FSC FINANCIAL SERVICES COUNCIL

Australian Law Reform Commission - Financial Services Legislation Inquiry: *ALRC Report 140*

FSC Submission

26 July 2023

Contents

1. About the Financial Services Council

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds and financial advice licensees. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing more than $3 trillion on behalf of over 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is one of the largest pools of managed funds in the world.

The FSC's mission is to assist our members achieve the following outcomes for Australians:

- to increase their financial security and wellbeing;
- to protect their livelihoods;
- to provide them with a comfortable retirement;
- to champion integrity, ethics and social responsibility in financial services; and
- to advocate for financial literacy and inclusion.

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2. Executive Summary

The FSC welcomes the opportunity to respond to Interim Report C (ALRC Report 140) **(Report)** of the Australian Law Reform Commission's **(ALRC)** Inquiry into financial services legislation **(Inquiry**).

The FSC agrees the law should be clearer, simpler and easier to use, and congratulates the ALRC on the detailed work done to date on simplifying, reframing and restructuring the corporations and financial services legislation. The FSC recognises that reform of the Corporations Act 2001 **(Corporations Act** or **Act),** the Australian Securities and Investments Commission Act 2001 (Cth) (**ASIC Act**) and related legislation would be a major undertaking.

The FSC agrees there is merit in the goal of simplifying the Act and reframing and restructuring the Act and the ASIC Act. However, the FSC has significant concerns about the cost, time and regulatory burden involved to all participants. The FSC makes the following key points.

- **Parliament**. The FSC has concerns regarding the amount of Parliamentary time that will be required across successive governments to implement the proposed reforms to corporations and financial services legislation. The proposals are ambitious in scope and the time that will be needed to address the scale of change required should not be underestimated. Governments invariably have ambitious agendas and financial services legislative reframing and restructuring would be relatively low profile. There are many pressing issues that Parliament needs to deal with. The FSC would question whether the resources that would be taken up with implementing the Report are justifiable in this context.
- **Regulators**. The Report contemplates that reform can be progressed in stages, and sets out how different pillars of reform could be implemented separately and independently of other pillars. However, the Report does not consider in detail the conduct of regulators. During the implementation or transition phase of any given pillar of reform, it is likely that industry will need considerable time and resources to adapt to the newly reframed and restructured law. Other stakeholders, including regulators, will also need time to adapt.

The FSC **recommends** that regulators should be required to adopt a regulatory stance and policy position that is accommodative of breaches made in good faith and reflects the challenges that will face industry in adjusting to the proposals.

The FSC **recommends** that specific transition periods should be built into the reform process and regulatory guidance will need to be revised and published in a timely manner following meaningful consultation with industry.

- **Businesses**. Reframing and restructuring complex legislation will have a material regulatory impost on businesses. Stakeholders will have to track and map the changes to the law, sometimes in great detail. They will also need to assess to what extent particular changes in framing and structure have on their own operational

processes, systems and policies. Legal and compliance teams will likely need to spend considerable time engaging with the reform process and assessing any final changes by way of a detailed gap analysis and mapping.

The FSC **recommends** that business should not be asked to fund the process of reform or be penalised for any issues that arise during the implementation process.

- **Policy.** When legislation is reframed and restructured, changes will be made at both the macro and micro level. While we note that the Report does not recommend changes in policy, the FSC submits that given the sheer scale of the contemplated reforms, it is likely that changes will be made that unintentionally have policy implications. Because these changes are inadvertent, they will by definition be difficult to identify in a timely manner and will not be subject to the normal parliamentary processes. If and when they are identified, it will take time and effort to debate the necessary amendments and redress the unintended consequences they have caused. See also our comments on Proposal C5 below.

The FSC **recommends** that proposed legislation should be subject to substantive stakeholder consultation in a timely manner to avoid unintended consequences.

The FSC will continue to contribute to the ALRC's Inquiry ahead of it reporting in December 2023. We would welcome the opportunity to discuss our submission further.

