simple to create and would be beneficial. **Example 8.16** shows how the lack of a simplified outline makes it harder to understand the deferred sales model provisions that appear in Part 2 Div 2 Subdiv DA of the *ASIC Act*.

8.69 The lack of simplified outlines or guides makes the law harder to understand and undermines the communicative power of the law. However, simplified outlines are no substitute for better design and drafting of the substantive provisions that are synthesised in an outline.

Example 8.16: A beneficial simplified outline

The deferred sales model ('DSM') for add-on insurance products was introduced following a recommendation of the Financial Services Royal Commission in 2019. The amendments to the *ASIC Act* were made in 2020.[73]

Conceptually, the DSM as implemented by the legislation is quite simple. As the ASIC Regulatory Guide explains, the DSM 'requires a clear four-day pause between when a customer enters a commitment to acquire a principal product or service, and when they are offered or sold an add-on insurance product'.[74] The Explanatory Memorandum also offered a succinct summary of the key functions of the DSM legislation.[75]

73 *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) sch 3.

74 Australian Securities and Investments Commission, *The Deferred Sales Model for Add-on Insurance* (Regulatory Guide No 275, July 2021) [RG 275.4].

75 Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Cth) [3.13]–[3.20].

The text of the law itself is long and complex, relying heavily on definitions and detailed drafting. No provision clearly states the core function of the law as clearly and succinctly as the ASIC guidance. A simplified outline for the DSM provisions could more clearly communicate the substance of the law and its principal function: to create a four-day gap between (1) a consumer acquiring a principal product or service and (2) any offers for add-on insurance in relation to that principal product or service. It could also alert readers to the fact that breach of the DSM provisions may attract criminal and civil consequences, and that there may be exemptions to the regime in regulations.[76]

76 Regulations have been made exempting products from the DSM: *Australian Securities and Investments Commission Regulations 2001* (Cth) pt 2A.

9. Principles for Structuring and Framing Legislation

Contents

Introduction

9.1 In this chapter, the ALRC proposes principles that should inform the structuring and framing of legislation. In accordance with the Terms of Reference for this Inquiry, 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.

9.2 This chapter proceeds in five parts. The first part explains the assumptions this Interim Report makes about how people use legislation, which necessarily affect the objective of legislative design. The second part outlines the legislative design objective identified by this chapter. The third part outlines principles for structuring and framing legislation that are directed at the achievement of the legislative design objective discussed in the second part. The fourth part identifies the range of aids to interpretation that law-makers can use to help achieve the legislative design objective and give effect to the principles for structuring and framing legislation. The final part briefly identifies considerations that may be relevant when applying the principles in the context of the *Corporations Act*.

9.3 In summary, this chapter suggests that:

- A 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.
- The principles for structuring and framing legislation discussed in this chapter all seek to achieve that objective. They are not 'rules' because they may be relaxed, modified, or traded off in particular circumstances when doing so is necessary to 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).

9.4 The principles outlined in this chapter have been developed from a review of:

- existing guidance published by various legislative drafting offices, including in Australia, Canada, New Zealand, the European Union, and the UK;
- judicial and academic commentary;
- the current structure and framing of Commonwealth legislation, particularly corporations and financial services 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.

9.5 Much of the discussion in this chapter may appear obvious. In modern legislative drafting, many of the principles discussed in this chapter are followed. But, as this Interim Report shows, many of the principles are not effectively implemented in the existing body of corporations and financial services legislation. Moreover, knowledge is not always translated into practice, given the constraints imposed by existing legislation, resourcing, and time.

9.6 In previous Interim Reports and Background Papers, the ALRC has explored why effective legislative design can be lacking.[1] Particular issues revolve around a focus by government on the 'flow' of new legislation, rather than the 'stock' of the existing statute book.[2] Drafters have noted that Australia has Acts that have been around for many decades,[3] the design of which may, despite amendments,

---

1 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [4.8]–[4.18]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.49]–[6.57]; Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [36]–[51].

2 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) 167, [6.9]–[6.25], [7.12]–[7.14].

3 Janet Erasmus, 'Keepers of the Statute Book: Lessons from the Space-Time Continuum' [2010] (1) *The Loophole* 7, 17.

partly reflect the (now outdated) drafting approaches common at the time of their enactment. Simplifying the stock of legislation, as this Inquiry has shown, can be a challenging but worthwhile exercise that requires government and stakeholder commitment.

9.7 Overall, it is worth clearly articulating the core elements of effective legislative structure and framing, and the benefits they bring to users in understanding and navigating legislation. Giving legislative designers and drafters insufficient time or resources to implement these principles has real consequences, as **Chapter 8** of this Interim Report also demonstrates.

Underlying assumptions

9.8 The ALRC has developed the legislative design objective and principles for structuring and framing legislation discussed in this chapter based on several assumptions about how people use, navigate, and understand legislation. As noted in Background Paper FSL3, there is little empirical research into how people use legislation.[4] The assumptions made in this chapter are therefore open to revision or qualification in light of future research.

9.9 The following assumptions have shaped the ALRC's views on the appropriate structure and framing of legislation:

- **People do not generally read legislation from beginning to end**.[5] Instead, users of legislation typically search within it to answer a question or solve a problem. For example, users seek to understand their disclosure obligations in relation to a superannuation product, or their rights in relation to receiving financial product advice. As noted in **Chapter 8** of this Interim Report, reading the *Corporations Act* from cover to cover would take the average reader more than 56 hours.
- **Legislation, and particularly corporations and financial services legislation, does not have a single audience or type of 'user'**.[6] Instead,

4 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [11]–[25]. The Tax Law Improvement Project undertook testing of exposure draft legislation, which offers one process for revising assumptions: Australian Government, *Tax Law Improvement Project: Building the New Tax Law* (Information Paper No 2, April 1995) 4.

5 This assumption was also made in the Corporations Law Simplification Program. The Task Force stated that, while people might occasionally 'read an Act from beginning to end, … most times we consult only a particular section': Corporations Law Simplification Program Task Force, *Drafting Issues: Designing the Law* (June 1995) 2. Similarly, the Task Force suggested that one of the reasons people 'consult a piece of legislation such as the Corporations Law … [is] to find out how to comply with a particular obligation': Corporations Law Simplification Program Task Force, *Organising the Law* (June 1995) 2.

6 A point made by Emeritus Professor Bottomley in relation to corporate law such as the *Corporations Act*: Stephen Bottomley, 'Corporate Law, Complexity and Cartography' (2020) 35(2) *Australian Journal of Corporate Law* 142, 16. Similarly, Turnbull notes that laws are 'usually written for a variety of users, and they are also read by administrators, members of Parliament, lawyers and the judiciary': Ian Turnbull, 'Plain Language and Drafting in General Principles' [1995] *The Loophole* 25, [16].

legislation has many audiences, and research suggests that over recent decades the audience for consuming legislation has grown more diverse.[7] This means that it is unrealistic to design legislation that is perfectly adapted to the needs of any 'user'. Instead, reforms to the structure and framing of legislation should focus on changes that are generally beneficial to anyone using the law. For example, consolidation, consistency, and the creation of mental models are useful to any user of legislation, as is the clearer communication of Parliament's legislative intent through locating the most important provisions before others (prioritisation).

- **Mental models of legislation are currently lacking,[8] and more could be done to structure and frame legislation to foster such models**. Research has highlighted that there is 'a pressing need to help readers to "find their feet" when reading legislation'.[9] This suggests a particularly strong emphasis on approaches to structure and framing that help users of legislation orient themselves.[10]
- **Aids to interpretation, such as headings, legislative notes, and decentralised tables of contents can help users of legislation**. This is supported by an OPC survey that found many aids to interpretation rated positively among respondents.[11]

9.10 The ALRC does not make assumptions about how and whether people will choose to comply with legislation or with the intent of legislation. Additionally, the principles in this chapter are intended to be implemented within the policy constraints imposed on legislative designers and drafters — the principles cannot override such constraints. For example, a desire to achieve meaningful compliance and reduce the risk of avoidance may produce highly prescriptive and particularised provisions, which introduce complexity into the law. However, in designing even highly prescriptive and particularised legislation, the principles in this chapter can be applied to help ensure the legislation remains as easy to navigate and understand as possible, consistent with the underlying policy objectives pursued by the legislation.

The objective of legislative design

9.11 During this Inquiry, the ALRC has made several proposals relating to legislative design. These proposals have all sought to advance the following objective: **that legislation is designed and drafted in a way that can be navigated and**

---

7 Office of the Parliamentary Counsel (UK), *When Laws Become Too Complex: A Review into the Causes of Complex Legislation* (2013) 19.

8 Alison Bertlin, 'What Works Best for the Reader? A Study on Drafting and Presenting Legislation' [2014] (2) *The Loophole* 25, 45.

9 Ibid 46.

10 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [22], [88]–[100].

11 Office of Parliamentary Counsel (Cth), *Results of the 2010 Legislation Users Survey* (2010); Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [12]–[14]; Ian Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11(3) *Statute Law Review* 161, 169–70.

understood as easily as possible, consistent with the underlying policy objectives pursued by the legislation. As explained in this part, this objective is essential to achieving the purpose of legislation, which is to effectively convert policy into legally enforceable provisions.

9.12 The legislative design objective seeks to ensure that legislation conveys its purposes and requirements in a way that is as clear and simple as possible. The objective of navigable and comprehensible legislation informs the 'overarching principles' that have guided this Inquiry:[12]

- **Principle One**: It is essential to the rule of law that the law should be clear, coherent, effective, and readily accessible.
- **Principle Two**: Legislation should identify what fundamental norms of behaviour are being pursued.
- **Principle Three**: Legislation should be designed in such a manner as to promote meaningful compliance with the substance and intent of the law.
- **Principle Four**: Legislation should provide an effective framework for conveying how the law applies.
- **Principle Five**: The legislative framework should be sufficiently flexible to address atypical or unforeseen circumstances, and unintended consequences of regulatory arrangements.

9.13 Principles One to Four are aimed at producing navigable and comprehensible legislation. Principle Five underscores the fact that there are circumstances in which the navigability and comprehensibility of legislation may need to be compromised, such as to ensure sufficient flexibility. Principle Five also recognises that legislation must be designed so as to facilitate its later amendment. Embedding such flexibility helps ensure coherent development of the law, which underpins a legislative framework that remains navigable and comprehensible over the long term.

9.14 Moreover, as this Inquiry has shown through the development of an alternative legislative model for financial services legislation,[13] navigability and comprehensibility have been compromised in financial services legislation more than is necessary in favour of flexibility.[14] The Terms of Reference for this Inquiry recognise that an effective legislative framework should ensure flexibility while maintaining navigability and comprehensibility.

---

12 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [1.37]–[1.65].

13 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) ch 2.

14 For discussion of ways in which corporations and financial services legislation is unnecessarily complex in ways that impact navigability and comprehensibility, see **Chapter 8** of this Interim Report; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.25]–[3.160]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.7]–[6.48].

Why an objective, and why this objective?

9.15 The objective expressed above 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 as possible to navigate and understand, consistent with the policy being implemented. 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.[15]

9.16 Historically, some have suggested that legislative drafting has a range of 'goals' that may need to be traded-off against each other. For example, in 1990, the Victorian Law Reform Commission suggested that legislation

> must be as accurate or 'precise' as possible. However, precision is not the only goal of legislative drafting. Legislation must also be intelligible.[16]

9.17 On one interpretation, this statement suggests that the goal of creating legally sound provisions, which can effectively create 'enforceable rights and duties',[17] may require trading off the goal of 'intelligible' legislation.

9.18 A similar trade-off appears to be implied in OPC's Plain English Manual and guidance on reducing complexity in legislation. The Plain English Manual informs drafters that their 'first duty' is to draft 'precise' laws that 'do all the things the policy instructors want, and don't do anything else'.[18] The Guide then notes that OPC also has 'a very important duty to do what [OPC] can to make laws easy to understand'.[19] The guidance on reducing complexity in legislation also appears to imply a trade-off between 'simplicity' and 'precision'.[20] Commonwealth drafting guidance implicitly, and perhaps not deliberately, suggests that precision and comprehensibility are separate objectives of legislative design.

9.19 Finally, the *Legislation Act 2003* (Cth) suggests a similar range of goals that may need to be traded off against each other. Section 16 of the *Legislation Act 2003* (Cth) places an obligation on First Parliamentary Counsel (as head of OPC)

---

15 The apparent dichotomy between comprehensible and precise legislation has also been criticised by Turnbull: see Turnbull (n 6) [18]–[19].

16 Law Reform Commission of Victoria, *Access to the Law: The Structure and Format of Legislation* (Report No 33, May 1990) 1.

17 Ibid.

18 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [4].

19 Ibid [5].

20 Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [18], [33].

to 'encourage high standards in the drafting of legislative instruments and notifiable instruments' by causing

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

9.20 The goals articulated in s 16 may imply that pursuing 'legal effectiveness' is a separate objective to designing and drafting legislation that is clear or intelligible. This implication may be unhelpful, given that legal effectiveness is arguably the product of legislation that is clear and intelligible, and that legislation becomes more effective if it is clearer and more intelligible.

9.21 In articulating the above legislative design objective, the ALRC suggests that any dichotomy between effective legislation and navigable and understandable legislation would be a false one. Legislation will be less effective, both in the narrow sense of being construed as intended, or in the broader sense of achieving its policy objectives, where it is less easy to navigate and understand. The more navigable legislation is, and the easier it is to understand, the more likely it is that legislation will prove effective in implementing policy. Conversely, a provision must be precise and legally sound if it is to be understood: an imprecisely drafted provision cannot communicate the law so as to be meaningfully understood according to Parliament's intention.

Precision, navigability, and comprehensibility

9.22 On one view of legal effectiveness, the goal of precision is to draft legislation that achieves policy objectives — to convert policy into law. For example, a provision may seek to prohibit conduct, regulate activities, or confer rights. The resulting legislation may be legally intricate, with carve-outs and carve-ins, drafted to ensure often complex policy objectives can be converted into legislative text.

9.23 Such complex legislation, driven by policy choices, should nonetheless be structured and framed to be as navigable and comprehensible as possible, given the constraints imposed by policy. Provisions may still be structured and framed to make clear their relationship to one another, to highlight their context and purpose, and to lead users from obligations to related detail and exemptions.

