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3 August 2023

Australian Law Reform Commission
119 North Quay
Brisbane QLD 4000

Dear Commission

Interim Report C – Financial Services Legislation (ALRC Report 140)

Allens welcomes the opportunity to comment on the Australian Law Reform Commission's *Interim Report C on Financial Services Legislation* (ALRC Report 140) issued in June 2023 (***Interim Report C*** or the ***Report***).

Attached are our submissions on the following Proposals and Questions set out in the Report:

Proposal	Questions
C10	Whether a new Financial Services Law should be enacted as Sch 1 to the *Corporations Act 2001* (Cth)
C11	The effectiveness of restructuring and reframing financial services legislation in the manner outlined in the illustrative Financial Services Law Schedule
C14	Whether the working principles set out in Interim Report C should be applied when structuring and framing corporations and financial services legislation

As we noted in our submissions in relation to *Interim Report A on Financial Services Legislation* (ALRC Report 137), we support this important review of the *Corporations Act 2001* (Cth) (***Corporations Act***), which we hope will result in a clearer, simpler and more accessible legislative framework for the regulation of financial services. We believe that other financial services legislative regimes would also benefit from a similar review in due course, particularly the *Superannuation Industry (Supervision) Act 1993* (Cth).

Please let us know if you would like to discuss any aspect of our submissions.

Yours sincerely

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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**).

Summary

While we support the view that consolidation, grouping, coherence, prioritisation, intuitive flow, mental models and succinctness (collectively, the ***Working Principles***) are all essential elements of the structuring and framing of corporations and financial services legislation, we consider it important to establish a taxonomy that better distinguishes between, on the one hand, the principles for, and the objectives of, the structuring and framing of legislation, and, on the other, the methods ultimately employed in the furtherance of those principles and objectives. With this taxonomy in mind, we consider that the Working Principles should be revisited with a view to better capturing the objectives of legislative restructuring and reframing which, in our view, should also capture the 'communicative power' of the law.

Discussion

Proposal C14 provides the logical starting point for our submissions in relation to Interim Report C. This is because any support for, or opposition to, the Working Principles set out in that proposal will necessarily inform our responses to the remainder of Interim Report C.

At is most basic, a principle is a fundamental truth, proposition or assumption forming the basis of a system of belief or a chain of reasoning.[1] In the context of legislative structuring and framing, principles are, accordingly, the basic propositions that shape our approach to such structuring and framing. By way of example, the Attorney General Department's paper titled '*Clearer Commonwealth Laws: causes of complex legislation and strategies to address these*' identifies the following general principles, among others, as essential in improving the clarity and accessibility of laws:

(a) Laws should not be unnecessarily complex to give effect to policy.

(b) Legislation should enable those affected to understand how the law applies to them.

(c) Laws should be drafted with, and assessed for, clarity.

Respectively, these may be classified as the principles of legislative **simplicity**, **comprehensibility** and **clarity**. Each speaks to a fundamental quality of legislation; it is a proposition about what legislation should be like that informs how legislation is ultimately structured and framed.

[1] *Macquarie Dictionary* (8th ed, 2020) 'principle'.

Importantly, in our view, these principles also highlight a key drawback of the proposed Working Principles that have informed Interim Report C. Specifically, the Working Principles appear to conflate the concepts of legislative principles, methods and objectives. To demonstrate:

(a) only three of the Working Principles may be properly characterised as principles in the sense described above. That legislation should be thematically and conceptually coherent (**coherence**), that it should be structured intuitively (**intuitive flow**) and that it should be as succinct as possible (**succinctness**) are three principles that should form the basis for the structuring and framing of corporations and financial services legislation;

(b) co-locating related provisions (**grouping**), ordering provisions on the basis of significance (**prioritisation**) and minimising duplication and overlap in provisions (**consolidation**) are not so much principles, but legislative methods aimed at achieving, respectively, the principles of coherence, intuitive flow and succinctness; and

(c) aiding users to develop and maintain mental models that enhance navigability and comprehensibility (**mental models**) is an objective of the structuring and framing of corporations and financial services legislation to be achieved by means of the legislative methods set out in paragraph (b).