3. Proposals

3.1. Consumer Protection (Chapter 2)

Proposal C1

The Corporations Act 2001 (Cth) should be amended to restructure and reframe provisions of general application relating to consumer protection, including by grouping and (where relevant) consolidating:
a. Part 2 Div 2 of the Australian Securities and Investments Commission Act 2001 (Cth);
b. Part 7.6 Div 11 of the Corporations Act 2001 (Cth);
c. sections 991A, 1041E, 1041F, and 1041H of the Corporations Act 2001 (Cth);
d. Part 7.8A of the Corporations Act 2001 (Cth); and
e. sections 1023P and 1023Q of the Corporations Act 2001 (Cth

The FSC agrees that consumer protection provisions should be as easy to navigate and understand as possible[1]. We note that the Report argues that "*the legislative chapter created under Proposal C1 would serve as a single point of consideration for consumers who wish to understand (or need to be advised about) the key protections that apply for their benefit*"[2]. The FSC is not persuaded that a single chapter of a schedule to the Act serving as a single point of consideration for consumers is a realistic goal, given the difficulties in deciding what should go inside or outside this chapter, and the inevitability that some things consumers would expect to see there are in fact left out. Indeed, if this chapter is described as a single point of consideration, or a "single home for the core standards of generally applicable commercial behaviour", this runs the risk of misleading users into not looking elsewhere when they sometimes should.

The FSC suggests that the drafting and signposts make it clear that other legislation may be relevant to the issues the reader is seeking to understand. In addition, to the extent there are other provisions of the Act and ASIC Act that may arguably be relevant to consumer protection that are excluded from the proposed new chapter in Schedule 1, the FSC suggests that the draft legislation's explanatory memorandum clearly explains the reasoning behind the decision and signposts clearly where those other rights are located.

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.

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[1] Although that is of course true of all legal provisions, not just those specifically aimed at consumers. However, we are not persuaded that the audience of these provisions *may include consumers themselves*, as the Report asserts (page 21 of the Summary). Realistically, in our view the vast majority of consumers do not read corporations and financial services legislation.
[2] Page 22, Summary.

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.

The FSC is broadly supportive in principle of Proposal C2 and Proposal C3 regarding the removal of duplicative legislative provisions and consolidating these provisions in a way that enhances consumer understanding and improves accessibility.

3.2. Disclosure (Chapter 3)

Proposal C4

The Corporations Act 2001 (Cth) should be amended to restructure and reframe provisions relating to disclosure for financial products and financial services, including by grouping and (where relevant) consolidating:

a. Part 7.7 Divs 1, 2, 3A, 6, and 7;

b. section 949B; and

c. Part 7.9 Divs 1, 2, 3 (excluding ss 1017E, 1017F, and 1017G), 5A, 5B, and 5C.

Fundraising disclosure. The FSC notes that Proposal C4 would not include the disclosure regimes that relate only to financial advice (which would be included in a separate chapter of the Financial Services Law) and provisions relating to fundraising that are located in Chapter 6D of the Act. While it would presumably be relatively clear from the contents/index pages of the proposed Financial Services Law that there will be a separate, stand-alone chapter (Chapter 5) on financial advice (and thus it will be reasonably well signposted that the disclosure regime for financial advice would be located in that chapter), this would be materially less obvious with respect to fund raising disclosure (given that the proposal is not to include this within the Financial Services Law at all and there will be no reference to it in the contents/index page). Given the importance of fundraising disclosure issues presently located in Chapter 6D and that some readers may assume these provisions would be located in the Financial Services Law, the FSC submits that their location should be flagged clearly in the Financial Services Law to alert readers and reduce the risk of misunderstanding.

Parallel reform processes. The Report notes, with reference to the reforms contemplated in Interim Report B (reforming the legislative hierarchy) that "*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]. This underscores that there is effectively a dual implementation risk where legislative reform is concerned, with here the specific issue being reform of the disclosure regime. There are effectively two parallel reform processes being contemplated and each carries implementation risks. First, the risk of failure to implement the reforms to the legislative hierarchy (Interim Report B reforms), and second, the risk of failure to implement the reframing and restructuring reforms (Interim Report C reforms). The risks would be further magnified if at the same time a government is trying to also introduce policy reform simultaneously (which could be viewed as a kind of "triple implementation risk"). The FSC would suggest that further analysis is carried out with respect to the relative risks involved where a particular legal subject matter (such as disclosure) involves reform to the legislative hierarchy, and/or reframing and restructuring, and/or policy reform.