9.24 In this way, the ALRC suggests that legal precision is enhanced by legislation that is as easy to navigate and understand as possible. Users of legislation, including lawyers and the judiciary, are more likely to fall into error in interpreting legislation where it is less navigable or comprehensible. The legislation thus becomes less precise in converting policy into law where it is less navigable or comprehensible.

9.25 Most importantly, the process of statutory interpretation is affected by the ease with which provisions can be navigated and understood. Provisions that are less navigable or comprehensible, based both on their plain text and their broader purpose and context, invite multiple interpretations. Generally, only one of these interpretations can be said to be consistent with what Parliament intended. The goal of achieving precise, legally effective law is therefore frustrated, as lawyers give

diverging advice and courts reach different conclusions, which may then need to be settled by appellate courts.

9.26 Navigability is particularly important in ensuring that legislation can be interpreted and applied consistently with the intention of Parliament. Statutory interpretation requires that, when considering the text of a statute, regard must also be had 'to its context and purpose'.[21] This context and purpose will be obscured if users are unable to navigate the broader text of a statute so as to identify related provisions, situate each provision within a broader framework, and form a picture of Parliament's intention in using the words it has chosen. Navigable legislation therefore underpins the process of statutory interpretation.

Achieving policy objectives

9.27 More generally, much legislation is designed to alter behaviour by assigning rights and obligations. For example, legislation may seek to reduce conflicts of interest by restricting conflicted remuneration. Similarly, it may seek to limit risks of consumer harm by imposing a delay between the offer and purchase of a product. Legislation is more likely to bring about changes in behaviour that achieve policy objectives where it is designed to be as easy to navigate and understand as possible.

9.28 For example, in making numerous findings of actual or potential misconduct, the Financial Services Royal Commission identified the legislative architecture of financial services legislation as one factor in non-compliance.[22] The Financial Services Royal Commission concluded that financial services laws fail to effectively communicate the fundamental norms they pursue and that legislative design needs to ensure that 'policies can be given better and simpler legislative effect'.[23]

Timeframes and resource constraints

9.29 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 legislative project. In Interim Report B, the ALRC examined how short timelines for designing and drafting legislation can affect an Act's quality.[24]

---

21 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 [14].

22 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 494–496.

23 Ibid 496. See also Andrew Godwin and Micheil Paton, 'Social Licence, Meaningful Compliance, and Legislating Norms' (2022) 39(5) *Company and Securities Law Journal* 276, 281.

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

9.30 In working to short timeframes, drafters may feel the need to draft legislation that is legally effective in the sense that Ministers, government legal advisers, and policy instructors are satisfied that the legislation will implement the policy objective in legal text. As discussed above, the fact that some may conceptualise effectiveness in this narrow way, without regard to the navigability and comprehensibility of the resulting provisions, may ultimately reduce the likelihood of achieving the desired policy outcome. Having been produced under great time pressure, such legislation is liable to be misinterpreted by courts, the legal profession, or among the public at large. Ensuring that legislation achieves the broad sense of 'legal effectiveness' described above — recognising that effectiveness is enhanced by legislation being more navigable and comprehensible — requires giving legislative designers and drafters sufficient time and resources to develop legislation.[25] In this respect, it is worth repeating the ALRC's comments from Interim Report B:

> While timelines for new policy measures are ultimately a matter for government, the desire to progress measures quickly can increase legislative complexity and create subsequent problems.[26]

What does the objective mean for structuring and framing legislation?

9.31 Appropriate structure and framing are key to achieving the objective of legislation that can be navigated and understood as easily as possible. Legislative designers and drafters may do little about the inevitable complexity of certain subject matter or the complex policy choices made by Ministers or Parliament.

9.32 Structure and framing, along with the legislative hierarchy, are therefore two of the most powerful vehicles for improving the navigability and comprehensibility of legislation in line with the Terms of Reference for this Inquiry.[27] **Chapters 1** and **8** of this Interim Report explain in further detail why structure and framing are critical elements of any legislative framework.

---

25 The impact of inadequate drafting time on the structure of legislation was emphasised by Turnbull in comments to the Inquiry into Legislative Drafting by the Commonwealth: House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth* (September 1993) [10.7].

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

27 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [1.37]–[1.65].

Principles for structuring and framing legislation

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**).

9.33 The remainder of this chapter discusses the principles for structuring and framing legislation identified in **Proposal C14**. These principles are intended to help achieve the legislative design objective discussed above. They are not 'rules' to be applied inflexibly, and they are not intended to be exhaustive of how the legislative design objective may be achieved. They will often need to be traded-off against one another.

9.34 What the legislative design objective requires in any circumstance may differ. There are 'no hard and fast rules' of legislative drafting more generally.[28] Further, as Dr Onoge has observed,

> while there are occasional rules of thumb that may assist, they will do so only if applied flexibly and with an eye constantly on achieving the most clear, simple, and effective result in each context.[29]

9.35 To some extent the principles for structuring and framing legislation overlap. The realisation of each principle is sometimes assisted through the implementation of another. For example, one way that legislation may facilitate the creation of more useful mental models is by grouping provisions thematically. Ultimately, the

28 Geoffrey Bowman, 'Sir William Dale Annual Memorial Lecture: The Art of Legislative Drafting' (2005) 7(1–2) *European Journal of Law Reform* 3, 9.

29 Elohor Onoge, 'Structure of Legislation: A Paradigm for Accessibility and Effectiveness' (2015) 17(3) *European Journal of Law Reform* 440, 456.

principles in **Proposal C14** are a guide for legislative design and drafting, which can help achieve more navigable and comprehensible legislation.

Consolidation

9.36 As a general principle, legislation should be designed in a way that minimises duplication and overlap. Where this is not the case, provisions should be consolidated. Consolidation of duplicated or overlapping provisions enhances the law's communicative power and increases its comprehensibility without changing its substance or effect.

9.37 Legislative simplification programs have long recognised the importance of consolidation. The Private Health Insurance Bill 2007 (Cth), which consolidated nine primary Acts into one, also sought to 'consolidate provisions' that addressed the same subject matter, thereby expressing 'regulatory requirements more efficiently'.[30] The Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*') found that the Act's 'complexity is compounded by the way it overlaps' with other regulatory arrangements.[31] The project to simplify taxation laws aimed to structure legislation so as to minimise duplication across different subject matters.[32] The ALRC also suggested this principle in Interim Report B,[33] and analysed the complexity created by duplication and overlap in Interim Report A.[34]

9.38 Corporations and financial services legislation evidences a significant amount of duplication and overlap.[35] Over time, governments may notice shortcomings in the law, or desire to provide additional clarity about the application of the law in some circumstances. For reasons of expediency, the fastest way of legislating may often be to simply introduce a new provision, rather than to update and consolidate the law in respect of certain subject matter as it already exists. In this way, legislation may include overlapping provisions that are 'variations on a theme', or which broadly concern the same conduct.

9.39 For example, in Background Paper FSL9, the ALRC outlined how

> over the past several decades law-makers in Australia have undertaken the extensive enactment of provisions designed to proscribe financial service providers from engaging in misleading, deceptive or unconscionable

30 Explanatory Memorandum, Private Health Insurance Bill 2006 (Cth) [55]–[58].
31 Graeme Samuel AC, *Independent Review of the EPBC Act* (Final Report, October 2020) 74.
32 Australian Government (n 4) 11.
33 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.44].
34 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [3.90]–[3.91].
35 **Chapters 2**, **3**, **4**, **5**, and **8** of this Interim Report give a range of specific examples of overlap and duplication in corporations and financial services legislation. See also, Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.31]–[5.39].

> conduct … [which has] resulted in a sprawling regime that, at its heart, is targeted at essentially the same kinds of conduct.[36]

9.40 Background Paper FSL9 considered that the proliferation of provisions was unnecessary and created problems, including that:

- the expressive power of the law was reduced on account of unnecessary complexity;
- the existence of numerous statutory provisions governing each subject invited or required parties to consider and potentially plead (or defend against) more than one provision, thereby increasing the burdens of litigation and enforcement; and
- more generally, the proliferation made the law more difficult to comprehend and apply, wasting time and resources, and lessening the likelihood of compliance.[37]

9.41 Background Paper FSL9, and **Chapter 2** of this Interim Report, show how the existing protections can be consolidated, while preserving their existing scope and available remedies. The policy of expanding consumer protections, which appears to have resulted in the proliferating provisions, need not be compromised in better designing legislative provisions.

9.42 Consolidation can also be helpful when multiple provisions express the same idea but with different scopes. These provisions do not overlap in their effect. Instead, they overlap in terms of their content or policy purpose, and could therefore be consolidated into a provision that is stated more generally to capture the scope of conduct regulated by the more specific provisions. For example, in **Chapter 4** of this Interim Report, the ALRC discusses the potential for consolidating five prohibitions on conflicted remuneration, each of which is distinct in its scope, into a higher-level provision that captures all prohibited conduct. Likewise, **Chapter 3** of this Interim Report discusses how disclosure regimes for FSGs and PDSs could be consolidated in certain respects, given they often rely on the same substantive requirements. These regimes have no overlap in scope, but they nonetheless overlap in content and policy purposes.

9.43 The principle of consolidation should guide legislative designers when conceiving legislation or considering amendments to it. The aim should be to achieve the intended legislative purposes with provisions that most effectively communicate the law because they are singular and encompassing — rather than through numerous provisions directed at more specific conduct or circumstances (when the more general conduct, or other circumstances, are addressed by other provisions).

---

36 Australian Law Reform Commission, 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law' (Background Paper FSL9, December 2022) [1].

37 Ibid [68].

Coherent legislative principles

9.44 One way in which provisions may be consolidated or otherwise simplified is through the use of 'coherent principles' drafting, a concept from tax legislation and referred to in this Interim Report as 'coherent legislative principles' to distinguish from other types of principles. OPC guidance recognises that coherent legislative principles can help ensure that policy is communicated more 'clearly and concisely' in legislation.[38] Such principles also make the law 'very easy to read', and help ensure that the 'general purpose of the law is easy to understand'.[39]

9.45 As defined by Greg Pinder, a legislative 'principle' is a provision that:

- is an operative legislative rule;
- specifies the outcome, rather than the mechanism that achieves it; and
- expresses the outcome at the highest possible level rather than itemising a list of outcomes for every conceivable case.[40]

9.46 To be 'coherent', legislative principles should help users 'make sense and order out of the law', and should be 'intuitive or obvious to someone who understands the law's context'.[41] The Australian Privacy Principles ('APPs'),[42] particularly APP 6, offer an example of coherent legislative principles in practice.[43] Coherent legislative principles can be helpful for users by framing any prescriptive detail or rules that accompany the principle. By expressing outcomes at the highest possible level, coherent legislative principles may also replace such detail or rules.

9.47 At times, legislative principles may need to be subject to lower-level detail, or what Pinder and the former Second Parliamentary Counsel, Thomas Reid, refer to as 'unfolding'.[44] Despite this, principles should be framed so that a person complying with them would in effect be complying with the core requirements of the law — even if the person missed all the detail. In that context, 'unfolding' should generally be reserved for circumstances

> where it is useful to explain the principle's application to particular situations or where there may be a sufficient doubt or ambiguity about [a principle's] meaning or scope to warrant clarification.[45]

9.48 The coherent legislative principles approach can offer a design philosophy and methodology for bringing together disparate and prescriptive obligations under

---

38 Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [16].
39 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [15].
40 Greg Pinder, 'The Coherent Principles Approach to Tax Law Design' [2005] (1) *Economic Round-up* 75, 78.
41 Ibid.
42 *Privacy Act 1988* (Cth) sch 1.
43 Pinder also examines the example of s 139DQ(1) of the *Income Tax Assessment Act 1936* (Cth): Pinder (n 40) 78.
44 Ibid 84; Thomas Reid, 'Interpreting the GST Law: Tax Law Based on Coherent Principles' (2005) 5(11) *Australian GST Journal* 239, 240.
45 Pinder (n 40) 84.

a broader coherent legislative principle. OPC guidance suggests that coherent legislative principles can be an alternative to legislating for 'a wide range of alternatives in minute detail',[46] which will often result in a degree of overlap and duplication. OPC guidance also emphasises the importance of policy instructors accepting that adopting a coherent legislative principles approach may result in less prescriptive legislation and potential 'loss of precision'.[47] As noted above, 'unfolding' may help to provide lower-level detail where necessary. Nonetheless, the coherent legislative principles approach may not be appropriate for all legislation.

Parallel structures

9.49 The use of 'parallel' structures is one exception to the general principle that duplication and overlap should be avoided. Parallel structures mean that functionally similar provisions use the same or similar structure.[48] Parallel structures may be used where it would not be desirable to otherwise consolidate provisions. For example, Chapter 7 of the *Corporations Act* sets up multiple licensing regimes, such as for operators of financial markets (Part 7.2), operators of clearing and settlement facilities (Part 7.3), and providers of financial services (Part 7.6).[49]

9.50 Given the policy of having different licensing regimes for these entities, it may not necessarily be desirable to consolidate the licensing provisions of Parts 7.2, 7.3, and 7.6 into a single licensing obligation. Instead, upon enactment of the *FSR Act*, these three parts used parallel structures for each licensing regime. These parallel structures help support a mental model of licensing provisions. Therefore, while they may not be consolidated, other principles for structuring and framing legislation discussed in this chapter could be applied by each of the different licensing regimes.[50]

9.51 OPC guidance also encourages the use of parallel structures to avoid the mixing of 'conditions and exceptions, or "if" and "unless" clauses, in the same sentence'.[51] A degree of duplication is therefore accepted in favour of simpler and more succinct sentence structures. The ALRC discussed the use of parallel structures in Background Paper FSL3.[52]

---

46 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [17].

47 See, eg, ibid [15]–[18]; Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [17]–[18].

48 Turnbull (n 6) [17]; Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [103]. The *Plain English Manual* gives ss 18–21A of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and ss 27–33 of the *Sales Tax Assessment Act 1992* (Cth) as examples of parallel structures.

49 For a demonstration of how these provisions use a parallel structure, see Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) 43 (Appendix B).

