Corporations, Financial Services and Charities – Regulatory Complexity and Coherence

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Abstract: *Regulatory complexity and incoherence are an increasing challenge facing many parts of the Australian legal system. Particular issues arise in the regulatory frameworks governing corporations, financial services and charities – areas in which the similarities and differences offer insights into the nature of regulatory complexity and the possible responses. In light of a pressing need to simplify and rationalise these regulatory frameworks, this article critically analyses the issues and suggests potential reforms. In doing so, it draws on the findings from two current projects and academic research by scholars such as Emeritus Professor Stephen Bottomley of ANU College of Law.*

I INTRODUCTION

One of the challenges facing the Australian legal system is regulatory complexity and the concomitant need for simplification and greater coherence. Nowhere is this more so than in corporations and financial services regulation and charities regulation – areas in which the similarities and differences offer insights into the nature of regulatory complexity and the possible responses. We define regulatory complexity broadly to mean not just the legal framework within which activities and participants are regulated, but also the design of legislation – both primary and delegated legislation – and the broader regulatory ecosystem as reflected in regulatory guidance and codes of conduct.

Although differences exist between these areas, one point that is common to each area of regulation is that problems with legislative design can create a high level of unnecessary complexity, particularly as a result of the existence of multiple sources of law and overlapping duties and obligations. This reminds us of the importance of how the regulatory framework is framed and structured. It also reminds us that good legislative design is not only a question of simplification, where appropriate, but also a question of rationalisation; namely, removing unnecessary parts or elements to avoid duplication and inconsistencies.

This article suggests ways in which simplification and greater coherence could be achieved in these areas, drawing in particular on the insights and findings from the current inquiry of the Australian Law Reform Commission (ALRC) into the legislative framework for corporations and financial services regulation and a project on governance and regulation of charities funded by the Australian Research Council.[1] It also draws on academic research by scholars such as

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[1] DE 190100792 *Restoring Public Trust in Charities – Reforming Governance and Enforcement.* This project has involved comprehensive comparative investigation of governance and regulation in the charitable sector in a

Emeritus Professor Stephen Bottomley. The article is structured in five parts. Part II outlines the conceptual framework for an understanding of complexity and coherence and explains why complexity matters. Part III undertakes a high-level comparison of the two areas of focus – corporations and financial services regulation and charities regulation – to identify similarities and differences. Parts IV and V discuss the nature of complexity in each area and analyse potential solutions. Part VI concludes by suggesting observations and learnings from the comparative analysis.

II COMPLEXITY AND COHERENCE

Complexity has frequently been identified as a problem with legislation in areas such as corporations and financial services regulation.[2] The Oxford Learner's Dictionary defines the term 'complex' as 'the state of being formed of many parts; the state of being difficult to understand.'[3] There is a significant and growing body of literature examining legislative complexity and regulatory complexity more broadly. Some of the literature draws on complexity theory to identify the extent to which complex systems are 'composed of many elements',[4] of which some elements 'are not static but evolve with time'.[5] Of particular relevance to this article is the proposition that complex systems are 'nonlinear',[6] with the result that 'the concept of predictability must, for all practical purposes, be abandoned'.[7]

The concept of predictability has been used to distinguish between a complex system and a complicated system. Often used as a synonym for complexity, the adjective 'complicated' has been defined as 'made of many different things or parts that are connected; difficult to understand'.[8] In a colloquial sense, the terms 'complexity' and 'complicated' are often used interchangeably.[9] In a general legislative context, Jacobs has referred to a complicated system as 'one that is not simple' but nonetheless is knowable.[10] Further, Jacobs suggests that 'a complicated system is generally predictable.'[11] In contrast, a complex system is not predictable: '[i]n a complex system the relationship between cause and effect can only be understood in retrospect.'[12]

In the context of corporate law, Bottomley has similarly drawn a distinction between being 'complex' and being 'complicated':

number of jurisdictions with the aim of making recommendations for legislative and policy reform. Further details can be found at: https://law.unimelb.edu.au/centres/mccl/research/projects/projects/restoring-public-trust-in-charities.

[2] For general feedback on complexity in relation to the *Corporations Act 2001* (Cth), see Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021).

[3] Oxford Learner's Dictionary, available at https://www.oxfordlearnersdictionaries.com/.

[4] Stefan Thurner, Rudolf Hanel and Peter Klimek, *Introduction to the Theory of Complex Systems* (Oxford University Press, 2018) 22, as cited in ALRC, 'Legislative Framework for Corporations and Financial Services Regulation: Complexity and Legislative Design' (Background Paper FSL2, October 2021) ('ALRC Background Paper FSL2'), [55] – [57].

[5] Thurner, Hanel and Klimek (n 4) 22.

[6] Ibid 23.

[7] Ibid 6, as cited in ALRC Background Paper FSL2 (n 4) [57].