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'.

Borderline cases of policy change. The Report considers that "*the new proposal does not involve an alternative standard of disclosure or a shift in policy settings…*", but rather "*the amended standard would also help frame any future policy developments concerning disclosure*."[4] While the FSC agrees that the better view is that this proposal would appear to be in keeping with the existing policy of the law, it could nonetheless arguably be categorised as a substantive change in the law that constitutes a change in policy. This raises the question, where there are disagreements or borderline cases of whether a proposed reframing and restructuring change is in fact a change in policy, what is the framework for dealing with them in the context of the ALRC's law reform proposals? This should be articulated in more detail.

Technological neutrality. The Report also comments as follows:

Given the Australian Government's intention to make Treasury portfolio legislation more technology-neutral, 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[5].

The FSC is supportive of making legislation more technology-neutral. Relevantly, with regards to reframing and restructuring the disclosure regime, the FSC submits that it should

[3] Paragraph 3.8, page 63 of the Report.
[4] Paragraphs 3.101 and 3.102, page 87 of the Report.
[5] Paragraph 3.89, page 82 of the Report, referring also to eg, Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023 (Cth)

be made clearer that disclosure documentation, such as periodic statements, should be able to be provided to investors in a technologically neutral way where appropriate. More specifically, periodic statements should be able to be provided in a similar way to the manner set out in the *Corporations Amendment (Meetings and Documents*) *Act 2022* which enables responsible entities of a registered scheme, a company or a disclosing entity to give meeting related documents to a person in a range of ways electronically, including accessing documents electronically, or also physically. Under this approach members retain choice for their preferred method of communication and can elect whether to receive information in physical or electronic form.

The FSC submits that if such a move towards technology-neutral disclosure were to be made pursuant to the Report, it is important that the principles underlying the legislative change are embraced by regulators and that regulatory guidance is consistent with any changes. For example, in 2016 ASIC published RG 221 *Facilitating digital financial services disclosures* in March 2916 with the stated purpose "*to clarify our interpretation of the law and to explain the relief we have given in relation to the delivery of digital disclosures and the removal of potential barriers to the use of more innovative Product Disclosure Statements (PDSs), Financial Services Guides (FSGs) and Statements of Advice (SOAs)*."[6] Regulatory guidance such as RG 221 would need to be updated in a coordinated and timely manner to ensure consistency with any new chapter on disclosure. The task of updating such regulatory guidance will take considerable time and involve input from the regulated population.

Objective standard. In terms of the proposed wording change itself, the FSC would question whether the concept of "promotes understanding"' is too ambiguous and a more objective standard should be adopted. For example, the requirement could be that disclosure documents must be worded "in a way that promotes a reasonable person's understanding of the information". Although the FSC acknowledges the view put forward in the Report that, having considered the merits of an objective standard, the ALRC has decided not to recommend an objective standard[7], the proposed amendment needs to be assessed against another of the ALRC's objectives – to reduce the time and resources to comply with the law. If a subjective rather than objective standard is adopted, the FSC submits that this may adversely impact the ability of business to comply in a cost effective and efficient manner.

3.3. Financial Advice (Chapter 4)

Proposal C6

[6] Regulatory Guide RG 221 Facilitating online financial services disclosures (asic.gov.au)
[7] See paragraph 3.126 of the Report

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.

Problem of subjectivity. The FSC notes that the proposed relocation of particular provisions as outlined above may not necessarily result in an improved outcome in terms of intuitive flow or for navigability for all users of the legislation. To some extent, any choice as to whether and where to locate a particular area of law within the Act involves an element of subjectivity. For example, sections 912EA and 912EB of the Act are currently located within the broader set of reportable situations/breach reporting provisions, which makes sense and is intuitive in terms of ease of access to such provisions generally. If moved to a new standalone financial advice chapter, as proposed, this may be an unexpected result and less intuitive for a reader who is expecting to see these provisions sit with the rest of the section on breach reporting (although the FSC notes that the ALRC outlines sensible reasons for including these provisions within the financial advice chapter given that they deal with the provision of personal advice). If moved, the FSC suggests that the legislation include comprehensive cross references between the general breach reporting provisions and such provisions in other parts of the law such as the proposed financial advice chapter in the Schedule. Alternatively, if these sections are not relocated, the financial advice chapter could incorporate cross references back to these relevant breach reporting sections which may be a simpler and less cumbersome outcome.