50 For another example of circumstances in which duplication may be acceptable, see the use of headings discussed in Nick Horn, 'Legislative Section Headings: Drafting Techniques, Plain Language, and Redundancy' (2011) 32(3) *Statute Law Review* 186, 198–200.

51 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [52].

52 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [86].

Grouping and coherence

9.52 This principle stipulates that it is desirable that 'like' provisions — namely, provisions concerning the same or similar subject matter, or that apply in the same or similar circumstances — be co-located or proximate to one another.

9.53 The importance of grouping or co-locating provisions has been emphasised in a range of reform programs to Commonwealth legislation and in drafting guidance. The Corporations Law Simplification Program Task Force noted that it

> is disconcerting if provisions are scattered. This uncomfortable state occurs in the Corporations Law frequently as many users have complained. Perhaps the worst example is the definitions which are scattered throughout the Law: some are found at the beginning in section 9, others are found in individual chapters, parts and divisions.[53]

9.54 OPC guidance encourages drafters to group together provisions with 'a common subject-matter'.[54] Similarly, the *Private Health Insurance Act* sought to 'co-locate … provisions which address aspects of the same element of private health insurance business'.[55]

9.55 Structural approaches to better group provisions are evident across Commonwealth legislation.[56] Amendments in 1998 to the *Australian Securities and Investments Commission Act 1989* (Cth), for example, recognised the importance of grouping and highlighting the 'core consumer protection provisions for consumers of financial services'.[57] The ALRC also suggested the principle of grouping in Interim Report B.[58]

9.56 Grouping is often closely associated with coherence and an intuitive structure.[59] For example, the *Company Law Review Act 1998* (Cth) organised provisions 'in a more logical order, to avoid as far as possible the need to refer to several parts of the [Corporations] Law to understand a single topic'.[60] Reflecting the need for coherence, OPC guidance notes that drafters should 'group related concepts in a way that makes the relationships easy to understand'.[61] The Corporations Law

---

53 Corporations Law Simplification Program Task Force (n 5) 2.
54 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [103].
55 Explanatory Memorandum, Private Health Insurance Bill 2006 (Cth) [56].
56 Explanatory Memorandum, Financial Framework Legislation Amendment Bill 2008 (Cth) [74]; Explanatory Memorandum, Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022 (Cth) [129], [186], [344].
57 Explanatory Memorandum (House of Representatives), Financial Sector Reform (Consequential Amendments) Bill 1998 (Cth) [4.33]. The *Australian Securities and Investments Commission Act 1989* (Cth) was the predecessor to the *ASIC Act* enacted in 2001.
58 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.44].
59 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) [6].
60 Explanatory Memorandum, Company Law Review Bill 1997 (Cth) [2.12].
61 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [103].

Simplification Program Task Force argued that 'coherent grouping of material is critical to the effective communication of the Law'.[62]

9.57 Secondary literature also emphasises the importance of coherently grouping provisions. According to Onoge, legislation should follow a 'thematic structure', which 'keeps related material together, promoting ease of understanding'.[63]

9.58 The grouping of provisions is particularly important for making legislation more navigable. Grouping makes 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.

9.59 The principle of grouping should be applied at all levels of the legislative hierarchy. In other words, where provisions are appropriately contained within primary legislation and concern the same or similar topics, they should be grouped together. That grouping should be replicated in other 'layers' of the hierarchy. However, the principle of grouping should not determine what goes where in the legislative hierarchy in a 'vertical' sense. In other words, not all technical detail on the one topic should be co-located with the key provisions in an Act. In this way, the principle of grouping operates alongside a principled use of the legislative hierarchy, as discussed in Interim Report B.[64]

9.60 In this Interim Report, the clearest example of how the principle of grouping may be applied to improve the expression of the law is in the context of conduct provisions. **Chapters 2**, **4**, and **5** of this Interim Report exemplify how grouping should take place in that context. **Chapter 3** of this Interim Report discusses how provisions relating to financial product and financial services disclosure should be grouped together.

Prioritisation

9.61 Generally, provisions should be ordered so that those provisions of greatest significance to a legislative scheme, or of broadest application, precede provisions of more limited significance or scope. This may be summarised as requiring that key provisions come first. This principle goes back hundreds of years, constituting Lord Thring's third rule of drafting that 'principal provisions should be separated from subordinate provisions'.[65] The ALRC suggested the principle of prioritisation in Interim Report B.[66]

---

62 Corporations Law Simplification Program Task Force (n 5) 2.
63 Onoge (n 29) 458.
64 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) chs 2–3.
65 Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing, 2014) 64.
66 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.44].

9.62 The principle of prioritisation is well-accepted in legislative drafting and secondary literature. The Independent Review of the *EPBC Act* called for a restructure of the Act so that 'material of most relevance to the reader [is] … placed upfront'.[67] Indeed, designers and drafters of financial services legislation made implicit reference to the principle of prioritisation in 1998 amendments to the *Australian Securities and Investments Commission Act 1989* (Cth) that introduced Part 2 Div 2. The amendments prioritised some provisions 'early in the text' because they 'have an explanatory function for readers'.[68]

9.63 Onoge describes the principle of prioritisation in terms of

> putting key information before less important information. The key information has to do with the subject matter that is key to the audience; then it broadens out to material that is less important to the audience, but is still important for carrying out the policy intent, such as the administrative provisions …[69]

9.64 Daniel Greenberg CB also argues that legislative drafters should aim

> to present the material in the form and order which will most readily and easily enable the reader to build up a picture of the law. If the law is complicated, but there are certain fundamental principles that can helpfully be understood before proceeding to the detail, it is right to express the fundamental principles first and then qualify them.[70]

9.65 Such an approach to structuring legislation has been commended in some inquiries and reports into legislative drafting. For example, legislative guidance developed by the Law Commission of New Zealand suggests that the sequencing of provisions should 'be logical' in that:

- substantive matter should precede procedural matter;
- the general should precede the particular;
- provisions of universal or wide application should precede provisions of limited application;
- that which is basic or fundamental should be presented prominently and not be obscured by minor provisions; and
- the procedural or administrative provisions should be removed where possible to a schedule, so as to give prominence to important material.[71]

9.66 Similarly, in an article on 'Ten Commandments for Better Legislative Drafting', Professor Kelly of the Victorian Law Reform Commission said that:

---

67 Samuel (n 31) 79.
68 Explanatory Memorandum (House of Representatives), Financial Sector Reform (Consequential Amendments) Bill 1998 (Cth) [4.15].
69 Onoge (n 29) 457.
70 Daniel Greenberg (ed), *Craies on Legislation* (Sweet and Maxwell, 12th ed, 2020) [8.1.19].
71 New Zealand Law Commission, *Legislation Manual: Structure and Style* (Report No 35, May 1996) 35.

> The Act should begin with the central operative provisions. The main messages should come first. … Enactment, commencement and similar peripheral material should be placed at the end of the Act.[72]

9.67 After extracting this quotation, the Inquiry into Legislative Drafting in 1993 acknowledged 'the importance of the principle of putting the main message first as an aid to communication'.[73]

9.68 Reflecting on this principle, Professor Xanthaki argues that legislative drafting

> has a lot to learn from advertising in the techniques used to ensure that, whatever the abilities of the audience, they come out with one clear message. … If the message is a prohibition, then this is exactly what the user needs to take away from the legislative text; if the message is a declaration, then this is what the user should 'hear'. This aim can be greatly facilitated by choices of structure.[74]

9.69 Prioritising provisions for users can help ensure that the law's fundamental norms, standards, and obligations can be heard 'loud and clear'. Application of the principle can therefore underpin adherence to Recommendation 7.4 of the Financial Services Royal Commission, that

> 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.[75]

9.70 As this Interim Report shows, the prioritisation principle is often not reflected in the current presentation of financial services legislation.[76] **Chapters 2–5** of this Interim Report therefore suggest a re-organisation of provisions that is consistent with the prioritisation principle, and the other principles outlined in this chapter.

Intuitive flow

9.71 Wherever possible, provisions of legislation should be ordered to provide an intuitive flow for users. This is sometimes referred to as a 'logical flow', 'logical order', or 'logical structure'. In other words, provisions should order the legislation in a predictable and consistent way that reflects a structure users can understand. This principle draws on and supports the principles of coherence and fostering mental models.

---

72 D. St L. Kelly, *Second Supplementary Submission - Ten Commandments for Better Legislative Drafting* S588, cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (n 25) [7.32].

73 Ibid 114.

74 Xanthaki (n 65) 61–2.

75 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 22) 44.

76 **Chapters 2**, **3**, **4**, **5**, and **8** of this Interim Report give a range of examples of how provisions are poorly prioritised for readers of the legislation.

9.72 The importance of an intuitive flow has been emphasised in amendments to, or rewrites of, Commonwealth legislation.[77] Similarly, secondary literature often refers to the importance of an intuitive flow, structure, or sequence,[78] as do government reports.[79] As Spring Yuen Ching Fung and Anthony Watson-Brown argue,

> even complex issues can be made easier to understand if they are presented in a logical way. The writers who have discussed the traditional drafting style have all argued for a logical approach.[80]

9.73 The ALRC suggested the principle of an intuitive or 'logical' flow in Interim Report B.[81] In Interim Report A, the ALRC emphasised the importance of 'intuitive' legislative design, such as in relation to defined terms.[82]

9.74 An example of intuitive flow in practice is that, generally speaking, a provision that requires a person to obtain a licence should precede obligations that apply to a licensee. This is an ordering of provisions that is likely to be more intuitive to users. Such ordering makes the message clearer and easier to navigate. **Examples 8.1** and **8.2** in **Chapter 8** of this Interim Report, which relate to a fictional 'Milk carrier licence' regime, highlight the benefits of an intuitive flow to provisions.

9.75 The principle of intuitive flow is one that may need to be traded off against other principles or be applied in a more localised way. For example, it would be difficult to order the entirety of the *Corporations Act* in an intuitive way because the Act deals with such broad subject matter. However, an intuitive flow may be applied to lower-level provisions, such as chapters, parts, and sections.

Mental models

9.76 As observed in **Chapter 8** of this Interim Report, mental models provide the foundation for how humans understand and navigate the world. Users of specific Acts, and the statute book more generally, build up mental models of how legislation works and how they should interact with it. Good mental models give users a 'structure to the apparent randomness' of the law, which enables users to navigate and understand provisions more quickly.[83] Accordingly, a key aim of those who

---

77 See, eg, Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (Cth) [30]; Explanatory Memorandum, Territories Law Reform Bill 2010 (Cth) 28–9, 35–6; Explanatory Memorandum, Therapeutic Goods Amendment (2020 Measures No. 2) Bill 2020 (Cth) 162.

78 Xanthaki (n 65) 65.

79 Victorian Law Reform Commission, *Plain English and the Law: The 1987 Report Republished* (2017) [33].

80 Spring Yuen Ching Fung and Anthony Watson-Brown, 'Traditional Drafting in Common Law Jurisdictions' (1995) 16(3) *Statute Law Review* 167, 167.

81 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.44].

82 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [6.13]–[6.40].

83 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.

design and draft legislation should be to assist users to develop a clear and helpful mental model about how the legislation operates, and how users should interact with it. As described below, consistent legislative design provides the foundation of good mental models, which are also supported by the other principles for structuring and framing legislation.

9.77 There are two types of mental models that exist in relation to legislation:

- Mental models of the statute book: Users of Commonwealth legislation may have a mental model of how legislation across the statute book is generally structured and framed. For example, users may know that parts appear below chapters,[84] and that sections provide the basic building block for communicating the substantive provisions of legislation. Users may also make assumptions about the location of general definitions, such as towards the beginning or the end of Acts. Mental models of the statute book are of limited usefulness because design choices are inconsistent across different Acts and legislative instruments. For that reason, mental models of specific legislation are more important.
- Mental models of specific legislation: Users of specific Acts and legislative instruments may develop mental models of how that legislation, or specific provisions within it, are structured and framed. This includes knowing how offences are created, where important obligations or subject matters are generally located, and how primary and delegated legislation interact. Mental models can also be developed for certain areas of the law. For example, users of corporations and financial services legislation may have a general sense of the ways in which different Acts interact with each other, with frequent cross-referencing of definitions and concepts.

9.78 The principles for structuring and framing legislation described above are means by which users of legislation are more likely to develop and deploy helpful mental models. For example, by grouping related provisions, users will know that provisions relating to a certain subject matter or topic are likely to be found together. Prioritisation would draw users to the core provisions that help understand the intent of the law.

9.79 Apart from the above principles for structuring and framing legislation, a key means by which mental models can be supported is through consistency. As the former First Parliamentary Counsel of the UK, Sir Stephen Laws, has observed, 'consistency is a large part of how to achieve coherence and clarity'.[85] According to Onoge, 'consistency of practice within a jurisdiction undoubtedly facilitates predictability and easy use of statutes by regular users'.[86]

---

84 Though not all Acts use chapters. See, for example, the *ASIC Act*.

85 Evidence to Select Committee on the Constitution, Parliament of the United Kingdom, 23 November 2016 (Stephen Laws) [Q70].