[8] Oxford Learner's Dictionary (n 3).

[9] See also ALRC Background Paper FSL2 (n 4).

[10] Roger Jacobs, 'Legislation in a Complex and Complicated World' [2017] (3) *The Loophole* 19, 20.

[11] Ibid.

[12] Ibid.

> … being complex is not the same thing as being complicated…A complicated rule or set of rules … can be analysed, parsed, broken down into its component parts and then reassembled, perhaps even represented in a flow chart of the type 'if A then B, if not-A then C (and so on)' … Complexity resists this type of approach. The dynamic interconnections and the moving parts that comprise a complex system cannot be reduced to the linear logic of a summary or a flow chart. For the most part, when we seek to simplify rules, we are addressing their complicatedness, not the overall complexity of which they are a part …Put another way, an uncomplicated set of rules may still be part of a complex system.[13]

If there is a difference between 'complex' and 'complicated' as suggested by Bottomley, it lies in the notion that, although both terms convey the state of having many interconnected parts or elements, the term 'complex' conveys the state of having many *dynamic* parts, the effects of which differ depending on the circumstances to which the legislation is applied. An example in the area of financial services regulation is the definition of a 'financial product', which is dynamic in terms of changing according to the specific area of regulation and producing different effects accordingly. The position is exacerbated by the existence of extensive qualifications and exceptions that qualify the definition of a 'financial product' and introduce additional layers of complexity.

The challenge with a complex regulatory framework is that it is complicated in terms of having many interconnected parts, which may need to be broken down and reassembled in order to understand how the framework operates, and it also bears the risk of having many dynamic parts that interconnect in a potentially inconsistent or incompatible manner. Complexity increases the risk of incoherence as it makes it difficult to ascertain how all the parts should interrelate or fit together.

Other examples of complexity in the context of financial services are the concepts of unconscionability and misleading or deceptive conduct, each of which is expressed in different – or subtly different – ways in legislation. This creates challenges for interpretation and application.[14] A further example of complexity are the myriad prohibitions and obligations in the *Corporations Act* that govern conduct and give rise to the potential for overlapping claims and charges.[15] The challenges generally of treating the same conduct or culpability in different ways, including by reference to the concept of unconscionability, have recently been articulated by Justice Derrington of the Federal Court of Australia:

> [The Australian Securities and Investments Commission] was successful in arguing that the same facts that supported the charge of unconscionability of NAB's conduct applied to its other charges,[16] though unconscionability involved a different measure or characterisation of the conduct. The basis of that success means that NAB is found liable upon several items for the same conduct in relation to different forms of legislation directed to the same purpose, consumer protection, where the added claims are based on no further culpability. The same culpability merely meets the different description of offences contained in separate statutory

[13] Stephen Bottomley, 'The Complexity of Corporate Law' (2022) 44(3) *Sydney Law Review* 415, 431.
[14] See ALRC, 'All Roads Lead to Rome: Unconscionable and Misleading or Deceptive Conduct in Financial Services Law' (Background Paper FSL9, December 2022).
[15] See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) ('ALRC Interim Report A') [3.78]: 'The number and location of obligations and prohibitions in an Act may be a cause of complexity. These are critical components of any legislative scheme, as are the civil penalties, offences, and other consequences that may flow from breaching them.'
[16] The other charges were failure to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly' under s 912A(1)(a) and to 'comply with the financial services law' under s 912A(1)(c).

> provisions designed to be adequate to catch different forms of misconduct within their purview. This result is undesirable, and although it was perfectly valid to bring the claims in the alternative as a precaution, the question whether all should be pursued to finality should now be considered by ASIC.[17]

The ALRC has suggested that 'a key objective when designing legislation should be to ensure that it is as easy to navigate and understand as possible, consistent with the policy objectives being pursued by the legislation'.[18] This objective is embodied within the term 'coherence', which has been defined as meaning 'logical and well organized; easy to understand and clear'.[19] This definition highlights that coherence depends not just on comprehensibility but also on structure.[20] The ALRC has further suggested that a legislative framework is coherent 'if it hangs or fits together, if its parts are mutually supportive, if it is intelligible, if it flows from or expresses a single unified viewpoint'.[21] Conversely, incoherent law is 'unintelligible, inconsistent, ad hoc, fragmented, disjointed, or contains thoughts that are unrelated to and do not support one another'.[22] As a result, the ALRC concludes, 'coherence needs to be assessed by reference to both the individual components of legislation and to legislation as a whole.'[23]

As Bottomley has noted, however, some degree of complexity is unavoidable:

> … we should be clear in our diagnoses and realistic about the possible outcomes … This suggests an acknowledgment that some degree of complexity is necessary or unavoidable, and that the task is to find the optimal or necessary degree of complexity to achieve the system's aims.[24]

