

### WEBINAR — From Ideas to Action: What Interim Report C means for you

MONDAY 10 JULY 2023

#### TRANSCRIPT

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Justice Craig Colvin

Hello and welcome everyone to today's Australian Law Reform Commission webinar 'From Ideas to Action: what Interim Report C means for you'. We thank you for your interest and participation. I'm Justice Craig Colvin, I am a part time Commissioner of the Law Reform Commission and joining me for today's webinar, and you'll meet them in a moment, are my colleagues at the Commission, Chris Ash, Ellie Filkin and Nicholas Simoes da Silva.

May I begin by acknowledging the Traditional Owners of the land on which we meet and wherever you may be joining us from around Australia. I join the webinar from Boorloo, Perth, next to the Derbal Yerrigan the place of the Whadjuk people of the Noongar Booja. I acknowledge their continuing culture and would like to pay my respects to their elders past and present.

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Justice Craig Colvin

The purpose of today's webinar, of course, is to discuss Interim Report C. It is the last of three interim reports in the Commission's Inquiry into the Legislative Framework for the Corporations and Financial Services Regulation. We have been building to this one, and as you may be aware, Interim Report A focused on the use and importance of definitions within the structure in the legislation. Interim Report B focused on the coherence of the overall regulatory design and the hierarchy of laws.

Now Interim Report C focuses on how Chapter 7 of the *Corporations Act* might be reframed or restructured to achieve a legislative framework for financial services that is clearer, more coherent, and more effective. I'd like to point out that all of the ALRC's publications relating to inquiry, including the interim reports, background papers and recordings of previous webinars and podcasts can be accessed and at the ALRC's website, which I would encourage you to visit.

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Justice Craig Colvin

We're keen to receive your feedback on the issues raised by Interim Report C, whether through formal submissions in response to Interim Report C or through consultations. The Interim Report represents the final opportunity for submissions before the final report on the inquiry, which is due to be published in November this year. The closing date for formal submissions is the 26th of July 2023.

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Justice Craig Colvin

I would like to thank everyone who has contributed to the work to date. Your contributions are greatly appreciated. They're essential in fact for developing meaningful and practical reforms. So let me give you a brief outline of Interim Report C before inviting my colleagues to speak. As with earlier reports, it makes various recommendations and puts forward a number of proposals and questions for engagement.



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Justice Craig Colvin

A key feature of the report is the proposal that most of Chapter 7 of the *Corporations Act* be restructured and reframed in a schedule to the Act, which may be known as the Financial Services Law. This schedule would also incorporate the consumer protections that relate to financial services that are currently in Part 2 Division 2 of the *ASIC Act*.

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Justice Craig Colvin

Ellie will explain this in a little more detail. Both Ellie and Nicholas will also explain how the ALRC's proposals for improving the structure and framing of Chapter 7 would be implemented independently, if that was chosen, of a new schedule to the *Corporations Act*. Interim Report C also identifies a number of principles that it is thought should guide the structure and framing of the legislation.

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Justice Craig Colvin

These principles are generally accepted in the literature and amongst professional drafters, but exactly what they mean for everyday users in a particular context that is, those who are affected by the rules is not often discussed. From the personal perspective of someone who has to struggle with interpreting legislation on an almost daily basis, structure and framing of legislation are crucial. This is because the rules of statutory interpretation require that when interpreting the text of a statute, a person must have regard to its context and purpose.

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Justice Craig Colvin

If the structure and framing do not help to expose with clarity, that context and purpose, then task of statutory interpretation made very difficult. The formal way in which lawmakers communicate their intentions to those who must interpret the law breaks down if the structure and framing isn't working well. Chris will discuss in further detail why the structure and framing of legislation matters not just for judges, but commercially as part of everyday business practice.

00:05:33:15 - 00:06:21:13

Justice Craig Colvin

Interim Report C also contains a chapter dedicated to implementing the proposed reforms. This deals with practical issues for implementation and the potential benefits. Nicholas will discuss these aspects and the ALRC's roadmap for implementing key reforms arising out of the Inquiry. In particular, he will explain the proposal to establish a dedicated taskforce, or taskforces, to oversee implementation. As I mentioned earlier, Interim Report C represents the last opportunity to make submissions before the final report and we therefore encourage feedback on the approaches to implementation that are discussed in Interim Report C.

00:06:21:13 - 00:06:55:09

Justice Craig Colvin

The report also contains four recommendations that formalise proposals from Interim Report B. These relate to making offense and civil penalty provisions easier to identify and the consequences for their breach easier to understand. So, with that introduction, I will now invite my colleagues to discuss three of the key themes arising out of Interim Report C, and to join me after that for a Q&A session.

00:06:55:10 - 00:07:50:01

Justice Craig Colvin

If anybody has questions or comments to make for the purposes of the Q&A, then please email your questions to [financial.services@alrc.gov.au](mailto:financial.services@alrc.gov.au). That's [financial.services@alrc.gov.au](mailto:financial.services@alrc.gov.au). So, thanks to you who have submitted questions in advance. We'll try and cover as much as we can, and we'll certainly take note of all of the questions as we progress the final report.