86 Onoge (n 29) 454.

9.80 Government and scholars have long recognised the importance of consistency in assisting users of legislation to find and understand the law. Writing in 1993, the Law Commission of New Zealand noted that

> structures become familiar; readers know where in an Act particular provisions are likely to be found; and the meaning and application of standard provisions will become more commonly known. Time is saved and dispute is less likely.[87]

9.81 As demonstrated by this Interim Report, inconsistent approaches to structure and framing are evident in financial services legislation.[88] This further reflects the 'lack of a clearly discernible legislative design philosophy across the law', as observed by Treasury in relation to inconsistent use of the legislative hierarchy.[89]

9.82 To the extent possible, consistency should be achieved not only within the one Act, or across a subject matter, but across the statute book. For example, legislation should ideally adopt a consistent approach to how offences are identified or where the meanings of defined terms may be located. In this way, a mental model can be developed that helps users, such as lawyers and judges, more easily navigate and use the legislation with which they interact. As former Commonwealth First Parliamentary Counsel, Ian Turnbull KC, observed, 'people who read Acts expect to find certain provisions in certain places'.[90]

Succinctness

9.83 When structuring and framing legislation, one aim should be to express the law as concisely and clearly as possible. The importance of the principle of succinctness is recognised across drafting guidance and practice.[91] Turnbull emphasises that simple writing requires 'shorter, better constructed sentences'.[92]

9.84 Succinctness is not an end in itself, but a means to improve clarity and comprehensibility. According to Onoge:

> Clarity is one of the basic qualities of good legislation. In order for legislation to be effective and of good quality, the provisions of the legislation must be clear

87 New Zealand Law Commission, *The Format of Legislation* (Report No 27, December 1993) [9].
88 See **Chapters 2–5** and **Chapter 8** of this Interim Report.
89 Department of the Treasury (Cth), Submission to the Financial Services Royal Commission (Interim Report)*, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Undated) [28].
90 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (n 25) 112.
91 Victorian Law Reform Commission (n 79) [70]–[72]; Susan Krongold, 'Writing Laws: Making Them Easier to Understand' (1992) 24(2) *Ottawa Law Review* 495, 514–16; Parliamentary Counsel Office (New Zealand), 'Principles of Clear Drafting' [3.31]–[3.33] <www.pco.govt.nz/clear-drafting/>; Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [8]–[13]; Office of the Parliamentary Counsel (UK), *Drafting Guidance* (2020) [1.3.2]–[1.3.5].
92 Turnbull (n 11) 166.

> and easy for the reader to understand. If the reader cannot comprehend the legislation, it would be a miracle if they behave as it prescribes.[93]

9.85 As with most other forms of writing, 'less is often more' when it comes to legislation. Provisions should be as short as possible. Lengthy provisions place an undue strain on users, who may fail to keep the initial part of a provision in their working memory. As OPC has observed, 'overly long sections' can mean that a 'reader struggles to maintain a clear understanding of what a particular section is trying to achieve'.[94]

9.86 In Background Paper FSL2, the ALRC suggested that particular features contributing to legislative complexity include extensive cross-referencing, the complex use of conditional statements (such as 'if' and 'where'), and the proliferation of exclusions and exemptions.[95] These are all features that may be addressed in order to improve the succinctness of legislation.

9.87 The Background Paper also considered several means of identifying and improving the expression of legislation, including by having regard to certain metrics of complexity, which may identify unnecessarily long or obscure provisions.[96]

Aids to interpretation

9.88 To help users navigate and understand legislation, and to help implement the principles for structuring and framing legislation, drafters can rely on a range of aids to interpretation.

9.89 Aids to interpretation are features of legislation that help frame legislation and provide guidance on its purpose, structure, and operation. As Don Norman observes, when confronted with complexity, people 'search for clues, for any sign that might help them cope and understand'.[97] Aids to interpretation are intended to assist users in that search, by providing users with a more curated experience when using legislation.

9.90 The aids to interpretation described in this part may also be thought of as aids to 'readability' or 'understanding'.[98] However, as argued above, legislation that can be navigated and understood simplifies the task of statutory interpretation by making it easier to identify the context and purpose of provisions. Anything that makes legislation easier to read or understand ultimately aids interpretation. The broad definition of 'aids to interpretation' adopted in this part also reflects that provided by

---

93 Onoge (n 29) 463.
94 Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016) [11].
95 Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [67]–[69].
96 Ibid [73]–[74], [89]–[94].
97 Norman (n 83) 14.
98 See, eg, Peter Quiggin, 'A Survey of User Attitudes to the Use of Aids to Understanding in Legislation' [2011] (1) *The Loophole* 96, [14].

former Commonwealth First Parliamentary Counsel, Hilary Penfold KC. According to Penfold, 'aids to interpretation' include 'a range of non-graphic aids, as well as graphics'.[99] Penfold also outlined a range of examples that might be thought to relate only to 'readability', as distinct from interpretation, such as identifying defined terms and tables.[100]

9.91 The ALRC has written extensively about how aids to interpretation can be better used in corporations and financial services legislation.[101] These aids can help provide a more navigable legislative framework. **Chapter 8** of this Interim Report demonstrates that corporations and financial services legislation makes little use of modern aids to interpretation. Scholars have also argued for greater use of aids to interpretation in corporations and financial services legislation.[102]

9.92 Aids to interpretation may include any feature or measure of legislation that helps frame its meaning or communicate its structure and operation. These include, for example:

- objects clauses, which clarify the intended regulatory objectives or purposes behind more particular provisions;
- the use of legislative examples, to clarify the operation of the law in particular circumstances;
- the use of simplified outlines,[103] helping users navigate by revealing the structure of a statute or constituent parts;
- theme statements, which 'state in one or 2 sentences (at most) what the division or subdivision is about';[104]
- decentralised tables of contents;[105]
- visual aids, such as flow-charts showing the circumstances in which users may need to have regard to certain provisions;
- clear headings that communicate the overall function of a provision or part; and
- notes, designed to provide additional information that may assist users, such as information about amendment history, or the location of other provisions or materials that may be of relevance.

---

99 Hilary Penfold KC, 'When Words Aren't Enough: Graphics and Other Innovations in Legislative Drafting' (Conference Paper, Language and the Law Conference, University of Texas, 6–8 December 2001) [12].

100 Ibid [12], [20]–[32].

101 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [67]–[110]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.44], [9.15]–[9.17].

102 Godwin and Paton (n 23) 284–9.

103 Office of Parliamentary Counsel (Cth), Drafting Direction 1.3A, 'Simplified outlines' (Document release 1.2, November 2016).

104 Office of Parliamentary Counsel (Cth), Drafting Direction 1.8, 'Special rules for Tax Code drafting' (Document release 1.0, May 2006) [59].

105 Ibid [50].

9.93 Aids to interpretation have a long history in legislative drafting. In 1991, Turnbull wrote about 'aids to understanding' as core elements of the Commonwealth's new drafting style.[106] Turnbull emphasised the importance of

> aids to understanding which are not merely linguistic. These are based on the perception that making a text easy to understand is not just a matter of language. Many other factors can help the reader.[107]

9.94 Similarly, writing in 2001, Penfold stressed the importance of graphics and related innovations as aids to interpretation.[108] Penfold wrote about tools such as flowcharts, method statements, tables, notes, examples, reader's guides, objects provisions, summaries, outlines, overviews, highlighting of defined terms, and theme statements. She gave extensive examples of their use in contemporary Commonwealth legislation. Today, guidance from OPC emphasises the importance of 'readability aids'.[109]

9.95 Overall, in Australian legislative design and drafting, there is a strong understanding of the importance and use of aids to interpretation. The main task is to improve the implementation of these tools across the existing body of legislation, and to ensure their effective use in new legislative enactments.

Objects clauses

9.96 The ALRC considers that there is under-utilisation of objects clauses in financial services legislation. As observed in the Interim Report of the Financial Services Royal Commission, the currently complex state of the law may 'cause the regulated community to lose sight of what the law is trying to achieve'.[110] As one means of rectifying this, the Financial Services Royal Commission suggested the inclusion of a 'statement of objects', which would 'identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a given subject'.[111]

106 Turnbull (n 11) 169.
107 Turnbull (n 6) [17].
108 Penfold (n 99).
109 Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013) [154]–[169].
110 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (Volume 1, 2018) 162.
111 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 22) 494.

9.97 More generally, the utility of well-drafted objects clauses has been well recognised. As the Centre for Plain Legal Language has observed:

> Research shows that readers are better able to understand and interpret texts when they have a context for reading them. Purpose clauses can give the reader a context in which to immediately interpret the legislation, as well as making sure that the law-makers are clear as to why they are enacting such a law.[112]

9.98 Having reviewed a substantial body of evidence, the Final Report of the Inquiry into Legislative Drafting by the Commonwealth said that:

> The Committee … encourages Commonwealth drafting agencies to make more use of these sorts of provisions as one way of promoting purposive interpretation and clarifying legislation by reducing the need for detailed prescriptions.[113]

9.99 However, objects clauses are not only useful when doing away with detail. Rather, they can also help users to navigate and comprehend the detail that may remain. As Lord Renton, who headed a seminal UK Parliamentary Inquiry into the topic of legislative drafting, observed in 1998:

> I have never taken the view that the aim of purpose clauses was to dispense with detail. It was to lead to better understanding of detail that such clauses have, within my knowledge, always been recommended.[114]

9.100 At present, users of financial services legislation are at risk of being overwhelmed with detail and have difficulty seeing the 'forest' of legislative purpose for the 'trees' of technical detail. Existing objects clauses, such as s 760A of the *Corporations Act* (concerning the objects of Chapter 7 of the Act), are insufficiently helpful on account of their vagueness and non-particularity. More helpful objects clauses could be directed at particular legislative schemes or parts, rather than at Chapter 7 of the *Corporations Act* as a whole (which, as discussed in **Chapter 8** of this Interim Report, deals with a broad and disparate set of subjects).

The limits of aids to interpretation

9.101 It is important to recognise that aids to interpretation alone cannot ensure that users are able to navigate and understand legislation, nor can they by themselves implement the principles discussed above. For example, simplified outlines cannot, and should not, be a substitute for provisions that are grouped together and structured logically. Objects clauses are no replacement for legislation that clearly communicates its purpose through prioritised and succinct provisions.

---

112 Quoted in House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (n 25) 121.

113 Ibid.

114 United Kingdom, *Parliamentary Debates*, House of Lords, 21 January 1998, vol 584, col 1598.

9.102 More generally, the utility of any specific aid to interpretation will depend on the context. The ALRC considers that there is room for increased use of all of the above measures in at least some circumstances. However, care must also be taken to ensure that legislation is not over-burdened by aids to interpretation; otherwise, complexity may be increased, rather than reduced.[115] Further, with regard to objects clauses specifically, such clauses should be designed to clarify underlying intent or purpose and should not consist of vague statements. The ultimate test of whether to include an aid to interpretation should be whether it helps ensure that 'the law-maker's intention is clearly communicated to the person[s] affected by the law'.[116]

9.103 It is also important to note that not all aids to interpretation may need to be included in the original version of an Act. For example, it may be that some aids to interpretation should only be made available in 'annotated' versions of legislation (as proposed by the ALRC in Interim Report B) or included in the digital presentation of legislation (ideally, with the functionality to turn 'on' and 'off' the presentation of certain details, including aids to interpretation).[117] The ALRC has given extensive consideration to the use of technological aids in publication and presentation.[118]

Principles in the context of the *Corporations Act*

9.104 Principles for structuring and framing legislation must be applied flexibly in the context of legislation as large and diverse in its subject matter as the *Corporations Act*. For example, the *ITA Act 1997*, despite its size, has a clear message and subject matter: 'you must pay tax on your income'.[119] From that principal message flow other messages, as well as an intuitive structure and framing. The *ITA Act 1997* sets out general rules for determining assessable income and permitted deductions before more specialist rules and provisions relating to the administration of the Act.

9.105 Unlike the *ITA Act 1997*, neither the *Corporations Act* nor Chapter 7 of the Act could begin with a provision listing the 'Core Provisions' of the legislation.[120] The *Corporations Act* and Chapter 7 are both products of a lengthy history and complex constitutional underpinnings.[121] The legislation therefore has no primary message. There is no obvious or intuitive structure to the Act because the content of the Act is not thematically rational.

---

115 For a discussion of how graphical aids to interpretation can cause complexity and undermine navigability and understanding, see Penfold (n 99) [38]–[68].

116 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (n 25) 137.

117 In Interim Report B, the ALRC recommended that ASIC should publish additional freely available electronic materials designed to help users navigate the legislation it administers: Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) rec 19, [9.4]–[9.10].

118 Australian Law Reform Commission, 'Improving the Navigability of Legislation' (Background Paper FSL3, October 2021) [111]–[170].

119 Tax Law Improvement Project, Building the New Tax Law (Information Paper No. 2, April 1995), 7.

120 *Income Tax Assessment Act 1997* (Cth) pt 1–3.

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

9.106 Any restructure and reframing of Chapter 7 of the *Corporations Act* must reflect the above realities. For example, it is helpful to understand the *Corporations Act* as akin to a collection of Acts. Each of these Acts, generally taking the form of chapters and parts, should apply the principles discussed in this chapter in a localised way. It is not possible for a narrative structure to lead someone through the entire *Corporations Act* or even through the entirety of Chapter 7 of the Act. Instead, particular provisions of the *Corporations Act* must seek to articulate a clear message, highlight core provisions, foster mental models, and reflect a structure that makes it easier to navigate and understand the legislation.

PART THREE: TECHNICAL SIMPLIFICATION

10. Penalty Provisions

Contents

Introduction

10.1 In this chapter, the ALRC makes one proposal and four recommendations to enhance the visibility of penalty provisions and related fault elements. The proposal and recommendations would help ensure that offences and other penalty provisions in corporations and financial services legislation are easier to navigate and understand. They would also increase the communicative power of penalties that attach to contraventions of corporations and financial services legislation.

10.2 Similar to the proposals and recommendations in Chapters 7–9 of Interim Report B, the proposal and recommendations in this chapter focus on discrete improvements that could be implemented alongside, or independently of, the other reforms discussed in this Interim Report.

10.3 Nonetheless, these proposals and recommendations reflect the principles for structuring and framing legislation discussed in **Chapter 9** of this Interim Report. In particular, they seek to consolidate provisions so that users of the legislation no longer need to consult multiple provisions to identify that contravening a provision attracts a penalty.

10.4 The reforms would also, depending on the provision, either eliminate or significantly minimise the effort required by users of the legislation to calculate applicable penalties. They would do this by avoiding the use of formulas and cross-references that can lead users across the statute book. Reformed provisions would more clearly state potential penalties and draw users' attention to additional rules that may alter any default penalty. Reform would also help users of corporations and financial services legislation to develop more useful and consistent mental models for how offences and other penalty provisions are created and identified.

Offences, civil penalties, and fault elements

10.5 The ALRC made two proposals in Interim Report B in relation to offences, civil penalties, and fault elements:

- Proposal B17 suggested that each offence and civil penalty provision, and the consequences of any breach, should be identifiable from the text of the provision itself.
- Proposal B18 suggested that offence provisions in corporations and financial services legislation should be amended to specify any applicable fault element.

10.6 Submissions to Interim Report B expressed overwhelming support for Proposals B17 and B18.[1] This part contains recommendations that would formalise Proposals B17 and B18.[2] The following recommendations, 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.