While this critique is clearly rooted in semantics, we consider that it is critical to establish a proper taxonomy of principles, methods and objectives from the outset of any legislative reform. This is because the principles underlying such reform will be determinative of the practical methods employed in structuring and reframing legislation, while any objectives will provide the benchmark against which the success of legislative reform may be measured. At least in part, the Working Principles already demonstrate this taxonomic structure – grouping is clearly an incident of the underlying principle of coherence, prioritisation of intuitive flow, and consolidation of succinctness. In turn, these methods, and their underlying principles, are each aimed at structuring and framing legislation in a manner that assists in the development of mental models. The problem, however, is in the grouping of principles, methods and objectives under the collective banner of 'Working Principles', which belies the discrete and nuanced functions that they separately perform.

Additionally, having a clearly articulated taxonomy facilitates the making of trade-offs between principles, which inevitably exist in tension with one another. In part, this is acknowledged by the ALRC in Interim Report C with respect to the use of parallel structures, which are employed in legislative drafting where the consolidation of provisions would not otherwise be desirable (for example, across the separate licensing regimes 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)).[2] Interim Report C characterises these structures as an exception to the principle of succinctness.[3] However, parallel structures are in our view an example of where succinctness (***Principle A***) gives way to intuitive flow (***Principle B***), which, in this context, demands the repetition of the relevant licensing regimes) on the basis that such repetition is more likely foster mental models of those regimes (***Objective A***).

Understood in this way, the above taxonomy highlights both the strengths and shortfalls of Interim Report C's 'Working Principles'. Specifically, it reveals that:

(a) the Report's principles, methods and objective have a coherent basis. In particular:

  (i) the legislative methods of grouping, prioritisation and consolidation are, respectively, underpinned by the principles of coherence, intuitive flow and succinctness; and

  (ii) these methods and principles are clearly intended to advance the overall objective of the structuring and framing of corporations and financial services legislation (i.e. the fostering of mental models); and

[2] Interim Report C at 9.49-9.50.
[3] Ibid at 9.49.

(b) equally, the 'Working Principles' set out just one objective of the structuring and framing of corporations and financial services legislation (i.e. mental models).

Accordingly, in addition to their proper categorisation, we consider that there is a need to revisit the Working Principles with a view to more clearly identifying, and expanding, the objectives of the structuring and framing of corporations and financial services legislation.

Based on our review of Interim Report C, the ability of legislation to help users identify norms and to influence social action (**communicative power**) is at least one other objective that should also be captured by the Working Principles. Communicative power is significant in that it speaks, not to the user's interactions with, and experience of, legislation from the perspective of navigability (which is the domain of mental models), but to the user's comprehension of the legislation's underlying norms, and how such understanding alters or affects their behaviour. In this sense, where mental models are a measure of a user's practical comprehension of legislation, communicative power is a measure of the influence of legislation over the user. In our view – noting that legislative objectives provide a benchmark for evaluating the success of reform – supplementing the Working Principles in this way would allow for a more holistic assessment of restructuring and reframing of corporations and financial services legislation that considers the normative, alongside the practical, merits of those reforms.

Proposal C10:

The Financial Services Law should be enacted as Sch 1 to the Corporations Act 2001 (Cth).

Summary

Noting the constitutional implications of restructuring and reframing corporations and financial services legislation, we consider that there is significant practical and normative upside to the enactment of a schedule to the *Corporations Act* setting out the Financial Services Law, and that such an approach – as distinct from the alternatives canvassed by Interim Report C – is most likely to foster mental models of the law, and enhance its communicative power.