For now, it's time to turn to our first topic, and I'll ask Chris to speak to the issue of the importance of structure and framing of legislation and what we mean by those terms.

So, Chris, can you tell us why structure and framing matters for anyone who may come within the operation of the legislation?

00:07:50:02 - 00:08:49:04

Christopher Ash

Thanks very much, Judge. They are very technical things and there's no perfect analogy, but one useful way that I at least find useful, to think about it is to see structure framing, a little bit, as being like a sporting field. So, let's take a football pitch, for example, with the FIFA Women's World Cup starting next week. Ordinarily you might see one that looks like this picture with the lines all straight, the field level and smooth, then the game will be played and almost no one will notice the field.

But if the ground is rough or uneven and the lines aren't drawn straight, then you'll probably notice it. Furthermore, the game play will probably be affected and possibly even the outcome, if the ball takes a bounce here or there off one of the rough patches. So, the same goes for the structure and framing of legislation. No one really notices them until they make life harder than it needs to be.

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Christopher Ash

This is how a focus on structure and framing in this third interim report fits within the Inquiry as a whole, because the Inquiry is really about identifying and, where possible, trying to minimise the sources of unnecessary complexity so as to make the legislation as easy to navigate and understand as possible. So, before we get much further, I should explain what we mean by the concepts of structure and framing. Both relate to how legislation is designed or crafted and how information is organised and presented.

Structure is mostly about the order in which things appear, as well as other aspects of presentation like whitespace and indentation. So relevant questions for structure are things like whether all materials should go in one Act or be spread across two Act's, and then how that material should be distributed across parts, chapters, or sections, etc. Framing is a broad concept which includes structure, but also all the other context that helps to shape a communication.

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Christopher Ash

In legislation this means headings, simplified outlines and notes. This still sounds quite abstract, so hopefully a couple of examples will help to illustrate why structure and framing are important. Now this slide has a lot of text on it, which I won't read, and I don't expect you to read either. But what it shows is the section of a fictional Milk Act, that we have drafted deliberately poorly so as to show the problems of poor structure and framing, and to show how that can be improved.

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Christopher Ash

Thankfully, no actual modern legislation is quite this bad. So, to step through just a few issues, Firstly, there are no useful subheadings, subsections, or white space. Instead, all the information appears in just one fairly uninviting block paragraph. Second, when we start looking at some of the detail, there is no intuitive order to the section. It begins with a specific power that applies to the Minister and for the Minister to make rules, which appears well before the generally applicable requirement that you need a license in order to sell milk. Even then, when that requirement is presented, an exception from the requirement for small businesses appears before it.

Thirdly, the section doesn't prioritise important information. The fact that it's an offence to sell milk without a license and that it carries a fairly hefty penalty is tucked away at the end of the section; when in reality this is probably the most important message that the section needs to convey.

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Christopher Ash

This slide now, using almost the same wording as the previous, shows the difference that structure and framing can make. Straight away you can see that adding some whitespace, breaking the material up among sections and adding some indentation makes the section appear much more approachable. Instead of the offense being at the end, this version prioritises the fact that it's an offense to sell milk without a license.

Secondly, the provisions that apply to sellers of milk are coherently grouped together and they aren't interrupted

by the administrative detail about how to apply for a licence. Which you're only likely to look at once anyway, and so is presented in a different part of the Act. Thirdly, the order makes more sense. It flows more naturally from the obligation to be licenced to the fact that you need to comply with certain rules once you're licenced, before the less important information about exactly how rules are made appears.

00:12:19:07 – 00:12:46:03

Christopher Ash

Fourthly, there are useful headings that give a clear idea of what each section and part is about. And finally, there are some aids to interpretation that help users find their way around the legislation. So, the first note, for example, shows where the procedures for applying for a licence can be found, as well as the definition of milk. The second shows where the rules that must be complied with under that section can be found.

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Christopher Ash

Now, we haven't just plucked this structure out of thin air. Instead, we've identified several principles that we've applied and that we think can be applied more generally to help structure and frame legislation. We've called them 'working principles' because in different cases their relative importance will differ, and they may need to be traded off against each. So, the first four of the principles on this slide, I've already illustrated in the Milk Act example: grouping, coherence, prioritisation and intuitive flow.

00:13:21:13 - 00:13:49:07

Christopher Ash

Consolidation refers to avoiding duplication and overlap, basically don't say the same thing twice, even if you do it in slightly different terms. Succinctness is similar in calling for brevity and clarity wherever possible. The final principle on this list, which we've labelled mental models, comes from the world of design more generally. People use mental models in their everyday lives in order to navigate and understand the world, and good design gives people clues about how to use things.

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Christopher Ash

So, for example, the shopping trolley icon on a website is fairly self-explanatory and it corresponds with most people's mental model about how it is that you buy something from a website. That same logic can be applied to legislation so that the design helps users of the legislation form and use mental models of that legislation. All of these principles further what we suggest should be the objective of legislative design, namely, to make legislation as easy to navigate and understand as possible.