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

2 In a note to Interim Report B, the ALRC discussed other potential reforms to civil penalties and infringement notice provisions, including the application of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth). Implementing the proposal and recommendations in this chapter of the Interim Report would be consistent with that Act and would not preclude the eventual application of the standard provisions it contains. See generally Australian Law Reform Commission, 'Recommendation 17 — Unnecessary Complexity Note' (September 2022) [72]–[87] <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Unnecessary-complexity.pdf>.

Identifying offence provisions

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.

10.7 **Recommendation 20** would ensure that all offence provisions in corporations and financial services legislation are visible on the face of the provision to which the offence attaches. The recommendation would also ensure that penalties are clear from the text of the provision. Implementing the recommendation would reduce the work that readers must do in identifying and understanding offence provisions, reducing the need to consult separately located rules that create offences and determine penalties.

10.8 **Recommendation 20** could be implemented by including the following at the foot of each offence provision:

> Maximum criminal penalty:
>
> (a) for an individual—[Applicable penalty];
>
> (b) for a body corporate—[Applicable penalty].
>
> Note: [Location of additional rules for determining the applicable penalty]

A novel approach

10.9 Offences and applicable penalties are identified by a range of terms and expressions across Commonwealth legislation. The *NCCP Act*, for example, uses the term 'criminal penalty' to identify offences and applicable penalties,[3] while other Acts only use 'penalty'. The expression 'maximum criminal penalty' has not been used in Commonwealth legislation. However, the ALRC suggests that this expression best communicates the effect of the law.

10.10 The use of 'penalty' does not clearly communicate that the penalty is criminal in character. Additionally, both 'penalty' and 'criminal penalty' suggest that the penalty specified is the only one available. However, this is not the case, as both s 1311A of the *Corporations Act* and s 4D of the *Crimes Act 1914* (Cth) provide that any penalty

3 See, eg, *National Consumer Credit Protection Act 2009* (Cth) ss 31(2), 32(2).

specified in legislation (such as one year imprisonment) is a maximum. Indeed, the rules in s 1311B of the *Corporations Act* mean that a term of imprisonment may be converted into a pecuniary penalty.

10.11 As the ALRC has previously explained, offence provisions should be capable of being interpreted and understood on their face without extensive regard to other Acts or other provisions.[4] Moreover, many users of corporations and financial services legislation may have little expertise in criminal law and may not be aware of provisions such as s 4D of the *Crimes Act 1914* (Cth). The proposed wording of the expression 'maximum criminal penalty' is designed to assist the greatest number of users, while the accompanying notes would direct users' attention to any provisions that determine the applicable penalty in a given case.

Recommendation 20 in the *Corporations Act*

10.12 Presently, and as explained in Interim Report B, offences are identified in a range of ways in the *Corporations Act*.[5] This inconsistency undermines navigability and complicates the process of understanding the Act. Moreover, the penalty for committing an offence is rarely identified in the offence provision itself. Instead, readers must consult various provisions of Part 9.4 Div 2,[6] as well as Sch 3 to the *Corporations Act*.

10.13 For example, s 994B(9) of the *Corporations Act* requires that a Target Market Determination be made available to the public free of charge. A note to the subsection indicates that it is an offence provision. However, the penalty of one year imprisonment for breaching the offence appears in Sch 3 to the *Corporations Act*. Moreover, rules in s 1311B of the *Corporations Act* allow a term of imprisonment to be converted to a pecuniary penalty for an individual. Section 1311C of the *Corporations Act* provides similar rules for converting the term of imprisonment to a pecuniary penalty for bodies corporate. Section 1311C only applies where no separate penalty is provided for a body corporate.

10.14 Implementing **Recommendation 20** would replace much of the work readers need to undertake in applying the rules in ss 1311–1311C of the *Corporations Act*. For example, in the case of s 994B(9), the first note could be repealed and the following added to the foot of the subsection:

---

4 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.23], [8.32].

5 Ibid [5.28]. See also Australian Law Reform Commission, 'Corporations Act Offence and Penalty Architecture' (September 2022) <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Corps-Act-offence-and-penalty-architecture.pdf>.

6 See, eg, *Corporations Act 2001* (Cth) ss 1311A, 1311B, 1311C, 1311E, 1311F.

Maximum criminal penalty:

(a) for an individual—1 year imprisonment or 120 penalty units, or both;

(b) for a body corporate—1,200 penalty units.

Note: Part 9.4 (Offences) of this Act includes additional rules for determining penalties.

10.15 This approach would increase the visibility of offence provisions and the applicable penalties. It would enable readers to more easily identify important provisions that attract significant penalties (such as imprisonment) compared with other provisions that attract lower penalties.

10.16 In the case of offences subject to a term of imprisonment greater than 10 years, it would be desirable to amend the note to reflect the fact that multiple different penalties, determined by more complex formulas, can be imposed under ss 1311B and 1311C of the *Corporations Act*. Nonetheless, it would still be desirable to include the default term of imprisonment and the simple maximum pecuniary penalty provided for by ss 1311B(4)(c) and 1311C(3)(c).

10.17 For example, contravening s 588GAB(1) of the *Corporations Act* attracts up to 10 years imprisonment. Under **Recommendation 20**, the first note to s 588GAB(1) could be repealed and the following added to the foot of the subsection:

Maximum criminal penalty:

(a) for an individual—10 years imprisonment or 4,500 penalty units, or both;

(b) for a body corporate—45,000 penalty units.

Note: Part 9.4 (Offences) of this Act includes additional rules for determining penalties. The maximum penalty can be higher in certain circumstances.

10.18 In the case of offences that only attract a monetary penalty and do not currently specify a separate penalty for a body corporate,[7] it would be helpful to specify the penalty applicable to both an individual and a body corporate, based on the rule in s 1311C of the *Corporations Act*. For example, s 916F(3) of the *Corporations Act* could be amended to repeal the note to that section and add the following to the foot of the subsection:

Maximum criminal penalty:

(a) for an individual—60 penalty units;

(b) for a body corporate—600 penalty units.

Note: Part 9.4 (Offences) of this Act includes additional rules for determining penalties.

---

7 Some offence provisions already provide for a separate penalty for bodies corporate: see, eg, *Corporations Act 2001* (Cth) ss 259F(3), 260D(3).

10.19 The design approach in **Recommendation 20** would not eliminate all complexity associated with offences and penalties. As discussed, this is because ss 1311B and 1311C of the *Corporations Act* would still include rules for determining the applicable penalty for offences subject to more than 10 years imprisonment.

10.20 Sections 1311 and 1311F of the *Corporations Act* could be repealed if **Recommendation 20** were implemented across the Act. Consequential amendments would also need to be made to ss 1311B and 1311C. Specifically, these amendments should ensure that the rules in ss 1311B(4)(c)–(d) and 1311C(3)(c)–(d) continue to have effect, even where a pecuniary penalty is provided in the offence provision itself. At present, ss 1311B(5) and 1311C(4) provide that the penalties in ss 1311B and 1311C only apply where there is no contrary intention in the *Corporations Act*. It is possible that implementation of **Recommendation 20** could be interpreted as evidencing such a contrary intention. Consequential amendments should ensure that legislative amendments to implement **Recommendation 20** do not limit the higher penalties available under ss 1311B(4)(c)–(d) and 1311C(3)(c)–(d). For example, amendments that state a pecuniary penalty in s 588GAB(1) for bodies corporate should not override the current effect of ss 1311C(3)(c)–(d), which allow for higher penalties in some circumstances. Consequential amendments to ss 1311B and 1311C are therefore important to preserve existing penalties.

10.21 Section 1311E could also be redrafted to provide that a penalty is only specified where the design approach in **Recommendation 20** is used.

Recommendation 20 in other Acts

10.22 **Recommendation 20** contemplates the inclusion of notes referring readers to any additional rules for calculating applicable penalties. For example, in the *Corporations Act*, notes could refer readers to Part 9.4 of that Act. In other Acts, similar rules for calculating applicable penalties will generally apply. In the *NCCP Act*, for example, a note could refer readers to Part 6-5A of that Act, which explains how to determine penalties for offences. Offences in the *ASIC Act* are governed by the rules that appear in Part 3B of that Act, so a note could refer readers to that Part. The ALRC has not exhaustively examined every corporations and financial services Act to identify the provisions, if any, that create additional rules for determining a penalty. **Recommendation 20** may nonetheless be implemented in those Acts.

Identifying civil penalties

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.

10.23 **Recommendations 21** and **22** would enhance the visibility of civil penalty provisions in the *Corporations Act* and *ASIC Act*. These recommendations could be implemented by including the following at the foot of each civil penalty provision:

> Maximum civil penalty: [Applicable penalty units]
>
> Note: [Location of additional rules for determining the applicable penalty]

10.24 As with criminal offences, improving the visibility of civil penalty provisions would ensure that the law better communicates its effect — the fact that a penalty provision exists — as well as the relative importance of different provisions. This would enable readers to understand the importance of provisions based on whether they are an offence or civil penalty. In this sense, **Recommendations 20–22** are complementary.

Creating the initial architecture

10.25 **Recommendation 21** is necessary for the implementation of **Recommendation 22** and would allow for civil penalties to be created in the manner contemplated by **Recommendation 22**. Section 79(2) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) ('*Regulatory Powers Act*') provides that a provision is a 'civil penalty provision' in several circumstances. Most relevantly, a provision will be a 'civil penalty provision' if it sets out at its foot a pecuniary penalty (or penalties), indicated by the words 'civil penalty'.

10.26 At present, a 'civil penalty provision' in the *Corporations Act* is defined by reference to s 1317E(3). Section 1317E(3) lists all provisions that are classified

as civil penalty provisions in the first column of a table. Column three of the table categorises these provisions: 'uncategorised', 'corporation/scheme civil penalty provision', and 'financial services civil penalty provision'. Currently, civil penalty provisions are only created in the *Corporations Act* if a provision is specified in s 1317E(3). Similarly, in the *ASIC Act*, 'civil penalty provision' is defined in s 12GBA(6), which lists four subdivisions.

10.27 This means that ss 1317E(3) of the *Corporations Act* and 12GBA(6) of the *ASIC Act* are authoritative lists of all civil penalty provisions in those Acts. However, those definitions limit the potential for increasing the visibility and navigability of civil penalties.

10.28 Introducing a definition of 'civil penalty provision' based on that found in the *Regulatory Powers Act* would have greater functional utility than existing definitions in the *Corporations Act* and *ASIC Act*. This is because civil penalties could be identified within the penalty provisions themselves. Moreover, a definition reflecting that found in s 79(2) of the *Regulatory Powers Act* would be more consistent with the definition of 'civil penalty provision' in s 5 of the *NCCP Act*.

10.29 **Recommendation 21** would not be needed if the *Corporations Act* and *ASIC Act* were subject to the civil penalty framework in the *Regulatory Powers Act*.[8] However, the *Corporations Act* and *ASIC Act* are not subject to that framework, making **Recommendation 21** necessary. In implementing **Recommendation 21**, it would not be necessary to adopt the civil penalty framework found in the *Regulatory Powers Act*. However, the Recommendation would facilitate future moves to adopt that framework, if desired.

Identifying civil penalty provisions

10.30 As discussed in Interim Report B,[9] the *Corporations Act* and *ASIC Act* would be simpler if each civil penalty provision incorporated the penalty into the provision itself. As they currently operate, the *Corporations Act* and *ASIC Act* are unnecessarily complex because civil penalty provisions can only be identified by consulting distinct sections of those Acts (s 1317E(3) of the *Corporations Act* and s 12GBA(6) of the *ASIC Act*), which may be located far away from the obligation for which the civil penalty exists. Moreover, the use of 'notes' to enable civil penalty provisions to be identified unnecessarily complicates the legislation, compared to incorporating the civil penalty itself into the substance of the relevant provision.

---

8 The ALRC discussed this approach in relation to Recommendation 17 of Interim Report B, which recommended simplifying unnecessarily complex provisions in corporations and financial services legislation: see Australian Law Reform Commission (n 2) [72]–[75], [83]–[87]. As noted above, implementation of **Recommendation 21** does not prevent future application of the *Regulatory Powers Act*.

9 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.20].

10.31 Incorporating the civil penalty into the text of the penalty provision itself is standard practice in other Commonwealth legislation. Implementing this approach across corporations and financial services legislation would be more consistent with the *NCCP Act* and legislation that adopts the definition of 'civil penalty provision' found in the *Regulatory Powers Act*.

10.32 **Recommendation 22**, in conjunction with **Recommendation 21**, would simplify the *Corporations Act* and *ASIC Act* and make them more navigable by ensuring users could easily identify civil penalty provisions. The recommendations would also enable users to get a sense of the maximum penalty possible, and therefore the provision's relative importance. For example, applying **Recommendation 22** to s 994F(1) of the *Corporations Act* would amend that provision to include the following at its foot:

> Maximum civil penalty:
>
> (a) for an individual—5,000 penalty units;
>
> (b) for a body corporate—50,000 penalty units.
>
> Note: Part 9.4B (Civil consequences of contravening civil penalty provisions) of this Act includes additional rules for determining penalties. The maximum civil penalty can be higher in certain circumstances.

10.33 The maximum penalty for a civil penalty provision is calculated under s 1317G of the *Corporations Act*, with separate formulas for individuals and corporations. The only exception is found in s 1101AC of the *Corporations Act*, relating to breach of an enforceable provision of an approved code of conduct, which sets a maximum pecuniary penalty of 300 penalty units. Part 9.4B of the *Corporations Act* also prescribes circumstances when higher pecuniary penalties may apply.[10] Additionally, Part 9.4B provides for alternatives to a pecuniary penalty order, such as the making of a relinquishment or compensation order.[11] Part 2 Div 2 Subdiv G of the *ASIC Act* includes rules for determining applicable penalties under that Act.

10.34 As with 'maximum criminal penalty', the term 'maximum civil penalty' has intentionally been chosen. Although there is an argument that 'maximum' should not be included because there is the potential for higher penalties if certain criteria are met under Part 9.4B of the *Corporations Act*, using the term 'civil penalty' alone risks confusion by suggesting that the stated penalty is the only penalty available, rather than the default maximum. In making **Recommendation 22**, the ALRC has sought to balance consolidating information into clear penalty provisions with the importance of accurately conveying the potential for alternative and higher penalties.