Bottomley has also noted that 'complexity and simplicity are not intrinsically good or bad. Neither are they mutually exclusive; a system can be complex in part and simple in other aspects.'[25] The ALRC has also acknowledged that a degree of legal complexity remains necessary.[26] This is because 'an irreducible core of necessary complexity' is required to achieve the desired outcomes of legislation.[27]

Accordingly, this article agrees with the ALRC that the task is not to avoid complexity but, instead, to avoid *unnecessary* complexity. A parallel in this regard could be drawn with the principles of contract drafting, where a distinction is often recognised between 'vagueness' and 'ambiguity'. The term 'vagueness' reflects the realities about the inherent vagueness of language and describes the situation where the meaning of a piece of text is clear, but the way in which it is interpreted is open to question. The term 'ambiguity', on the other hand, describes the situation where a piece of text may have two completely different meanings. Not

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[17] *Australian Securities and Investments Commission v National Australia Bank Limited* [2022] FCA 1324 at [379]. In this case, it was held that NAB's conduct in continuing to overcharge customers in circumstances where it knew that it was wrongfully doing so constituted unconscionable conduct.
[18] Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) ('ALRC Interim Report C') [2.11].
[19] Oxford Learner's Dictionary (n 3).
[20] Issues concerning structure and framing are the focus of the ALRC's Interim Report C (n 18).
[21] ALRC Interim Report A (n 15) [2.23], citing Ken Kress, 'Coherence' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2nd ed, 2010) 521, 521.
[22] Ibid.
[23] Ibid.
[24] Bottomley (n 13) 435.
[25] Ibid 420.
[26] See ALRC Background Paper FSL2 (n 4) [22].
[27] Ibid [25].

surprisingly, best practice is to reduce vagueness to the extent possible and avoid ambiguity at all costs. When translated into the legislative design context, best practice would be to reduce complicatedness to the extent possible and to avoid unnecessary complexity at all costs to reduce the risk that unnecessary complexity has an adverse impact on coherence.

Coherence is of critical importance to compliance on the part of regulated entities, and to enforcement on the part of regulators. It follows logically that the less coherent or clear the legal and regulatory framework is, the more difficult it will be to achieve basic compliance, let alone 'meaningful compliance' – a concept that is increasingly finding its way into modern parlance, particularly in the wake of developments in the environmental, social, and corporate governance (ESG) framework.[28] As Isdale and Ash have noted:

> Complexity matters because it makes the law difficult to understand. In turn, this makes it harder for consumers and their advocates to know their rights and be able to exercise them; for practitioners to be able to advise their clients confidently; for regulated entities to know how to comply with the law; and for regulators to enforce the law. … We all bear the consequences of legislative complexity, including through increased costs for financial products and services, and in publicly funding courts and regulators to wade through the legislative thicket.[29]

The relationship between complexity and clarity or coherence has been recognised by Chia and Ramsay, who have noted that the 'cost of increasingly complex legislation can be decreasing clarity' and that 'a lack of clarity in legislation results from a failure to effectively communicate the policies, purposes and concepts of legal rules.'[30]

It is relevant to note that complexity can be as much a product of poor legislative design as a product of policy complexity. Quite often, the policy or normative underpinnings are present; the problem is that it is difficult to see the norms for the rules, to borrow from the wood and trees expression.[31]

III COMPARING CORPORATIONS AND FINANCIAL SERVICES REGULATION WITH CHARITIES REGULATION

The two areas of regulation that are the focus of this article – or three if you separate the regulation of corporations from the regulation of financial services – share similarities in terms of the causes of legislative and regulatory complexity. These causes include multiple sources of law,[32] overlap and duplication between different sources of law (including as between statute

[28] For a discussion of meaningful compliance in the context of the relationship between norms and rules, see Andrew Godwin and Micheil Paton, 'Social Licence, Meaningful Compliance, and Legislating Norms' (2022) 39(5) *Company and Securities Law Journal* 276. See also ALRC Interim Report A (n 15) [2.24] – [2.27].

[29] William Isdale and Christopher Ash, 'Undue Complexity in Australia's Corporations and Financial Services Legislation' <www.alrc.gov.au/news/undue-complexity/>. See also APRA, 'Modernising the Prudential Architecture' (Issues Paper, 12 September 2022) <https://www.apra.gov.au/sites/default/files/2022-09/Information%20paper%20-%20Modernising%20the%20prudential%20architecture_0.pdf>: 'Navigating the prudential framework and the network of supporting advice can be complex, as it continues to be updated over time. Complexity makes it difficult for regulated entities to find and understand requirements, complicating risk management and amplifying compliance costs …'

[30] Hui Xian Chia and Ian Ramsay, 'Section 1322 as a Response to the Complexity of the Corporations Act 2001 (Cth)' (2015) 33(6) *Company and Securities Law Journal* 389, 393.