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Christopher Ash

Now, of course, in the real world there are constraints that make these principles hard to apply. So, for example, while these principles are generally applied in the case of new or modern legislation, older or frequently amended legislation like Chapter 7 of *Corporations Act*, as Ellie will explain shortly, generally doesn't adhere to these principles. Similarly, complex policy underpinning legislation can make it more difficult to apply these principles, and so too can it be made harder if there are time pressures in the design and drafting of legislation.

But the principles and the objective are both still important, and that's for a number of reasons. First, legislation is generally about changing behaviours to achieve certain results. Legislation that's harder to navigate and understand will be less likely to be understood and therefore less likely to be effective in achieving its goals, and those results. Secondly, legislation is necessary to achieve the desired outcomes.

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Christopher Ash

If legislation is difficult to navigate and understand, then it imposes burdens of compliance that are greater than necessary. Thirdly, the rule of law dictates that the law should be knowable and accessible. Legislation that's hard to navigate and understand goes contrary to this principle. So, what does this actually mean in the real world? Like complexity more generally, poor structure and framing can create costs in several ways.

Firstly, they increase compliance costs, and this is simply because it takes more time to navigate, understand, and then attempt to follow the law. Secondly, because compliance is less likely to be achieved, the costs arising

from noncompliance can increase. This can include consumer harm and litigation costs incurred by regulators in enforcing non-compliance. Finally, poor structure and framing make it harder for people to know and enforce their rights.

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Christopher Ash

This is particularly important in financial services legislation, which has a strong consumer protection element to it. So, I'll finish there. Hopefully that fairly quick overview has helped to give some idea of why the otherwise abstract world of framing legislation matters for you. Thank you. And back to you, Justice Colvin.

00:17:01:02 - 00:17:34:12

Justice Colvin

Thanks, Chris. We now are going to turn to the second topic, which concerns the way in which Chapter 7 of the *Corporations Act* might be restructured, as Chris identified. You'll hear from Ellie on this topic. So, Ellie a question posed for you is, can you tell us why Chapter 7 should be restructured and reframed, and what a better structure might look like?

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Ellie Filkin

Thank you, Judge. We've used the analogy of a cupboard to help describe Chapter 7 of the *Corporations Act*. It's absolutely chock full of boxes and old crates, and it's poorly organised. It's been a long time since it's been tidied up and it now holds more than it was ever designed to. The feeling of dread that you get when approaching a cupboard like that, is what stakeholders have told us it's like to approach Chapter 7 of the *Corporations Act*.

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Ellie Filkin

Largely due to historical reasons and a frequent amendment history over time, Chapter 7 doesn't adhere to the principles that Chris has described. In the Interim Report we've outlined several examples of the problems that face Chapter 7. However, it really boils down to three main issues.

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Ellie Filkin

Firstly, Chapter 7 really just does too much. Several people have told ALRC that Chapter 7 is more like an Act within an Act, than an actual chapter. This has been an issue since Chapter 7 was introduced. However, it's really gotten worse with time, and if Chapter 7 was made its own Act, it would be the 10th largest Act on the statute book.

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Ellie Filkin

The second issue is it fails to prioritise the key messages. As the Financial Services Royal Commission found there are fundamental norms in the legislation. However, they're hard to find and difficult to identify. These we make clearer with better framing. The spread of consumer protections between Chapter 7 of the *Corporations Act* and Part 2 Division 2 of the *ASIC Act* is a good example of this issue.

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Ellie Filkin

This creates overlap and reduces that communicative power, when they really are fundamental norms and should be clear on the face of the legislation. Third, the structure and framing of Chapter 7 makes finding that relevant or harder than it needs to be. Users often have to wade through a lot of irrelevant provisions in order to determine which of the provisions are relevant to their situation, and there's little help in the legislation itself to help them navigate and find the relevant areas.

The diagram to the right side of the slide shows how the provisions regulating the delivery of financial advice are spread across four different parts of the Act and dozens of disparate provisions. This lack of structure has in turn generated a large amount of ASIC guidance which attempts to make up for the lack of framing to help users navigate the law. So, what to do?

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Ellie Filkin

Much of Interim Report C focused on how Chapter 7 should be repacked, unpacked and repackaged in order to find better homes for different parts of the law that more effectively communicates with users and makes it more user friendly. Several stakeholders have suggested to the ALRC that financial services should be its own Act and a lot of other jurisdictions have some form of dedicated Financial Services Act.

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Ellie Filkin

However, for historical and constitutional reasons, that's just not possible at the moment. So, the ALRC has suggested, in lieu of this, that the financial services aspects of Chapter 7 should be moved into its own schedule, as well as incorporated with Part 2 Division 2 of the *ASIC Act*. This, in turn, could be known as the Financial Services Law or FSL Schedule for short.

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Ellie Filkin

There will be several benefits to this. Primarily, it would create a clear home for financial services law, which would give it a better sense of legislative identity. Experience with the Australian Consumer Law is a good comparison here, experience has suggested that the structure and title has improved public awareness among consumers. Using a schedule also provides the greatest flexibility in applying the principles Chris described earlier, and it also gives us more real estate to create new provisions and new numbering systems.