General comments

Our response on the merits of the proposed Sch 1 to the *Corporations Act* assumes:

(a) first, that any efforts to restructure and reframe corporations and financial services legislation are necessarily restricted by the established constitutional basis of the *Corporations Act*, and the existing terms of referral of matters from each state parliament to the Commonwealth;

(b) second, that such restrictions frustrate the possibility of de-coupling the relevant aspects of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ***ASIC Act***), and enacting standalone legislation that more coherently, intuitively and succinctly regulates corporations and financial services in Australia; and

(c) third, that the extensive amendments required to give effect to such a schedule would not otherwise exceed the existing terms of referral of matters from each state parliament to the Commonwealth, and the established constitutional basis of the *Corporations Act*.

Based on these assumptions, we consider that there are key practical and normative benefits to the enactment of a schedule to the *Corporations Act* that sets out the Financial Services Law. Consistently with our views on Proposal C14, these benefits are tied to the capacity of a schedule – as distinct from the

alternative approaches identified in Interim Report C[4] – to achieve the objectives of reframing and restructuring corporations and financial services legislation, including by cultivating mental models of the law, and enhancing its communicative power.

Practically, references to Chapter 7 as an 'Act within an Act' are liable to distort the reality that the chapter does not exist in a legislative or policy vacuum, but is instead embedded within the broader framework of the *Corporations Act*. As such, recontextualising all, or any part, of Chapter 7 within a schedule to the Corporations Act – thereby remaining within the confines of the broader framework – is likely to be a far simpler task than the complete removal of those provisions from that framework.[5] As Interim Report C correctly identifies,[6] the former approach avoids the need to de-couple from the *Corporations Act* important concepts that currently sit within Chapter 7, and means that cross-references and linkages to other parts of the Corporations Act may be retained (to the extent that the reframing and restructuring of Chapter 7 does not itself call for their amendment).

Additionally, the enactment of a new schedule would allow for significant flexibility in applying the methods of grouping, prioritisation and consolidation, not least because it would mean that the act of restructuring and reframing would not be limited by the existing legislative design of Chapter 7. Absolute freedom to apply these methods, and to strengthen the principles of coherence, intuitive flow and succinctness that underpin those methods, is, in our view, likely to lead to a Financial Services Law that best fosters mental models of that law among users. In particular, the thematic grouping of otherwise disparate provisions of the *Corporations Act* and the use of generally consistent structures across the schedule is likely to improve the navigability of the legislative framework, and allow users to identify the provisions of the Financial Services Law that are directly applicable to them.

From a normative perspective, the creation of a prominent home for the Financial Services Law has equally important implications. As the ALRC recognises in Interim Report C,[7] much like the experience of the *Australian Consumer Law*, a separate schedule is likely to establish a clearer legislative identity for the regulation of corporations and financial services, and to promote public consciousness of the legislative framework. These twin characteristics of identity and consciousness are, in our view, essential preconditions of the communicative power of the law. That is to say, the ability of those regulated by, to identify norms within, the Financial Services Law, and to modify their social conduct accordingly, is inherently linked to their awareness and understanding of the content of those laws.

Of course, the above needs to be balanced against the potential implications of 'relegating' the Financial Services Law to a schedule of the *Corporations Act*. This, in our view, would carry greater weight if the broader structure of the *Corporations Act* already exhibited the principles of coherence, succinctness and, in particular, intuitive flow, such that the position of a particular chapter, in relation to other chapters, of the Corporations Act was itself indicative of the relative importance of the contents of that chapter. However, given the generally accepted view that the existing legislative framework for corporations and financial services regulation is unnecessarily complex, fails to communicate fundamental norms, and hinders compliance,[8] we would caution against unnecessary emphasis on the position of Financial Services Law within the framework of the *Corporations Act*.

[4] As identified in Interim Report C, these include restructuring the provisions of Chapter 7 within that existing chapter, a new chapter, or multiple new chapters, or removing Chapter 7 (in whole or in part) and enacting equivalent provisions within the *ASIC Act*.
[5] Assuming such an approach was even permiss ble from a constitutional perspective.
[6] Interim Report C at 6.20.
[7] Ibid.
[8] Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report (Volume 1, February 2019) 494–6.

Proposal 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?