10.35 If **Recommendation 22** is accepted and implemented, amending legislation should ensure that the term 'maximum civil penalty' is not interpreted in a way that would disapply other rules in Part 9.4B of the *Corporations Act*. Rather, the

---

10 *Corporations Act 2001* (Cth) s 1317G(4)(c).
11 Ibid ss 1317GAB, 1317H–1317HE.

reference to 'maximum civil penalty' should be read with regard to its context and purpose,[12] including the broader framework for imposing higher pecuniary penalties and alternative penalties that exists in Part 9.4B.

Categorisation of civil penalty provisions

10.36 As noted above, civil penalty provisions listed in s 1317E(3) of the *Corporations Act* are categorised as one of the following:

- 'corporation/scheme civil penalty provision';
- 'financial services civil penalty provision'; or
- 'uncategorised civil penalty provision'.

10.37 These categories affect the availability of pecuniary penalty orders under s 1317G of the *Corporations Act* and compensation orders under ss 1317H and 1317HA of the *Corporations Act*. For example, if a civil penalty is categorised as a 'corporation/scheme civil penalty', then a court can only impose a pecuniary penalty order if the criteria in s 1317G(1)(b) are met, including that the contravention of the civil penalty provision is 'serious'.

10.38 Given their relevance to determining applicable penalties, these categories should be preserved when implementing **Recommendation 22**. This could be done by including a new subsection in relation to 'corporation/scheme' and 'financial services' civil penalties within the relevant provision. It would not be necessary to identify provisions that are 'uncategorised', as this is not a category that has legal purpose elsewhere in the *Corporations Act*. For example, s 985M of the *Corporations Act* could be amended to add the following subsection:

> (1A) The civil penalty provision in subsection (1) is a financial services civil penalty provision.

10.39 This subsection could be added alongside replacement of the note in s 985M(1), in accordance with **Recommendation 22** (as explained above, for example, in relation to s 994F(1) of the *Corporations Act*).

Infringement notice provisions

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

10.40 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:

12 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 [14].

- 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 lower level provision, such as a subsection, stating that the provision is subject to an infringement notice.

10.41 Infringement notice provisions should be clearly identifiable given their importance as an enforcement mechanism and as an element of the 'regulatory pyramid',[13] including as part of dual- or triple-track approaches to regulation in which contraventions may be offences, civil penalties, or subject to infringement notices.[14]

10.42 In the *Corporations Act*, infringement notices are identified through a mix of approaches. Some sections use a note to identify the provision as subject to an infringement notice.[15] Other infringement notice provisions are identified by another section that appears close to the infringement notice provision. For example, s 908CH of the *Corporations Act* provides that alleged breaches of s 908CF are subject to an infringement notice under Part 5 of the *Regulatory Powers Act*. Similarly, s 1272F of the *Corporations Act* provides that ss 1272C(1) and 1272D(1) are subject to an infringement notice under Part 5 of the *Regulatory Powers Act*.[16]

10.43 However, most infringement notice provisions in the *Corporations Act* are created by s 1317DAN, which provides a list of types of provisions that are 'subject to an infringement notice' under Part 9.4AB.[17] This list includes strict and absolute liability offences, as well as prescribed civil penalty provisions and offences.[18] Users must examine the *Corporations Regulations* to identify the prescribed civil penalty provisions and offences.[19]

---

13 While the Financial Services Royal Commission raised reservations about the role of infringement notices as an enforcement mechanism, they continue to play a role in enforcement under corporations and financial services legislation. For example, in 2022, ASIC issued infringement notices against four entities for 'greenwashing': Australian Securities and Investments Commission, 'ASIC issues infringement notices against investment manager for greenwashing' (Media Release 22-336MR, 2 December 2022); Australian Securities and Investments Commission, 'ASIC acts against greenwashing by energy company' (Media Release 22-294MR, 27 October 2022); Australian Securities and Investments Commission, 'ASIC issues infringement notice against superannuation trustee for greenwashing' (Media Release 22-379MR, 23 December 2022); Australian Securities and Investments Commission, 'ASIC issues infringement notices to energy company for greenwashing' (Media Release 23-001MR, 5 January 2023). See also Australian Government, *ASIC Enforcement Review Taskforce Report* (2017) 81.

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

15 See, for example, note 3 to s 674(2) of the *Corporations Act*, as well as note 3 to s 675(2).

16 See also the discussion of the three infringement notice regimes created by the *Corporations Regulations* in Australian Law Reform Commission (n 2) [76].

17 Additionally, Part 9.4AA of the *Corporations Act* provides that ss 674(2) or 675(2) are also subject to infringement notice powers. Specifically, see *Corporations Act 2001* (Cth) s 1317DAC(1).

18 See also s 1317DAM(1A) of the *Corporations Act*, which allows a 'Financial Services and Credit Panel' to issue an infringement notice if they believe on reasonable grounds that a person has contravened a 'restricted civil penalty provision'.

19 *Corporations Regulations 2001* (Cth) regs 9.4AB.01–9.4AB.02.

10.44 The penalty applicable to any given infringement notice is also difficult to identify. In the *Corporations Act*, the applicable penalty is not stated close to the contravention for which the infringement notice may be given. Section 1317DAP(2) of the *Corporations Act*, unhelpfully titled 'Matters to be included in infringement notice', includes the formula for determining the penalty for infringement notices issued under Part 9.4AB. Other formulas apply to specific infringement notice regimes.[20]

10.45 The complexity of the various infringement notice regimes in the *Corporations Act* could be reduced if each infringement notice provision were clearly identified as such. The complexity could be further reduced if the penalty applicable to any infringement notice provision were clearly identified in the provision. Other corporations and financial services Acts would also benefit from increased visibility and transparency of infringement notice provisions in those Acts.[21]

Identifying fault elements

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.

10.46 **Recommendation 23** formalises Proposal B18 in Interim Report B. The recommendation follows from the proposition that offences should be capable of being understood from the text of the provisions that establish them. Clearly identifying fault elements would reduce unnecessary complexity and legal ambiguity. Consistent with the principles for structuring and framing legislation in **Chapter 9** of this Interim Report, consolidating fault elements into the text of offence provisions would help to make such provisions more self-contained and capable of being understood on their face.

Response to Proposal B18

10.47 Proposal B18 received unanimous support among stakeholders who offered a view on it.[22] For example, the joint submission of Chartered Accountants Australia and New Zealand, CPA Australia, the Financial Planning Association of Australia, the Institute of Public Accountants, and the SMSF Association said that they 'support the full implementation' of the proposal.[23] They considered that it 'would improve

20 See, eg, *Corporations Act 2001* (Cth) s 1317DAE.
21 Such Acts include the *NCCP Act, SIS Act*, and *Insurance Contracts Act 1984* (Cth).
22 Australian Banking Association, *Submission 61*; Stockbrokers and Investment Advisers Association, *Submission 63*; Financial Services Council, *Submission 66*; MinterEllison, *Submission 74*; Law Council of Australia, *Submission 75*.
23 Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

user understanding of the offence provisions ... and the applicable fault element'.[24] They also considered that it 'will greatly simplify the legislation and improve the navigability of the law for those operating under it'.[25]

The importance of specifying fault elements

10.48 As discussed in detail in Interim Report B,[26] the *Corporations Act* does not generally specify a fault element for an offence. Instead, it applies the *Criminal Code*,[27] which provides for fault elements that apply where no fault element is specified.[28] The fault element depends on whether a physical element consists only of 'conduct', or a 'circumstance' or 'result'. Many offences in the *Corporations Act* were not drafted with the *Criminal Code* in mind, such that it is not always clear whether a physical element consists of conduct, a circumstance, or a result. Stakeholders have told the ALRC that identifying the relevant fault element for an offence in the *Corporations Act* can be challenging and resource intensive.

Implementing Recommendation 23

10.49 **Recommendation 23** would mean that each offence provision expressly states the applicable fault element for each physical element of the offence. This would mean that offence provisions look more like s 952D of the *Corporations Act*, which expressly identifies that knowledge and recklessness are the applicable fault elements.[29] The definitions of each fault element would continue to rely on application of the *Criminal Code*, thereby preserving consistency with other Acts that apply the Code.

10.50 Implementing **Recommendation 23** would potentially be a significant undertaking.[30] Treasury would need to work closely with the Office of the Commonwealth Director of Public Prosecutions ('CDPP') to identify offences for which the fault element is clear, and those for which the fault element may be more uncertain. Fault elements for some offences might be clear because, for example, the offences have been frequently considered by courts, or extensive advice has been obtained in relation to those offences.

---

24 Ibid.

25 Ibid.

26 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.30]–[8.32].

27 The *Criminal Code* appears in the Schedule to the *Criminal Code Act 1995* (Cth). Section 1308A of the *Corporations Act* provides that all offence provisions in the Act are subject to Chapter 2 of the *Criminal Code*.

28 *Criminal Code Act 1995* (Cth) sch s 5.6.

29 See also *Corporations Act 2001* (Cth) s 1041B.

30 Proposal B15 in Interim Report B also suggested consolidating offence provisions into a smaller number of provisions covering the same conduct. Implementation of this proposal could be a way of minimising the work involved in specifying fault elements, given there would be fewer offences and therefore fault elements. See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.31]–[5.39].

10.51 However, there will be offences that may not have been considered by courts, and perhaps not even closely analysed by ASIC or the CDPP.[31] Identifying the fault element for these provisions might be labour intensive and challenging. Furthermore, in some cases, legislating a fault element where there is uncertainty may generate controversy. Nonetheless, the potential for such uncertainty, and the fact that identifying fault elements can be so labour intensive and challenging, themselves justify **Recommendation 23**. Uncertainty increases the complexity of corporations and financial services offences, and stakeholders should not have to bear the costs of obtaining legal advice to determine applicable fault elements. Additionally, criminal proceedings would also benefit from a greater focus on establishing the core wrongdoing, rather than expending courts' and parties' time and effort in determining fault elements.

10.52 Given its potential complexity, implementation of **Recommendation 23** may benefit from the allocation of specific resources. Implementation could be phased as follows:

- First, government could commit to including fault elements in all new or amended offences in corporations and financial services legislation.
- Second, offence provisions where there is settled jurisprudence relating to the fault element could be amended in line with that jurisprudence.
- Third, offence provisions where ASIC and the CDPP have a clear view on the applicable fault element, and there is minimal controversy among stakeholders about those views, could be amended to include the agreed fault element.
- Last, amendments could be made to offences for which neither ASIC nor the CDPP have formed a clear view as to the applicable fault element, or for which controversy exists or may exist as to the applicable fault elements.

10.53 Where ambiguity or controversy exists, closer analysis and debate by Parliament may be warranted.

Complementary simplification

10.54 **Recommendation 23** could also offer an opportunity to enhance uniformity of the language surrounding fault elements, consistent with drafting best practice. For example, there are potentially many formulations to impute both a subjective and objective fault element. However, according to OPC, the phrase 'reasonably believes' should be preferred to alternatives.[32] As discussed in **Chapter 7** of this Interim Report, more consistent application of OPC guidance to older legislation would bring benefits for readers.

---

31 Provisions that have never been considered by courts, ASIC, or the CDPP could also be reviewed for continuing relevance.

32 Office of Parliamentary Counsel (Cth), Drafting Direction 2.2, 'Use of various expressions in draft legislation' (Document release 5.7, August 2019) [10]–[16].

Appendix A
List of Consultations and Events September 2022 – April 2023

Consultees

	Name	Consultee location
1	Bruce Dyer, Conisante Consulting	Melbourne
2	Dr Elizabeth Boros SC, Barrister	Melbourne
3	Professor Rosemary Langford, University of Melbourne	Melbourne
4	Gerard Brody, Consumer Action Law Centre	Melbourne
5	Emeritus Professor Stephen Bottomley, Australian National University	Canberra
6	Legal and Compliance Expert Group, Financial Services Council	Sydney
7	Australian Prudential Regulation Authority	Sydney
8	Australian Banking Association	Sydney
9	Professor Pamela Hanrahan, University of New South Wales	Sydney
10	Dr Robert Austin AM, Barrister	Sydney
11	Andrew Eastwood, Herbert Smith Freehills	Sydney
12	Luke Hastings, Herbert Smith Freehills	Sydney
13	Fiona Smedley, Herbert Smith Freehills	Sydney
14	Office of Parliamentary Counsel (Cth)	Canberra
15	Jacinta Dharmananda, University of Western Australia	Perth
16	Dr Ian Enright, Australian College of Insurance Studies	Sydney
17	Property Council of Australia	Various
18	Penny Nikoloudis, Allens Linklaters	Melbourne

	Name	Consultee location
19	Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia	Canberra
20	Equity Capital Markets Legal Committee, Australian Financial Markets Association	Sydney
21	Commonwealth Director of Public Prosecutions	Various
22	Criminal Law Division, Attorney-General's Department (Cth)	Canberra
23	Westpac	Sydney
24	Matthew Kimber, UK Law Commission	London
25	Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia	Various
26	Professor Hans Tjio, National University of Singapore	Singapore
27	Associate Professor Alvin See, Singapore Management University	Singapore
28	Professor James Lee, King's College London	Singapore
29	Paul Yuen, Monetary Authority of Singapore	Singapore
30	Fiona Gray, Linklaters	Singapore
31	Jonathan Horan, Linklaters	Singapore
32	Evan Lam, Linklaters	Singapore
33	Eugene Ooi, Linklaters	Singapore
34	Law Reform Committee, Singapore Academy of Law	Singapore
35	Assistant Professor Nydia Remolina Leon, Singapore Management University	Singapore
36	Associate Professor Zhang Wei, Singapore Management University	Singapore
37	Hagen Rooke, Reed Smith	Singapore

Events

Date	Host Organisation	Event Name
Australian Law Reform Commission events		
16 November 2022	Australian Law Reform Commission	Legislation Renovation: What Interim Report B means for you
15 February 2023	Corporate Law and Financial Regulation Research Program, Melbourne Law School Australian Law Reform Commission	Crypto Assets and Decentralised Autonomous Organisations
Other events		
15 November 2022	Legalwise	Native Title: Critical Considerations (Presented)
25 November 2022	Securities Commission of Malaysia	Financial Regulatory Reforms: the Experience in Australia (Presented)
29 November 2022	The State Bank of Vietnam Vietnam Asset Management Company	Reforms to Develop the NPL Trading Market in Vietnam (Presented)
5 December 2022	Australasian Institute of Anatomical Sciences University of Queensland	Australasian Institute of Anatomical Sciences Conference 2022 (Presented)
6 December 2022	Western Sydney University	Technology, Innovation and Law course (Presented)
20 January 2023	BenchTV	BenchTV Author's Corner (Presented)
20 February 2023	Cape York Institute	Cape York Institute's 2023 Think Tank Series (Presented)
6 April 2023	Monash University	Challenging Government: Law Reform and Public Advocacy course (Presented)

Date	Host Organisation	Event Name
6 April 2023	Australian Securities and Investments Commission	Presentation to ASIC Chief Legal Office (Presented)
27 April 2023	Asian Business Law Institute Singapore Management University	The Regulation of Crypto Assets and Blockchain-based Business Models in Australia (Presented)

Appendix B
Primary Sources

Australian legislation

Commonwealth Acts

Australian Securities and Investments Commission Act 2001 (Cth).