The FSC also notes that this is an example of enhanced risk where parallel reform processes are being undertaken. Here, there is enhanced risk in seeking to implement Proposal C6 at the same (or approximately the same) time as any policy reforms of the law of financial advice are implemented pursuant to the Quality of Advice Review. See also 3.2 above.

Finally, see also response to Proposal C8 regarding location of Sections 912EA and 912EB.

3.4. General Regulatory Obligations (Chapter 5)

Proposal C7

The Corporations Act 2001 (Cth) should be amended to restructure and reframe provisions of general application relating to financial services providers, including by grouping and (where relevant) consolidating:

a. Part 7.6 Divs 2, 3, and 10;

b. section 963K;

c. Part 7.7A Div 5 Subdiv A, and Div 6;

d. Part 7.8 Divs 2, 3, 4, 4A, 5, 6, and 9; and

e. sections 991B, 991E, 991F, 992A, and 992AA.

Proposal C8

The Corporations Act 2001 (Cth) should be amended to restructure and reframe provisions of general application relating to administrative or procedural matters concerning financial services licensees, including by grouping and (where relevant) consolidating Part 7.6 Divs 5, 6, and 8

Regarding these two proposals, the FSC would suggest that further explanation is provided with respect to the contents of the two proposed chapters to explain the reasoning for including a particular provision within either proposed new Chapter 3 (Obligations of financial services providers) or new Chapter 6 (Financial services licensees and representatives). It is not always going to be immediately intuitive to the user why one Chapter is chosen over the other.

We also note two points of apparent overlap that we recommend need to be clarified:

- Part 7.6 Div 3 (specifically Subdivision C) contains Sections 912EA and 912EB and thus please confirm whether these two Sections will sit within new Chapter 4 (as indicated in Proposal C6a) as well as new Chapter 5 (as indicated in Proposal C7a).
- Similarly, there is a partial overlap between Proposal C6(f) and Proposal C7(c) – Both proposals cover Part 7.7A Division 6 (anti-avoidance) and thus it should be confirmed where the anti-avoidance provisions would sit.

3.5. A Financial Services Law (Chapter 6)

Proposal C9

The Corporations Act 2001 (Cth) should include a Financial Services Law comprising restructured and reframed provisions relating to the regulation of financial products and financial services, including:

a. Part 7.1 Divs 1, 2, 3, 4, 5, and 7 of the Corporations Act 2001 (Cth);

b. Parts 7.6, 7.7, 7.7A, 7.8, 7.8A, 7.9, and 7.9A of the Corporations Act 2001 (Cth);

c. Part 7.10 of the Corporations Act 2001 (Cth), excluding provisions that relate more closely to the regulation of financial markets;

d. Part 7.10A of the Corporations Act 2001 (Cth);

e. Part 7.12 of the Corporations Act 2001 (Cth), excluding provisions that relate more closely to the regulation of financial markets;

f. Part 2 Div 2 of the Australian Securities and Investments Commission Act 2001 (Cth); and

g. a list of terms defined for the purposes of the Financial Services Law.

Superannuation. The Report does not contemplate reframing and restructuring superannuation legislation. Proposal C9 notably deals with a number of provisions in the Act and the ASIC Act which are relevant to superannuation providers, but not other key legislation, notably the Superannuation Industry (Supervision) Act 1993 (**SIS Act**). Given the importance of superannuation to the Australian financial system, it is notable that the Report does not explore the reasons for not recommending reframing and restructuring of the SIS Act and other relevant legislation simultaneously with the broader project of dealing with the Act and the ASIC Act.