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Ellie Filkin

Under this approach, the parts of Chapter 7 that more closely relate to financial markets would remain in Chapter 7. It's possible that they would also benefit from review and restructure in accordance with the principles Chris mentioned earlier. So, these could be done at the same time or as part of a later future reform project.

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Ellie Filkin

Interim Report C has a lot more detail about what the FSL Schedule could look like, including an illustrative outline. What I'll do now is briefly step through the main aspects of this chapter level overview of the FSL Schedule. Each chapter in FSL Schedule will be focused on a particular theme of regulation. The first theme would be generally applicable consumer protection provisions.

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Ellie Filkin

This outline here is what that chapter would look like, and we think this approach has a number of benefits. Firstly, it will better prioritise important obligations like the fundamental obligations not to mislead or deceive, and these general obligations would help frame later more specific obligations. These core standards of commercial behaviour apply to financial providers and should help guide their behaviour as towards consumers and therefore should be looked at as best.

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Ellie Filkin

Secondly, it clearly provides provisions by theme and application. These provisions have the broader scope as they apply to anyone providing financial services, and they apply the *ASIC Act* definition of financial products and financial services. Currently, these provisions are spread across the *ASIC Act* and different parts of Chapter 7. So, grouping them would also provide a clearer policy platform for future consumer protection provisions as they develop.

Finally, as the first substantive chapter of the FSL Schedule, its location would emphasise consumer protection as a fundamental policy that underlie that underlies financial services legislation.



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Ellie Filkin

The second chapter theme would be disclosure. Creating a single chapter relating to disclosure will make it much easier to find and navigate the relevant law and would also provide an opportunity for consolidation where there is currently duplication between different sources. As Nicholas will touch on, disclosure provisions are among the most complicated in the Act, and therefore those that would benefit the greatest from reform.

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Ellie Filkin

Third, we have suggested that there should be a chapter dedicated to financial advice. Compared to the diagram I showed you earlier, this outline would be much easier to navigate, and it would include provisions that only apply to the provision of financial advice. It would also better reflect the existence of a tailored regulatory regime for financial advisers, which treats it as a different profession to other financial services.

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Ellie Filkin

The final theme is that of general regulatory obligations, which we suggest should be split across two different chapters. This approach more clearly communicates the scope of different provisions. So, while Chapter 2 of the proposed schedule would apply to a broader range of products and services, by applying the definition currently in the *ASIC Act*, Chapter 3 would apply to a narrow range by applying the definition in Chapter 7 of the *Corporations Act*.

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Ellie Filkin

It also shows how more important obligations could be given priority of place over those that were less important, or administrative and procedural. Instead of being in Chapter 3, these could be placed in Chapter 6. Signposts could be placed in Chapter 3 to alert users of legislation that there are relevant provisions located later in Chapter Six.

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Ellie Filkin

Of course, the ALRC is conscious that creating the financial services law would be a lot of work and could be disruptive. Nicholas will discuss in more detail how this could be managed, but even if the idea to create a financial services law in a schedule weren't embraced, each of the chapters discussed today could instead be implemented within the body of the *Corporations Act*, either by creating new chapters or as parts within a chapter. Regardless of how they might be implemented the ALRC's proposals produce legislation that is easier to navigate and understand, and which provides a better framework for policy developments into the future.

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Justice Colvin

Slight delay while an old judge works out which button to push there, I'm afraid. So, Nicholas. Our final topic will be addressed by Nicholas and deals with implementation of the proposed reforms. As Ellie has foreshadowed. Throughout Inquiry we've been asking stakeholders how reforms might be implemented and how transition costs can be managed. So, the question for Nicholas is, can you tell us about the proposed road map for implementing reform and how the reforms could help reduce the costs that arise from the existing complexity of the law?

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Nicholas Simoes da Silva

Thank you, Judge. Yes, I think it's fair to say that implementation has been of keen interest to all stakeholders, and I think the main message we've heard from stakeholders is a real interest in understanding not only how reforms can be implemented so as to maximise their benefits, but also so as to minimise and manage any costs associated with reform.

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Nicholas Simoes da Silva

So just turning then to the core package of reforms that the ALRC has put forward. Ellie has talked to two of these. So, the first is the reformed legislative model, which was the subject of Interim Report B, and that covers a declutter Act, combined with a scoping order and rules. The scoping order, would contain exemptions and exclusions, and rules would contain prescriptive detail, appropriate for delegated legislation.

The Act would focus on the key regulatory obligations and fundamental norms and be restructured in accordance with the second limb of the package of reforms proposed by the ALRC. The Act would be restructured and reframed so as to make the law easier to find, to understand and navigate, and therefore to understand your core obligations and the penalties that might be associated with them.

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Nicholas Simoes da Silva

The final of the reforms proposed by the ALRC, Ellie has also about, the financial services law. These are the three main proposals so far made by the ALRC and which will be the subject of the final report. But there are other proposals as well in relation to definitions, for instance, that will also be discussed in that final report.

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Nicholas Simoes da Silva

Just to revisit what Chris discussed earlier, why do we think implementation matters? And we've, as Chris flagged, identified really three main reasons. These are that unnecessarily complex legislation makes compliance harder and more costly, it makes compliance less likely, and it makes it harder for consumers and investors to understand and exercise their legal entitlements. So just looking at that first point in Interim Report C, we gathered some data together to kind of try and quantify the compliance costs associated with the existing legislative framework.