Competition and Consumer Act 2010 (Cth).

Competition and Consumer Act 2010 (Cth) sch 2 ('*Australian Consumer Law*').

Corporate Collective Investment Vehicle Framework and Other Measures Act 2022 (Cth).

Corporations Act 2001 (Cth).

Corporations Amendment (Further Future of Financial Advice Measures) Act 2012 (Cth).

Corporations Amendment (Future of Financial Advice) Act 2012 (Cth).

Corporations Amendment (Professional Standards of Financial Advisers) Act 2017 (Cth).

Crimes Act 1914 (Cth).

Criminal Code Act 1995 (Cth) sch ('*Criminal Code*').

Environment Protection and Biodiversity Conservation Act 1999 (Cth).

Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (Cth).

Financial Services Reform Act 2001 (Cth).

Income Tax Assessment Act 1936 (Cth).

Income Tax Assessment Act 1997 (Cth).

National Consumer Credit Protection Act 2009 (Cth).

National Consumer Credit Protection Act 2009 (Cth) sch 1 ('*National Credit Code*').

Privacy Act 1988 (Cth).

Private Health Insurance Act 2007 (Cth).

Regulatory Powers (Standard Provisions) Act 2014 (Cth).

Social Security Act 1991 (Cth).

Commonwealth legislative instruments

ASIC Class Order — Technical Modifications to Schedule 10 of the Corporations Regulations (CO 14/1252) (Cth).

ASIC Client Money Reporting Rules 2017 (Cth).

ASIC Corporations (Client Money - Cash Common Funds) Instrument 2016/671 (Cth).

ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070 (Cth).

ASIC Corporations (Managed Investment Product Consideration) Instrument 2015/847 (Cth).

ASIC Corporations (NZD Denominated Client Money) Instrument 2018/152 (Cth).

ASIC Corporations (Short Selling) Instrument 2018/745 (Cth).

ASIC Corporations (Shorter PDS and Delivery of Accessible Financial Products Disclosure by Platform Operators and Superannuation Trustees) Instrument 2022/497 (Cth).

ASIC Corporations (Superannuation: Accrued Default Amount and Intra-Fund Transfers) Instrument 2016/64 (Cth).

Australian Securities and Investments Commission Regulations 2001 (Cth).

Corporations Regulations 2001 (Cth).

Financial Planners and Advisers Code of Ethics 2019 (Cth).

Australian case law

Australian Securities and Investments Commission v Kobelt (2019) 267 CLR 1.

Australian Securities and Investments Commission v National Australia Bank Limited [2022] FCA 1324.

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross (2012) 248 CLR 378.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362.

Foreign legislation

Financial Services and Markets Act 2000 (Public Offers and Admissions to Trading) Regulations 2023 (UK).

National Instrument 81-101, Mutual Fund Prospectus Disclosure (BC Reg 1/2000).

Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector [2019] OJ L 317/1.

Appendix C
Illustrative Financial Advice Chapter

This Appendix illustrates how a legislative chapter relating to financial advice may be constructed, as contemplated by **Proposal C6**.[1] The outline in this Appendix shows how financial advice provisions presently located across multiple parts of Chapter 7 of the *Corporations Act* could be restructured and reframed into a single chapter. The chapter would therefore only reflect existing financial advice legislation and in the absence of other substantive reforms, it would not introduce any new obligations or requirements.

The illustrative chapter outline is numbered consistently with it being enacted as part of the FSL Schedule contemplated by **Proposals C9** and **C10**. An illustrative FSL Schedule appears in **Appendix D** to this Interim Report.

In this Appendix, notes (that appear in similar form to legislative notes) are used to give some further detail about specific aspects of the outline.

Chapter 5—Financial Advice

Part 5.1—General obligations of providers of financial product advice

Division 1—Ban on conflicted remuneration

Note: This Division would include provisions equivalent to the obligations in Part 7.7A Div 4 Subdiv C of the Corporations Act. A note could direct readers to Part 5.4 Div 1 of this Chapter, which includes provisions affecting the scope and application of this Division.

Division 2—Ban on asset-based fees on borrowed amounts

Note: This Division would include provisions equivalent to the obligations in ss 964D and 964E of the Corporations Act. A note could direct readers to Part 5.4 Div 2 of this Chapter, which includes provisions affecting the scope and application of this Division.

---

1 For further discussion of **Proposal C6** and the outline in this Appendix, see **Chapter 4** of this Interim Report.

Division 3—Disclosure obligations

Note: This Division would include financial advice-specific obligations to undertake disclosure. These would include provisions equivalent to obligations that appear in Part 7.7 Div 2 and Part 7.9 Div 2 of the Corporations Act. Provisions regulating the form and content of disclosure would appear in the disclosure chapter of the FSL Schedule and in delegated legislation.[2]

Subdivision A—Obligation to give a financial services guide

Subdivision B—Obligation to give a product disclosure statement

Part 5.2—Obligations of providers of general advice

Division 1—Warning statements

Note: This Division would include provisions equivalent to the obligations in s 949A of the Corporations Act.

Part 5.3—Obligations of providers of personal advice

Division 1—General obligations of providers of personal advice

Subdivision A—Best interests duty and related obligations

Note: This Subdivision would include provisions equivalent to the obligations contained in Part 7.7A Div 2 of the Corporations Act. A note could direct readers to Part 5.4 Div 3 of this Chapter, which includes provisions affecting the scope and application of this Subdivision.

Subdivision B—Obligations in relation to charging ongoing fees to clients

Note: This Subdivision would include provisions equivalent to the obligations contained in Part 7.7A Div 3 of the Corporations Act. A note could direct readers to Part 5.4 Div 4 of this Chapter, which includes provisions affecting the scope and application of this Subdivision.

Subdivision C—Statements of Advice

Note: This Subdivision would include provisions equivalent to the obligations to give SoAs (Statements of Advice) contained in Part 7.7 Div 3 of the Corporations Act. A note could direct readers to Part 5.4 Div 5 of this Chapter, which includes provisions covering the form and content of SoAs.

---

2 See **Chapter 3** of this Interim Report for further discussion of the scope and design of a chapter relating to disclosure for financial products and financial services.

Subdivision D—Obligation to give a product disclosure statement

Note: This Subdivision would include provisions equivalent to the obligation in s 1012A of the Corporations Act, which only applies to personal advice. Provisions regulating the form and content of disclosure would appear in the disclosure chapter of the FSL Schedule and in delegated legislation.[3]

Division 2—Obligations of individuals providing personal advice

Note: Provisions in this Division are affected by various ASIC and Ministerial powers contained in Part 5.5 of this Chapter. Notes could be used to direct readers to specific powers where relevant.

Subdivision A—Registration requirements in certain circumstances

Note: This Subdivision would include provisions equivalent to the obligations contained in Part 7.6 Div 8C Subdiv A of the Corporations Act. A note could direct readers to Part 5.4 Div 6 of this Chapter, which includes provisions regulating when and how a person can become registered.

Subdivision B—Professional standards for relevant providers

Note: This Subdivision would include provisions equivalent to the obligations contained in Part 7.6 Div 8A of the Corporations Act.

Part 5.4—Complying with specific obligations

Division 1—Complying with conflicted remuneration obligations

Subdivision A—What is conflicted remuneration?

Note: This Subdivision would include provisions equivalent to Part 7.7A Div 4 Subdiv B of the Corporations Act, relevant to Part 5.1 Div 1 of this Chapter.

Subdivision B—Rebate of conflicted remuneration

Note: This Subdivision would include provisions equivalent to Part 7.7A Div 4 Subdiv D of the Corporations Act, relevant to Part 5.1 Div 1 of this Chapter.

Division 2—Complying with the ban on asset-based fees on borrowed amounts

Note: This Division would include detail not appropriate for

3 See **Chapter 3** of this Interim Report for further discussion of the scope and design of a disclosure chapter.

delegated legislation in relation to the ban on asset-based fees on borrowed amounts in Part 5.1 Div 2 of this Chapter.

Division 3—Complying with the best interests duty

Note: This Division would include detail not appropriate for delegated legislation in relation to the operation of the best interests duty in Part 5.3 Div 1 Subdiv A of this Chapter. Such detail could include provisions such as ss 961B(2)–(5) and Part 7.7A Div 2 Subdiv F of the Corporations Act.

Division 4—Complying with obligations for charging ongoing fees to clients

Note: This Division would include detail not appropriate for delegated legislation in relation to the obligations for charging ongoing fees to clients contained in Part 5.3 Div 1 Subdiv B of this Chapter. Such provisions could include detail as to the form and content of fee disclosure statements in s 962H and detail as to consent in ss 962T–962W of the Corporations Act.

Division 5—Complying with the Statements of Advice requirements

Note: This Division would include detail not appropriate for delegated legislation in relation to obligations to give SoAs in Part 5.3 Div 1 Subdiv C of this Chapter. This would include relevant provisions regulating the form and content of SoAs, presently contained in Part 7.7 Div 3 of the Corporations Act.

Division 6—How to become a registered relevant provider

Note: This Division would include detail not appropriate for delegated legislation in relation to becoming a relevant provider, presently contained in Part 7.6 Div 8A Subdivs B–C of the Corporations Act. This detail is relevant to Part 5.3 Div 2 Subdiv A of this Chapter.

Part 5.5—Ministerial and ASIC powers

Note: This Part would contain financial advice-related powers presently located across the Corporations Act. These would include powers equivalent to those located in Part 7.6 Divs 8A–8B of the Corporations Act, headings for which are outlined below.

Division 1—Action against relevant providers

Subdivision A—Action by Financial Services and Credit Panels

Subdivision B—Proposed action notices etc.

Appendix D
Illustrative FSL Schedule

This Appendix illustrates how the financial services-related aspects of Chapter 7 of the *Corporations Act* and the entirety of Part 2 Div 2 of the *ASIC Act* may be restructured within Sch 1 to the *Corporations Act* (the FSL Schedule), as contemplated by **Proposals C9** and **C10**.[1]

The illustrative outline in this Appendix is focused on the potential macrostructure of the FSL Schedule. As explained in **Chapter 1** of this Interim Report, the macrostructure includes provisions above the section-level, such as parts and divisions. There is limited development of the microstructure in the illustrative outline, such as the location and content of particular sections.

The illustrative outline therefore does not exhaustively replicate the existing legislation subject to **Proposals C9** and **C10**. Instead, it aims to show how the FSL Schedule might appear and how restructuring may improve the existing legislation. Section numbering is indicative only.

In this Appendix, notes (in a similar form to legislative notes) are used to give some further detail about specific aspects of the outline.

The ALRC invites stakeholder feedback on the illustrative outline in this Appendix in response to **Question C11**.

Schedule 1—The Financial Services Law

1 For further discussion of **Proposals C9** and **C10**, and the illustrative outline in this Appendix, see **Chapter 6** of this Interim Report.

Chapter 1—Introduction and application

Part 1.1—Preliminary

Part 1.2—Objects of the Financial Services Law

Part 1.3—How to use the Financial Services Law

s 1—How the Financial Services Law is arranged

s 2—How to identify defined terms and find definitions

s 3—The Scoping Order

s 4—Rulebooks

Note: The provisions in this Part would explain some of the design features of the FSL Schedule, such as prioritising important information, the use of signposts, how defined terms are identified (if applicable), and where definitions are located. This Part would also introduce the Scoping Order and Rulebooks.[2] Notes in this Part could refer to the powers to make scoping orders and Rules later in Part 7.1.

Part 1.4—Application and scope of the Financial Services Law

Division 1—Introduction

s 5—Simplified outline of this Part

Note: This section may also explain the concept of 'scope', and what is meant by provisions that refer to 'narrowing the scope of provisions'.[3]

Division 2—Financial products

s 6—Definition of *financial product*

s 7—How this Act applies to composite products

s 8—Narrowing the scope of provisions applying to financial products

Division 3—Financial services

s 9—Definition of *financial service*

s 10—Narrowing the scope of provisions applying to financial services

---

2 For discussion of the different elements of the ALRC's proposed legislative model, including the Scoping Order and Rulebooks, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.4]–[2.6], [2.15]–[2.56].

3 See ss 765A and 766J of the Prototype Act in Prototype Legislation B: Australian Law Reform Commission, 'Prototype Legislation' <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/prototype-legislation/>.

Chapter 2—Consumer protections and generally applicable offences[4]

Part 2.1—Introduction

s 11—Simplified outline of this Chapter

Part 2.2—General consumer protections

Division 1—Core standards of commercial behaviour[5]

s 12—General prohibition on misleading or deceptive conduct

s 13—General prohibition on unconscionable conduct

s 14—General prohibition on harassment and coercion (s 12DJ *ASIC Act*)

Division 2—Unfair contract terms

Note: This Division would contain provisions equivalent to Part 2 Div 2 Subdiv BA of the ASIC Act.

Division 3—Conditions and warranties in consumer transactions

Note: This Division would contain provisions equivalent to Part 2 Div 2 Subdiv E of the ASIC Act.