In the concluding paragraphs of Background Paper FSL11, the ALRC clearly articulates the problem:

"…*because the framework governing superannuation consists of an intermingling matrix of general law principles, legislation, and self-regulatory regimes, any reform will require a thorough consideration of whether, and if so how, other sources of superannuation law and regulation may be affected. In particular, consideration should be given to those areas in which alignment might be appropriate between the obligations of RSEs and those of AFS licensees, and those areas in which bespoke regulation in respect of superannuation should be maintained….submissions have noted that, like the Corporations Act, the SIS Act has been subject to many complex amendments and demonstrate complexity and sub-optimal design.192 Accordingly, a similar review into the SIS Act may be beneficial*."

This commentary is somewhat vague and inconclusive as to what the ALRC's thinking might be with regards to the SIS Act. Given the considerable effort from all stakeholders that will be involved in implementation of the various proposals and recommendations made by the ALRC in this Report, and the apparent existence of similar problems in other legislation relevant to superannuation, this does raise the question whether some problematic aspects of this legislation should be addressed at the same time as the Act and the ASIC Act. The FSC submits that further detail should be provided on the proposed approach to reframing and restructuring superannuation legislation in addition to the Act and the ASIC Act.

Corporate attribution rules. For the sake of clarity, the FSC submits that the ALRC should clarify how it is proposing to categorise the corporate attribution rules in s769B of the Act, considering the offence provisions have been separated into the 'consumer protection' and the 'financial products and financial services' sections?

Proposal C10

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

A document such as the illustrative FSL Schedule set out in Appendix D to the Report needs to balance providing enough detail to the reader to provide certainty and comprehension, while not overloading the text with excessive detail. The Report notes that the illustrative FSL Schedule "*does not exhaustively replicate the existing law in a new structure. Instead, it uses an outline to show how a schedule to the Corporations Act might appear and how restructuring would provide an opportunity to significantly improve the existing legislation*."[8]

When seeking to achieve the goal of significantly improving the legislation, as noted above, it will sometimes be unclear whether a proposed change is one of policy. While the FSC appreciates the inherent limitations of this approach, it is suggested that the ALRC should provide more specifics and detail to better understand the proposed framework set out in Appendix D.

The FSC notes that our members have a preference for Financial Services Law definitions to be contained within the Schedule (not added to section 9 of the Act).

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?

One-stop shop. The Report proposes that "*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).*"[9]

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[8] Paragraph 6.8, page 131, the Report.
[9] Paragraph 6.10, page 13, the Report.

The FSC submits that labelling this schedule as a one-stop shop understates the importance of other primary legislation integral to the provision of financial services, such as the Superannuation Industry (Supervision) Act 1993, National Consumer Credit Protection Act 2009, Insurance Act 1973 and the Life Insurance Act 1995. It also does not take into account more general statutes of key importance to financial products and services, such as anti-money laundering, taxation and competition legislation.

Given this, it would be better not to overstate the comprehensiveness of the schedule. See also 3.1 above.

Introductory table. If there are provisions within proposed Chapter 2 (Consumer protections and generally applicable offences) and Chapter 4 (disclosure about financial products and financial services) (and other specific sections) that deal with multiple products, it may be useful to have an introductory table that easily identifies specific provisions that should be considered for a particular product. For example:

Sections	Basic Deposit Products	MISs	…
1-3	x	x	
4			X

It may also be useful to highlight when provisions also apply to market participants – considering the general intention is for the FSL Schedule not to cover regulation of financial markets[10]

See also Executive Summary.

3.6. Implementation (Chapter 7)

Proposal C12

The Australian Government should establish a specifically resourced taskforce (or taskforces) dedicated to implementing reforms to financial services legislation.

Taskforces. The ALRC should provide more granular detail regarding the proposed taskforce(s) in terms of how it is constituted, costs and funding,

The FSC has concerns regarding estimated costs both in terms of initial set-up and ongoing costs (number of personnel required, premises, infrastructure, etc). It should also provide more detail regarding logistics and practicalities concerning establishing and maintaining these taskforces. While we appreciate that governments would set the terms of reference

[10] see paragraph 6.12 of the Report.

and the ALRC may not be in a position to provide detailed costs estimates, the FSC suggests that relevant costings are carried out in a timely manner.

Apart from these high-level issues, it is suggested that for the taskforce to properly operate, it would be critical to have consensus on the appropriate cross section of stakeholders to develop and be involved in the ongoing conduct of the taskforce. The composition of the taskforce should cover both the public sector, such as the government and relevant statutory regulators, and private sector, such as industry and consumer interests. Funding should not be met by way of industry levies on the regulated population.