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Nicholas Simoes da Silva

So, we gave a little taste of it, and even looking at the small data that we had, it gave the sense that there were billions of dollars being spent on an increasingly complex, and in some cases incoherent, legislative framework for corporations and financial services. Those costs were growing rapidly, in the data that we were looking at the costs were growing incredibly quickly.

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Nicholas Simoes da Silva

The second main issue, why we think implementation is so critical is that unnecessarily complex legislation makes compliance less likely and supervision of compliance more complex as well. The evidence for that, again, billions of dollars paid out over the last five years, in compensation programs and civil penalties by major financial services institutions. We think improvements to the legislative framework have the potential to reduce compliance costs, to potentially enhance compliance and unlock tens of millions of dollars in savings in terms of not only compliance costs but also reduced consumer harm, reduced regulatory expenditure, for instance.

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Nicholas Simoes da Silva

Again, the final reason is the impact that legislative complexity has on consumers and investors. Given the existence of institutions like the Australian Financial Complaints Authority, the legislation is something that consumers do have to engage with, and that investors do have to engage with as they seek to access these external dispute resolution or internal dispute resolution mechanisms. Reducing legislative complexity would therefore benefit those investors and consumers, in addition to regulators, to businesses and other regulated entities.

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Nicholas Simoes da Silva

Turning then to the package of reforms, as Chris flagged at the beginning, some of these could be implemented independently of one another, but we nonetheless have proposed them as a package. We think they work together to address the sources of complexity in corporations and financial services legislation. So, for instance,



the legislative model would reduce the prescriptiveness in the in Chapter 7 of the *Corporations Act*, for instance, focusing on the core norms and obligations, while delegated legislation dealt with some of the more prescriptive detail.

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Nicholas Simoes da Silva

The Act would then be restructured and reframed, now that it's less prescriptive, for instance, so that it better communicates the core obligations and norms that apply to people and makes it easier to find what provisions apply to which persons, for instance. So just while they can be implemented independently of each other, are suggesting these comprise a reform package and that's how we've thought about how you would implement this package of reforms.

00:31:49:14 – 00:32:13:04

Nicholas Simoes da Silva

So then just looking at how we would undertake implementation, how we suggest it could be undertaken. We talk about a reform roadmap and we've suggested that it comprises six reform pillars, and the first five of these cover all of the financial services related provisions of Chapter 7 of the *Corporations Act* and Part 2 Division 2 of the *ASIC Act*; consumer protection, disclosure, financial advice, as well as licensing and other regulatory obligations.

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Nicholas Simoes da Silva

The sixth pillar is focused on recognising the possibility of future policy development. This is something a number of stakeholders have raised with us, concerns that if government were to continue developing new policy initiatives that might disrupt or render impossible implementation of the ALRC's proposals.

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Nicholas Simoes da Silva

What we've suggested in Interim Report C, is that in fact new policy initiatives will offer a vehicle, a platform for implementing some of the ALRC's proposals. Financial advice is a potentially obvious example of this. If Government were to commit to substantive policy changes, the legislative amendments needed to implement those policy changes would also be used to undertake some of the reforms proposed by the ALRC, such as the creation of a new financial advice chapter, for instance, and consideration being given to reallocating material between primary and delegated legislation.

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Nicholas Simoes da Silva

We think new policy initiatives are not an obstacle to the reforms, but in fact offer a vehicle for implementing them over time and for combining them with other government priorities, for instance. Very briefly as well, the ALRC has suggested that implementation of these pillars should occur in a staged manner. We haven't suggested a big bang where you undertake the amendments for each of the pillars but commence them at a single point in time.

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Nicholas Simoes da Silva

We've suggested that you approach these one at a time perhaps, leaving sufficient room for consultation and for transition periods before their commencement. This allows governments to choose which of the pillars they wish to pursue and not commit to all of them, for instance – a point I'll return to in a moment.

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Nicholas Simoes da Silva

Very quickly as well, just to flag the conceptual framework that the ALRC put forward in Interim Report C. I won't go into much detail about this, but in the Interim Report, we laid out how we think different types of provisions could be approached for the purposes of reform. So, for instance, we identified significant provisions being consumer protections, for example, and these are provisions that make relatively little use of delegated legislation and where reform would mostly be a matter of amending provisions of the Act and moving that around, reframing and restructuring it so that they're better communicated and easier to find and understand.

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Nicholas Simoes da Silva

Complex provisions are those that make extensive use of delegated legislation and a lot of proscription in the Act as well. Disclosure is the most notable example among the most complex in the *Corporations Act*, with a huge number of ASIC's legislative instruments, regulations and highly prescriptive provisions in Part 7.7 and 7.9 of the *Corporations Act*.

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Nicholas Simoes da Silva

I won't touch from policy evolving provisions, having already discussed them, but minimal amendment provisions are just useful to flag. Although we've spent three years criticising the *Corporations Act*, there are nonetheless a number of provisions throughout Chapter 7 that require only relatively minimal amendment to bring them into a reformed legislative framework; licensing provisions, for instance, and those relating to the core obligations of financial services licensees.