Summary

Although we consider that the thematic grouping of provisions, the reduction of overlap, and the adoption of consistent structures exhibited by the illustrative Financial Services Law Schedule (***FSL Schedule***) should, in the abstract, lead to a more effective financial services law, determining its efficacy will ultimately require a post hoc assessment of any legislative reform. Additionally, in our view, the success of the FSL Schedule in its final form will hinge on the extent to which its drafting, structure and context are informed by the policy and purpose of the provisions being co-located, consolidated and re-ordered.

General comments

While we are generally supportive of the legislative methods of grouping, prioritisation and consolidation – and the principles underpinning those methods – which have informed the structuring and framing of the FSL Schedule, we consider it necessary to qualify our support by reference to the following caveats.

First, as an overarching comment, wherever attempts are made to restructure and reframe legislation, it is important to consider whether the dislocating of provisions from their existing context, and the recontextualising of those provisions within a novel framework, substantively alters the meaning of those provisions and, if so, whether such substantive change is desirable and consistent with their intended meaning. Context is, after all, a powerful intrinsic aid to legislative interpretation – as Dixon CJ observed in *Commissioner for Railways (NSW) v Agalianos* (***Agalianos***),[9] '[t]he context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed.' As such, the broader grouping, prioritising and consolidating of legislative frameworks must be undertaken having regard to how those methods might influence the interpretation of particular provisions.

Second, Dixon CJ's comments in *Agalianos* also allude to the important connection, and the need for consistency, between context and purpose and policy. Practically, this means that the process of restructuring and reframing of financial services legislation – including by means of co-locating, reordering and prioritising, and consolidating provisions – should be informed as much by the substantive content of the relevant provisions, as it is by their underlying policy goals. By way of example, in grouping provisions under the thematic policy banner of 'consumer protection' in Chapter 2 of the illustrative FSL Schedule, it appears that insufficient regard has been had to the distinction between those provisions that, in their current context, are intended to protect 'consumers',[10] and those that are intended to have broader application.[11] Similarly,

[9] (1955) 92 CLR 390 at 397.
[10] As defined in section 12BC of the *ASIC Act*.
[11] For example, the proh bitions on misleading and deceptive conduct in section 1041H of the *Corporations Act* and section 12DA of the *ASIC Act* apply, respectively, in connection with the conduct of a financial services business, and the provision of financial services, generally, whereas the prohibition on harassment and coercion under section 12DJ of the *ASIC Act* (which, for the purposes of the illustrative FSL Schedule, has been co-located with those general proh bitions) applies only in relation to the supply or possible supply of

such grouping could potentially disregard differences between similar concepts under the current provisions in the Corporations Act and the ASIC Act (e.g. by virtue of different definitions of 'financial product', and different penalties, in the separate regimes – for which there is likely to be a policy rationale and which may have broader implications).

Finally, as these submissions previously touched on in relation to the use of parallel structures, the fact that each of these legislative methods are underpinned by distinct principles means that they, much like the underlying principles, are likely to exist in tension with one another. As such, and as Interim Report C acknowledges, there may be contexts where the pursuit of harmony between legislative grouping, prioritisation and consolidation will be a futile exercise, and one or more of the methods may need to give way to others. In such cases, determinative of this trade-off exercise should be the objectives of legislative reform, with precedence being given to the legislative methods – and their underlying principles – that, in the relevant context, are most likely to achieve such objectives.

Having regard to these general comments, we address the first two paragraphs of Proposal C14 in turn.

Paragraph a. – providing an effective framework

As we noted in our comments in relation to Proposal C14, the objectives of legislative reform provide the benchmark against which the success of that reform may be measured. On this view, the question of a legal framework's efficacy requires a post hoc assessment of the legal framework against its stated objectives. In the context of the illustrative FSL Schedule, the relevant questions are, accordingly, whether that schedule:

(a) assists consumers and regulated entities and sectors to develop and maintain mental models of the legislative framework (**mental models**); and

(b) allows consumers and regulated entities and sectors to identify norms within the framework, and influences their social action (**communicative power**).