The FSC suggests that consideration should be given to also establishing a taskforce that reviews all new legislation for compliance with the drafting rules proposed in Proposal C14 (excluding the implementation of the 6 pillars discussed in the Report). This will require the principles in C14 to be considered during the drafting process, which is important to note as such considerations may easily be overlooked if legislative designers/drafters have limited time to draft the provisions. This could also help in maintaining drafting consistency and maintaining the objectives of this review.

Staged reform and pillars. The FSC notes that the ALRC recommends a process of identifying targeted and stages reforms that successive Parliaments and governments may take forward[11] and attempts to "learn from the successes and challenges of previous reform programs". In this regard the ALRC should provide further detail as to specific issues or areas where learnings are being implemented to avoid problems of the past.

The FSC notes that the Reform roadmap in the Report contemplates a reform pillar for "policy-evolving provisions" (Pillar 6) which the ALRC suggests would not disrupt implementation of the reform package[12].The FSC has reservations with this suggestion. On the contrary, in our view it is likely that attempting to implement evolving policy changes at the same time as reframing or restructuring existing law would be potentially very disruptive. For example, if at the same time the Act is amended to restructure and reframe provisions relating to financial advice (as contemplated in Proposal C6) there are simultaneous policy changes made to implement the recommendations of the Quality of Advice Review, it is difficult to see how this would not be disruptive. Users of the provisions concerning financial advice will need to track how they are transferred from their current locations and then reframed and restructured in the new Chapter 5 of the Financial Services Law, while simultaneously track any substantive changes driven by policy change. It would seem that where reframing and restructuring is accompanied by policy change the burden on all parties in keeping up with the changes would be materially increased.

The FSC submits that more detail should be provided on how Pillar 6 would interact with the other reform pillars set out in the Report.

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[11] See page 30, Summary.
[12] See page 31, Summary.

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

The ALRC should provide more detail as to the nature, composition and cost of such an independent reviewer.

The FSC has concerns regarding how frequently these reviews will be, and how detailed. Complex legislation can take considerable time and resources to review. It is not clear to what extent the independent reviewer will be required or choose to engage other stakeholders. The time and resources that other parties will need to contribute to the independent review process should be further explored and costed.

The FSC submits that the ALRC should further consider the regulatory burden on industry in respect of participating in the activities of any taskforces contemplated by Proposal C12 and/or the independent reviewer.

3.7. Principles for Structuring and Framing Legislation (Chapter9)

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).

The FSC in principle supports these working principles but would need to review draft legislation to provide any further feedback as to how they are working in practice with respect to the Act and the ASIC Act.

3.8. Penalty Provisions (Chapter 10)

Proposal C15

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

The FSC is broadly supportive of this approach in principle.

4. Recommendations

4.1. Penalty Provisions (Chapter 10)

Recommendation 20

Offence provisions in corporations and financial services

(a) legislation should include the following at the foot of each provision:

(b) the words 'maximum criminal penalty';

(c) any applicable monetary or imprisonment penalty, expressed as one or more amounts in penalty units or terms of imprisonment; and

(d) a note referring readers to any additional rules for calculating the applicable penalty.

Legislation should state when a breach of the provisions is not deemed to be significant under s912D(4)(e)) of the Act (and is therefore not automatically reportable to ASIC).

The FSC submits it is inefficient to require licensees to check the regulations to see whether an exception applies to the relevant provision.

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.

Legislation should state when a breach of the provisions is not deemed to be significant under s912D(4)(b) or (e) of the Act (and is therefore not automatically reportable to ASIC).

The FSC submits it is inefficient to require licensees to check the regulations to see whether an exception applies to the relevant provision.

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.

The FSC is supportive of this approach in principle. However, we note that the ALRC acknowledges the implementation of Recommendation 23 "would potentially be a significant undertaking"[13]. Given this, the FSC submits that more consideration should be given, and detail provided, as to the potential costs for all stakeholders and regulatory burden involved.

[13] Paragraph 10.50, page 243 of the Report.