In Interim Report C we suggested some restructuring of those provisions, but nothing that would radically change the way they're expressed or their content, for instance. There's a lot of minor, minimal amendment provisions that could be addressed as part of the implementation process.

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Nicholas Simoes da Silva

Just looking then at what we've learned from previous reforms and how that has informed the implementation roadmap that we've put forward. In designing the pillars, we've really tried to respond to some of the challenges, but also the successes of previous simplification and reform programs. For instance, we've tried to design a set of pillars that are quite separable in a single parliament. Government doesn't have to commit to undertaking all of the pillars simultaneously. It might only commit to one or two, for instance, in a single term of government, which then also ties into trying to create manageable reform packages.

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Nicholas Simoes da Silva

We've tried to design the pillars in a way that means they could be implemented within a single parliament, within a single term of government, for instance. Then looking at prioritising the reforms, we're conscious that some reform programs have not always been fully completed. And so, then it's a matter of prioritising reform so that you get the biggest bang for your buck upfront, and that's what the reform bill has tried to do.

Consumer protection, disclosure, financial advice – we think if you were able to reform those three key areas, you would achieve many of the benefits that the law reform package is aimed at achieving. Eliminating hundreds of legislative instruments, regulations, and a lot of prescriptive provisions from the Act, for instance.

00:37:18:00 - 00:37:47:07

Nicholas Simoes da Silva

Those are the lessons that we've tried to carry forth into this implementation roadmap to make it as realistic as possible for stakeholders. Another lesson from previous reform packages is the importance leadership, and of consultation, and of processes that allow for continued development of the implementation roadmap, as and when problems might arise. So that's why we've proposed the creation of reform taskforces or a task force.

00:37:47:08 – 00:38:21:04

Nicholas Simoes da Silva

So, for instance, there might be one for each pillar or there could be an overarching task force, for instance. It would be the jobs of these task forces to develop the implementation roadmap so as to allow sufficient transition periods for businesses to bring internal business systems across, for instance, and for that reason, although we suggested that the taskforces be led by Treasury. We've also proposed that they combine a range of non-government stakeholders from the private sector and elsewhere among the non-government stakeholder community.

00:38:21:06 – 00:39:14:10

Nicholas Simoes da Silva

We think the taskforces, alongside other proposals that the ALRC has made, such as a Rules Advisory Committee and post-legislative scrutiny, we think these mechanisms will focus lawmaking processes on the users of the legislation. Making sure that there's sufficient time for transition, making sure that the legislative development process is an inclusive one that is able to address problems as and when they arise; so really trying to build on processes as well as changes to the technical substance of the law.

Finally, although the analysis has suggested road map tries to minimise and manage transition costs, there nonetheless will be transition costs in moving to a simpler legislative framework. Those would be for government, for businesses and for a range of other stakeholders. But as we'll be arguing in the final report, we think those costs are worth it. Financial services legislation we've argued, is really the invisible, often unnoticed, social infrastructure that sits behind the modern financial system and the millions of transactions that occur between investors and consumers and businesses every year. As we've heard from stakeholders, in course of this Inquiry, and as we've found in our own analysis, that infrastructure is in a severe state of disrepair.

00:39:47:04 – 00:40:19:07

Nicholas Simoes da Silva

So just as building a new road takes money and causes disruption, we think that investing in financial services legislation so too will carry costs. It will bring disruption as well, but it will also reduce complexity, improve, navigability and create a more flexible regulatory framework. Then the ultimate outcome, a better road, more easily travelled, more easily built upon and expanded as and when needed and with a clearer destination at the end.

00:40:19:08 - 00:40:48:13

Nicholas Simoes da Silva

Interim Report C provides a lot more detail about implementation and how we think it could occur. But we really want to hear more from stakeholders as approach the final report. So please take the last opportunity that has arisen in the course of this three-year inquiry to make submissions, and to let us know your feedback on this implementation model and how you think we could do it better and how we can make implementation as effective and efficient as possible. Thank you, Judge. I'll hand back to you.

00:40:48:14 - 00:41:29:13

Justice Colvin

Thank you so much, Nicholas. That concludes the formal presentations in relation to the key aspects Interim Report C. There's now an opportunity for questions, and they can still be communicated, but I'll raise a number of them now with our panellists. A question firstly for you, Chris. In Ellie's presentation there was a reference to the fact that in other places we have financial services Acts in a single piece of legislation. Why is it we can't move in that direction in Australia?

00:41:29:13 – 00:42:03:12

Christopher Ash

Thanks Judge. The reasons for that are largely historical and constitutional, and so Australia is unique in that it includes the substantial body of financial services legislation in the same act that regulates the establishment of corporations, the operation of corporations, insolvency and all manner of other things.

00:42:03:12 - 00:42:35:04

Christopher Ash

Many other jurisdictions, as you point out, have standalone financial services legislation. In the case of the UK, that is the *Financial Services and Markets Act* and New Zealand adopts different approaches and has some standalone legislation as well. While there are good arguments for doing so, as a lot of people would suggest, which is extracting Chapter 7 from the *Corporations Act* into its own act, it just wouldn't be possible under present constitutional arrangements.