Although we do not have the benefit of a post hoc assessment, in the abstract, we consider that the principles underlying, and the legislative methods adopted in drafting, the illustrative FSL Schedule should achieve the objectives set out above. In particular, our view is that the grouping and prioritisation of provisions within the FSL Schedule, motivated by the principle the legislation should be structurally coherent and intuitive, will allow consumers and regulated entities and sectors to more easily:

- navigate the legislative framework and identify the provisions of the FSL Schedule that are directly applicable to them (or a to a particular scenario), specifically as a result of:
    - the thematic grouping of otherwise disparate provisions of the Corporations Act within the chapters, parts, divisions and sections of the schedule; and
    - the adoption of generally consistent structures across the schedule that move from the generic (i.e. objects, principles and standards of general application) to the specific (i.e. provisions governing particular users or scenarios);
- discern, through the structure of the FSL Schedule (specifically, through the prioritisation of certain standards and objectives), the behavioural norms espoused by the framework as a whole, or by particular chapters or parts of that framework; and
- self-regulate on the basis of the specific provisions of the FSL Schedule applicable to the user, as well as its broader normative underpinnings.

Of course, these views must be qualified by reference to our general comments above. As such, the efficacy of the illustrative FSL Schedule's legal framework will hinge on the extent to which reference has been had to

financial services to a 'consumer' (as defined in section 12BC of the *ASIC Act*). The varying scope of these provisions represents, in our view, a clear policy choice of the legislature to which regard must be had in reframing and restructuring corporations and financial services law, particularly given the limited Terms of Reference of the current review.

the underlying purpose and policy of the provisions being grouped and prioritised, and whether, in the event of any conflict, the relevant legislative principles have been properly traded off.

Paragraph b. – making the law clearer, more coherent and more effective

Given the substantial overlap between paragraph b., paragraph a., and our general comments on the illustrative FSL Schedule, we do not propose to comment separately on each of the concepts set out above. In particular, coherence and efficacy, and the logical connection between the two (a more coherent legal framework contributing to the efficacy of financial services legislation), are a focus of our previous response in relation to paragraph a. It is, however, worth briefly touching on the concept of 'clarity'.

Notably, 'clarity' is not one of the Working Principles of the structuring and framing of corporations and financial services legislation. In part, this might be explained by the fact the concept itself is a broad church, and the proposition that the law should be clear tells us far less than the related propositions that the law should be thematically coherent and intuitively structured. Relatedly, the restructuring and reframing of legislation is concerned more with what might be described as 'structural', as opposed to 'substantive', clarity – the focus of reform is, in this context, on how provisions relate to one another in their legislative context, rather than on the substantive content of those provisions. In our view, the ALRC has, therefore, correctly chosen to focus on the more nuanced principles of coherence, intuitive flow and succinctness which, in any event, have resulted in an illustrative FSL Schedule which, through its navigability, exhibits structural clarity.

For completeness, we note that the above should not be taken to imply that structural and substantive clarity are mutually exclusive concepts. As we have previously argued, structural clarity leads to substantive clarity:

(a) first, because, as part of the interpretive process, the structure and context of legislation inform the substantive meaning of its component provisions; and

(b) second, because structural navigability allows users to more easily discern the law's underlying norms which, in turn, means that users are more likely to understand its substantive content.

That being said, structural clarity will not itself guarantee substantive clarity and, as such, efforts to improve the overall 'clarity' of the law necessarily require reform to the substantive content, and policy underpinnings, of the law (which, we acknowledge, is beyond the scope of the ALRC's Terms of Reference).

In terms of the structure of the Illustrative FSL Schedule, we think that there is potentially some overlap (and, therefore, lack of clarity) between Chapter 2 (Consumer protections and generally applicable offences) and Chapter 3 (Obligations of financial services providers), which could be improved. For example, it was not clear to us whether Chapter 2 is intended to capture prohibitions that apply to the provision of financial services, whereas Chapter 3 is intended to apply to specific obligations that apply to holders of Australian financial services licences. If so, the Chapter headings could be clearer, and some parts of Chapter 3 (e.g. hawking provisions) may need to be moved to Chapter 2.