Part 2.3—Specific consumer protections

Division 1—Compliance with product intervention orders

s 15—A person must comply with a product intervention order (s 1023P *Corporations Act*)

s 16—Civil liability for contravening a product intervention order (s 1023Q *Corporations Act*)

Note: A note to this Division could refer to the later provisions in Part 7.2 relating to the making of product intervention orders.

Division 2—Other specific protections and prohibitions

s 17—Cash price must be stated in certain circumstances (s 12DD *ASIC Act*)

s 18—Offering rebates, gifts, prizes, or other incentives (s 12DE *ASIC Act*)

---

4 See **Chapter 2** of this Interim Report for further discussion of the scope and design of this Chapter of the illustrative FSL Schedule.

5 See **Chapter 2** of this Interim Report for discussion of the ALRC's proposals to consolidate misleading, deceptive, or unconscionable conduct into the first two general prohibitions expressed in this Division.

s 19—Bait advertising (s 12DG *ASIC Act*)

s 20—Referral selling (s 12DH *ASIC Act*)

s 21—Pyramid selling of financial products (s 12DK *ASIC Act*)

Note: These sections illustrate the types of existing specific obligations and prohibitions that may be included in this Part.

Division 3—Deferred sales for add-on insurance products

Note: This Division would contain provisions equivalent to Part 2 Div 2 Subdiv DA of the ASIC Act.

Part 2.4—Design and distribution obligations

Note: This Part would contain provisions equivalent to Part 7.8A of the Corporations Act.

Part 2.5—Generally applicable offences

s 22—Preservation and disposal of records etc (s 1101C *Corporations Act*)

s 23—Concealing etc of books (s 1101E *Corporations Act*)

s 24—Falsification of records (s 1101F *Corporations Act*)

s 25—Precautions against falsification of records (s 1101G *Corporations Act*)

Note: These sections illustrate the types of generally applicable offences that may be included in this Part.

Part 2.6—Enforcement, remedies and other powers

Note: This Part would contain provisions relating specifically to enforcement of the consumer protections contained in the Chapter, including provisions equivalent to, for example, Part 2 Div 2 Subdivs G–GC of the ASIC Act.

Chapter 3—Obligations of financial services providers[6]

Part 3.1—Introduction

s 26—Simplified outline of this Chapter

Part 3.2—General obligations of financial services providers

Division 1—Provider of financial services must be licensed or authorised

6 See **Chapter 5** of this Interim Report for further discussion of the scope and design of the chapters relating to the general regulatory obligations of financial services providers.

s 27—Provider of financial services must be licensed (s 911A *Corporations Act*)

s 28—Providing financial services on behalf of another (s 911B *Corporations Act*)

Division 2—Conduct obligations

Subdivision A—Hawking prohibition

s 29—Prohibition on hawking of financial products (s 992A *Corporations Act*)

s 30—Right of return and refund for hawked financial products (s 992AA *Corporations Act*)

Subdivision B—Restriction on use of certain words or expressions

Note: This Subdivision would contain restructured and reframed provisions equivalent to Part 7.6 Div 10 of the Corporations Act.

Division 3—Remuneration and fees

Subdivision A—Conflicted remuneration

s 31—Product issuer or seller must not give conflicted remuneration (s 963K *Corporations Act*)

Subdivision B—Volume-based shelf-space fees

Note: This Subdivision would contain restructured and reframed provisions equivalent to Part 7.7A Div 5 Subdiv A of the Corporations Act.

Part 3.3—Obligations of financial services licensees

Division 1—General obligations of financial services licensees

Note: This Division would contain restructured and reframed provisions equivalent to s 912A of the Corporations Act.

Division 2—Obligations to clients

s 32—Obligation to cite licence number in documents (s 912F *Corporations Act*)

s 33—Financial services licensee to give priority to clients' orders (s 991B *Corporations Act*)

Note: These sections illustrate the types of existing specific obligations and prohibitions that may be included in this Division.

Subdivision A—Obligations to notify and remediate clients

Note: This Subdivision would contain provisions equivalent to Part 7.6 Div 3 Subdiv C of the Corporations Act.

Subdivision B—Dealing with clients' money and other property

Note: This Subdivision would contain provisions equivalent to Part 7.8 Divs 2, 3, and 5 of the Corporations Act.

Division 3—Restrictions on transactions

s 34—Dealings with non-licensees (s 991E *Corporations Act*)

s 35—Dealings involving employees of financial services licensees (s 991F *Corporations Act*)

Division 4—Obligations to inform and assist ASIC

Note: This Division would contain provisions equivalent to ss 912A(1)(cc), (3A)–(3G) and Part 7.6 Div 3 Subdiv B of the Corporations Act.

Division 5—Obligations in relation to financial records, statements and audit

Note: This Division would contain provisions equivalent to Part 7.8 Div 6 of the Corporations Act.

Division 6—Obligations in relation to specific products and services

Subdivision A—Obligations relating to insurance

Note: This Subdivision would contain provisions equivalent to Part 7.8 Div 4 of the Corporations Act.

Subdivision B—Responsible lending conduct for margin lending facilities

Note: This Subdivision would contain provisions equivalent to Part 7.8 Div 4A Subdiv A of the Corporations Act.

Subdivision C—Notice of margin calls under margin lending facilities

Note: This Subdivision would contain provisions equivalent to Part 7.8 Div 4A Subdiv B of the Corporations Act.

Chapter 4—Disclosure about financial products and financial services[7]

Part 4.1—Introduction

s 36—Simplified outline of this Chapter

Part 4.2—General obligations and penalties

Note: This Part would contain consolidated provisions of general application to financial products and financial services disclosure.

Division 1—Disclosure standards

Note: This Division would contain the core and generally applicable disclosure standards, including that disclosure must be 'clear, concise and effective'.

Division 2—General offences

Note: This Division would include offences for defective disclosure and failing to undertake disclosure.

Division 3—Other requirements

Part 4.3—Disclosure about financial services

Note: This Part would contain provisions requiring disclosure in relation to financial services. This would include provisions equivalent in scope to Part 7.7 Divs 2 and 3A of the Corporations Act. This Part would not include provisions requiring the giving of Statements of Advice equivalent to Part 7.7 Div 3. Specific financial advice disclosure requirements appear in Chapter 5 of this illustrative FSL Schedule.

Division 1—When disclosure document must be given

Division 2—Form and content of disclosure document

Division 3—Further obligations

Part 4.4—Disclosure about financial products

Note: This Part would contain provisions requiring disclosure in relation to financial products other than securities. This would include provisions equivalent in scope to Part 7.9 Div 2 of the Corporations Act. Specific financial advice disclosure requirements appear in Chapter 5 of this illustrative FSL Schedule.

---

7 See **Chapter 3** of this Interim Report for further discussion of the scope and design of a chapter relating to disclosure for financial products and financial services.

Division 1—When disclosure document must be given

Division 2—Form and content of disclosure document

Division 3—Further obligations

Part 4.5—Specific disclosure regimes

Note: This Part would contain provisions that create specific disclosure regimes. This would include provisions equivalent to Part 7.9 Divs 5A, 5B, and 5C of the Corporations Act.

Chapter 5—Financial advice[8]

*Note: This Chapter would contain the range of provisions relating to financial advice outlined in Proposal C6 and **Appendix C** to this Interim Report.*

Chapter 6—Financial services licensees and representatives[9]

Part 6.1—Introduction

s 37—Simplified outline of this Chapter

Part 6.2—Representatives of financial services licensees

Division 1—Authorised representatives

Note: This Division would contain provisions equivalent to Part 7.6 Div 5 of the Corporations Act.

Division 2—Liability of financial services licensees for representatives

Note: This Division would contain provisions equivalent to Part 7.6 Div 6 of the Corporations Act.

Part 6.3—When a licence can be varied, suspended or cancelled

Note: This Part would contain provisions equivalent to Part 7.6 Div 4 Subdiv C of the Corporations Act.

---

8 See **Chapter 4** of this Interim Report for further discussion of the scope and design of a chapter relating to financial advice. A more detailed outline of the contents of a financial advice chapter appears in **Appendix C** of this Interim Report.

9 See **Chapter 5** of this Interim Report for further discussion of the scope and design of the chapters relating to the general regulatory obligations of financial services providers.

Part 6.4—Banning or disqualification of persons from providing financial services

Note: This Part would contain provisions equivalent to Part 7.6 Div 8 of the Corporations Act.

Part 6.5—Australian financial services licences

Division 1—How to get a licence

Note: This Division would contain provisions equivalent to Part 7.6 Div 4 Subdiv A of the Corporations Act.

Division 2—The conditions on a licence

Note: This Division would contain provisions equivalent to Part 7.6 Div 4 Subdiv B of the Corporations Act.

Chapter 7—Ministerial and ASIC powers

Part 7.1—Scoping orders, financial services rules and specific exemptions

Note: This Part would contain provisions equivalent to Part 7.11A of the Prototype Act forming in Prototype Legislation B.[10]

Part 7.2—Product intervention orders

Note: This Part would contain provisions equivalent to Part 7.9A of the Corporations Act, with the exception of the obligations to comply with a product intervention order.

Part 7.3—Authorising and regulating external dispute resolution

Note: This Part would contain provisions equivalent to Part 7.10A of the Corporations Act.

Chapter 8—Dictionary

Note: This Chapter would contain any rules for interpretation and either the definition, or a signpost to the definition, of terms defined for the purposes of the Financial Services Law.[11]

---

10 See Australian Law Reform Commission (n 2). For discussion of the different elements of the ALRC's proposed legislative model, including the Scoping Order and Rulebooks, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.4]–[2.6], [2.15]–[2.56].

11 For discussion of the scope of the dictionary in the FSL Schedule, see **Chapter 6** of this Interim Report.

Appendix E
Illustrative Navigability Aid

This Appendix illustrates how a 'skeleton' FSL Schedule, discussed in **Chapter 7** of this Interim Report, may provide a navigability aid for users of existing financial services legislation. The illustrative simplified outlines in this Appendix show how such outlines could be used to explain where the legislation relevant to a particular theme is presently located. They may also foreshadow the structure of a fully implemented FSL Schedule, helping users to develop a mental model of the legislation in advance of its enactment and commencement.

The chapter numbering in this Appendix is based on the structure of the illustrative FSL Schedule in **Appendix D** to this Interim Report. Section numbering is included only to aid readability and does not represent a proposed location for these provisions.

Schedule 1—Financial Services Law

Chapter 1—Introduction and application

Chapter 2—Consumer protections and generally applicable offences

1100 Simplified outline of consumer protections and generally applicable offences in existing legislation

Definitions for consumer protection obligations

Generally applicable consumer protection provisions adopt the definitions of ***financial service*** and ***financial product*** located in sections 12BAA and 12BAB of the *Australian Securities and Investments Commission Act 2001*. Consumer protection provisions will apply to persons providing financial services and financial products within the meaning of those sections.

General and specific consumer protections

Persons providing financial services must comply with general and specific consumer protections. Consumer protections are in Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* and Chapter 7 of the *Corporations Act 2001*.

Consumer protections in the Australian Securities and Investments Commission Act 2001

Subdivisions BA, C, D, DA, and E of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* include consumer protections such as the general prohibitions on misleading or deceptive conduct, unconscionable conduct, and unfair contract terms. Penalties and remedies in relation to these consumer protections are contained in Subdivisions G, GA, GB, GC, and H of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001*.

Consumer protections in the Corporations Act 2001

Product intervention orders can be made in relation to financial products issued to retail clients. Persons covered by a product intervention order must comply the terms of the order. Product intervention order provisions appear in Part 7.9A of the *Corporations Act 2001*.

Most persons issuing or selling financial products must comply with design and distribution obligations located in Part 7.8A of the *Corporations Act 2001*.

Generally applicable offences

Persons regulated by provisions of the *Corporations Act 200*1 may be subject to generally applicable offences located in various sections outside Chapter 7 of the Act. These include sections 1101C, 1101E, 1101F, and 1101G.

Chapter 3—Obligations of financial services providers

2200 Simplified outline of generally applicable regulatory obligations of financial services providers in existing legislation

Definitions and concepts for regulatory obligations

Regulatory obligations generally adopt the definitions of ***financial service*** and ***financial product*** located in Divisions 3 and 4 of Part 7.1 of the *Corporations Act 2001*. Regulatory obligations will therefore apply to persons providing financial services and financial products within the meaning of those sections.

Many regulatory obligations only apply to financial services licensees and their representatives. Other provisions may apply to any person providing financial services.

General regulatory obligations of persons providing financial services

Persons providing financial services must comply with generally applicable regulatory obligations contained in Chapter 7 of the *Corporations Act 2001*. These include obligations to:

- be licensed or authorised when carrying on a financial services business (Division 2 of Part 7.6);
- comply with restrictions on hawking financial products (sections 992A and 992AA);
- comply with restrictions on remuneration and fees (Divisions 4, 5, and 6 of Part 7.7A); and
- comply with restrictions on terminology (Division 10 of Part 7.6).

Obligations of financial services licensees

Financial services licensees must comply with a range of general and specific obligations.

General obligations

General obligations appear in Subdivision A of Division 3 of Part 7.6 of the *Corporations Act 2001*. This Subdivision includes the obligation to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly. Several general obligations, such as a prohibition on unconscionable conduct and an obligation to give priority to clients' orders, appear in Division 7 of Part 7.8.

Specific obligations

Specific obligations appear in various provisions of the *Corporations Act 2001*:

- Subdivisions B, C, and D of Division 3 of Part 7.6 contain obligations to inform and assist ASIC, notify and remediate clients, and cite licence numbers.
- Division 11 of Part 7.6 contains restrictions on agreements with unlicensed persons relating to the provision of financial services.
- Divisions 2, 3, 5, and 9 of Part 7.8 contain obligations in relation to dealing with client money and other property.
- Division 6 of Part 7.8 contains obligations in relation to preparing financial records and financial statements, and in relation to the appointment of auditors.

Product-specific obligations

Divisions 4 and 4A of Part 7.8 contain obligations in relation to insurance and margin lending facilities.

Procedural and administrative provisions

Chapter 6 of this Schedule outlines procedural and administrative provisions relating to financial services licensees and authorised representatives.