I won't go into and bore you with all of the detail now — we've got a background paper for that — but basically the Commonwealth's power to amend the *Corporations Act* and the *ASIC Act* largely stems from a referral of matters from the States under the Constitution. Now the terms of that referral expressly provide that the Commonwealth cannot use that power to enact other standalone legislation.

It can only use it to, to make this is a defined term of express amendments to specific legislation - the *Corporations Act*, the *ASIC Act* and a couple of other less significant acts. The consequence of that is that a standalone act couldn't be enacted. It's that background that that has driven at least in part suggesting that the financial services will be placed in a schedule to the *Corporations Act*.

00:43:34:02 - 00:44:16:13

Christopher Ash

It's for similar reasons that the Australian Consumer Law appears in the schedule to the *Competition and Consumer Act*. One other point, it's worth noting, is that we haven't suggested just simply extracting the entirety of Chapter 7. What we've suggested instead is that you could create a more coherent body of financial services law if you took the financial services related aspects and grouped them together separately from the markets related aspects. I think that's, as Ellie touched on, while it makes sense at a high level to include markets and financial services together in Chapter 7, the result is that it simply does too much. We think you can get a more coherent, clearer framework if you take a different approach to those. That's the opportunity that this Inquiry offers, I think.

00:44:16:13-00:45:22:14

Justice Colvin

Yes, it provides an explanation, really the context why we're suggesting that a significant form of reform finds its place in a schedule to a piece of legislation. It's really a mechanism by which it can be given an appropriate separate identity, to carry into effect a lot of the proposals that have been recommended.

So, another question in relation to how long this might take if the recommendations are accepted. A question for you, Nicholas, in relation to that process and whether there's a risk that it could be started and not finished or only get halfway completed?

00:45:22:14 - 00:45:51:07

Nicholas Simoes da Silva

Yes, I think it's a very important question and one we've been conscious of, looking at previous reform efforts, particularly in relation to income tax. So incomplete simplification projects are a risk. The main way we've sought to address that are first to create a sense of momentum, and so that's things like the task force, making sure the evidence of harm and the problems in the existing legislative framework are clear.

So, trying to first create a sense of momentum, but then designing an implementation roadmap that then takes the benefits as quickly as possible. Consumer protection, disclosure and financial advice, as we've said, we think if you can reform just those three areas, we've prioritised as the first three reform pillars, that that is where you can really win a lot of the big benefits here.

00:46:16:10 - 00:46:40:09

Nicholas Simoes da Silva

In that sense, to perhaps torture another metaphor we're not really picking low hanging fruit, we're trying to pick the ripest fruit. So the areas of the law that are most ready for reform where the benefits would be greatest and try and pick those as quickly as possible and get them done as quickly as possible. In that sense, you know, parliament doesn't have to pick the whole tree, for instance, but we do have to start somewhere.

With the reform pillars we've proposed, we've said that that is could where you pick the biggest benefits first and as quickly as possible. So I think it's both trying to create that sense of momentum and hopefully maintain it and then trying to seize the benefits as quickly as possible of any reforms to the legislative framework.

00:47:02:14 - 00:47:27:00

Justice Colvin

Yes, but maybe it's even another metaphor, a kind of town planning metaphor – where there's an overall design of the way all of this is going to look, you don't have to build the whole city in one go, but by designing the way in which it will happen, you know that each element as its reformed, will fit in with the other elements in the same sort of sort of way.

I think that is an important aspect of what's being done, but its not as you mentioned earlier a Big Bang kind of approach. The idea is that it has built into it structures to be able to implement this over time.

So, another question then, Ellie, if we do this, how do we know that what has happened through continuous reform where you've ended up with this complexity and incoherence, why won't we just get that coming back again?

00:47:54:03 – 00:48:23:01

Ellie Filkin

That's a really important question, and it's our belief that the best approach to that issue is post enactment review. In the past there's really been a bit of a for attitude when an Act has been brought into force. However, what the legislation is increasingly including requirements for post-enactment review to take place, which effectively means going back and scrutinising what effect an act has had and whether it is meeting its objectives or it needs to be reassessed. This is often called post-review or post-legislative scrutiny, which is a distinction that we've discussed in a background paper.

00:48:46:07 – 00:49:18:11

Ellie Filkin

It's a proposal in Interim Report C that the financial services legislation include a provision requiring periodic review by an independent reviewer, to ensure that it is meeting those key goals, that complexity is being reduced and that those expenses associated with the implementation efforts do eventually go down and that the overall legislative scheme is improved.

So, one useful benchmark for this would be notional amendments. We know from previous interim reports that these pose a very significant issue for stakeholders and make the law quite inaccessible. There's currently about 1200 of them on the statute book. If, after a certain period of time, we are able to assess it's no longer part of the legislative scheme, and they have been either discontinued or incorporated into the legislation. That would be a tangible benefit that we'll be able to report, and that's just one example.

00:49:42:01 - 00:50:13:15

Justice Colvin

Thanks, Ellie. I think there's been two references to the background in different background papers. Part of what has occurred during this Inquiry has been some substantial work done in particular areas to produce some excellent background papers. They're available...another plug to access the website on these on these topics and pick up on those.

So, picking up again on this restructuring and reframing process and how it can be undertaken and whether it requires new legislation or whether it can be applied to old legislation in a particular way. I think a question for you, Nicholas, about whether what is being conceived of requires you to start afresh?

00:50:13:15 - 00:51:59:13

Nicholas Simoes da Silva

I think although this Inquiry has been focused, really, on corporations and financial services legislation over the course of the three interim reports, we have also had to step back and have a broader look at how legislation is designed and drafted in Australia and internationally. In that way we're not proposing anything radical that requires ripping up existing approaches. What we've really tried to do is understand existing best practice, synthesise it and really distil it into principles that can be applied.

For that reason, it isn't a matter then of going into the statute book and cutting things up and rewriting things willy nilly. It really can be quite targeted reforms to certain areas of existing legislation as well as these principles then being used to inform new legislative initiatives. So just in that first way, Treasury is already undertaking number of reform programs that in a way implement some of the principles identified in this inquiry.

00:51:59:13 - 00:52:55:04

Nicholas Simoes da Silva

For instance, the Treasury Laws Improvement Program, will be doing things like creating single glossary for the *Corporations Act*, and that builds on principles like having a mental model of the legislation, so you know where to go to find definitions and to be grouping provisions and structuring them intuitively for readers. Again, Treasury has a rationalising asset instruments measure, and so the idea there is to bring together some of the proliferating instruments that are out there and consolidate them, which is another of the principles that the ALRC put forward.

And grouping of provisions so that they can most easily be found besides one another, so taking six instruments, for instance, and consolidating and grouping them together so that it's easier for stakeholders to find the

provisions that apply to them, and then to read and understand those provisions. So already I think these principles that we've distilled are helping to inform or are already being reflected in existing reform programs.

Just also the principles are designed so that they can be applied no matter how big or small a legislative measure is, so whether you're amending or creating a new section or part or division, for instance, these principles can inform those reforms. It doesn't require a whole new Act in which to implement these principles. If, for example, you're creating a new part you can think about, or drafters and designers can think about, how to structure that so that it prioritises important provisions for the reader. So that provisions are grouped as effectively as possible and mental models are fostered.

I think, just in terms of making sure we don't rip up the statute book or anything, that which I don't think is a risk, but OPC, the Office of Parliamentary Counsel and policy instructors have a lot of experience in the sense. So, choosing when to rewrite a part of the statute book to bring it into best practice. So, you know, there's already this experience in terms of that issue.

00:53:44:05 - 00:54:08:00

Nicholas Simoes da Silva

I think what we've done that's been quite helpful is in distilling these principles, we've given other stakeholders a set of tools by which they can look at new or amended legislation and say, well, is this implementing these principles as effectively as possible?

I think we're trying help foster a dialog, not only within government about how to build better legislation, but between government and other stakeholders who can bring these perspectives and say, well, are you building a mental model as effectively as possible? Or are you creating financial provide advice provisions as helpfully as you can? So, trying to foster that dialog between drafters and designers and the users of legislation on the other side. Thank you, Judge.

00:54:36:04 - 00:55:02:12

Justice Colvin

Thank you, Nicholas. I think a final question and forgive me for a Dorothy Dixter question for you Chris. So, what's left for the ALRC final report now we've been through three interim reports?

00:55:02:12 - 00:55:33:05

Christopher Ash

Yes, having written three interim reports, I'd like to think that the final report would just write itself now, but there is some further work to do. We will obviously reflect further on stakeholder views and submissions that we've received to date in order to think about what proposals we convert into recommendations.

We'll obviously also reflect on the submissions in response to Interim Report C that we've outlined today and we're also planning, I think as Nicholas has touched on, on saying more about implementation in the final report, which again, hopefully some feedback will help us to develop that discussion. We'll also touch upon some of the alternatives that have been suggested to us throughout the Inquiry. So hopefully there will be a little bit of new material there for you to look forward to.

00:55:33:06 - 00:55:57:15

Justice Colvin

Thank you for that and thank you, Chris, Ellie and Nicholas for the excellent presentations. It's almost time to bring the presentation to an end. Can I say before doing that that of course these reports are proposed, in this interim way, in order to facilitate a consultation and submissions, and we invite and encourage them short or long, whether they're focused on a particular aspect or whether they're engaging comprehensively with what is being addressed in Interim Report C.

The date for close of submissions, again, is the 26th of July 2023, and this is sort of the end of the process of submissions before the final report is formulated. I encourage you to take out that final opportunity to address them, particularly the practical issues that are thrown up by what has been proposed up until this particular point in time. The submissions are best made through the website if they can, we can receive them physically, but they're best made in that manner or by sending an email to [financial.services@alrc.gov.au](mailto:financial.services@alrc.gov.au).

I thank you all for your attendance and for your interest and we look forward to receiving your submissions or engagement in the ongoing consultation process. Thank you very much.