[31] See Godwin and Paton (n 28) 281.

[32] The existence of multiple sources of law was identified as a challenge in the review of the insolvent trading safe harbour, where submissions stated that Australia's bankruptcy, restructuring, insolvency and turnaround regimes were among the most complex in the world. In the area of corporate insolvency, for example, insolvency processes are contained, and must be navigated by users, in Chapter 5 of the *Corporations Act*,

law and the general law), poor legislative design in terms of structure and framing, the existence of relevant soft law in the form of regulatory codes, guidance and industry standards, and increasing complexity arising from real-world factors, such as policy complexity,[33] and in the case of financial services, a tendency to be overly prescriptive and complexity in products, services and activity generally.[34] Technology is also increasingly becoming a cause of regulatory complexity as market participants innovate by introducing new legal structures, such as decentralised autonomous organisations (DAOs), and new ways of delivering services, such as the enhanced delivery of financial planning services through robo-advisors.[35] Increasing complexity has led to demands for greater clarity and certainty on the part of stakeholders. It is important to acknowledge, however, that greater detail or prescription does not necessarily lead to greater certainty. As noted by an early submission to the ALRC in 2021, '[t]he clamour for certainty that seems to have attended corporate regulation, and which at least in part has led us to the current state, has not resulted in certainty being achieved. The opposite is true.'[36]

There are, of course, key differences between corporations and financial services regulation and the regulation of charities. For example, in corporations and financial services regulation, the power of the Australian Securities and Investments Commission (ASIC) to grant exemptions and to modify legislation through what are commonly referred to as notional amendments has contributed to complexity. This is a problem that does not exist to the same extent for charities, which involves much less delegated legislation. In addition, unlike corporations and financial services regulation, each of which was the product of referrals from the states (similar to the regulation of credit),[37] the charities sector suffers from multiple jurisdictional and sometimes inconsistent governance requirements as between state and federal legislation.

Another difference concerns the users of legislation. In the charities space, it might be said that the users are likely to be less familiar with the regulatory framework and less able to seek professional legal advice than in the corporations and financial services area, although a similar challenge might be said to exist in the context of financial services. Bottomley has observed the following in relation to corporate law, although his comments could apply equally to all areas of regulation:

> In short, corporate law is not 'user-centric' … The difficulty with trying to achieve comprehensibility is that the Act has no single category of 'user'; indeed, that term is ambiguous.

Schedule 2 (Insolvency Practice Schedule) of the *Corporations Act*, and the *Insolvency Practice Rules (Corporations) 2016* (Cth). See Treasury, *Review of the Insolvent Trading Safe Harbour* (Report, 21 November 2021), 84-85. For an observation on the similarities between the issues with the insolvency law framework and the framework for financial services, see The Hon Justice Sarah C Derrington, 'The Changing Face of Law Reform in Australia: Commentary on the ALRC's Inquiry Into Insolvency, its Contribution to the Current Legal Framework and the Need for a New Review Given the Passage of Over 30 Years' (Speech to ARITA Expert Series: Insolvency – Session 1, 11 November 2021).

[33] Andrew Godwin, Vivienne Brand and Rosemary Teele Langford, 'Legislative Design – Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280, 281: '[t]he more detailed and complex policy becomes, the more detailed and complex law tends to become and vice versa'.

[34] See ALRC Background Paper FSL2 (n 4) 9.

[35] For a discussion about the use of DAOs by charities, see Alexandra Sims, *Decentralised Autonomous Organisations: Governance, Dispute Resolution and Regulation* (thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy, Department of Accounting and Corporate Governance, Macquarie Business School Macquarie University, May 2021) 92 – 95.

[36] Unpublished submission in the ALRC's files.

[37] For a discussion of the constitutional background in respect of corporations and financial services, see ALRC, 'Historical Legislative Developments' (ALRC Background Paper FSL4, November 2021).

> Does it refer only to those to whom the rules are intended to apply, or does it also include those who have the job of enforcing, interpreting, applying or giving professional advice about those rules? There have long been arguments that at least some aspects of corporate legislation should be drafted specifically for the user audience of professionals and experts from whom investors and business people seek advice.[38]

Research suggests that over recent decades, the audience for consuming legislation in general has grown more diverse.[39] This trend is likely to continue, particularly as the interface between technology and legislation becomes greater and technology itself becomes a 'user' of legislation in the form of artificial intelligence. Although the difficulties in designing legislation in a way that accommodates all potential users should be acknowledged, it appears axiomatic that if a legislative framework or a regulatory system generally is too complex for all users, including the audience of professionals and experts from whom investors and businesspeople seek advice, the system is not 'fit for purpose'.

IV CORPORATIONS AND FINANCIAL SERVICES REGULATION

A Complexity

In its Preamble, the Terms of Reference for the ALRC inquiry into the legislative framework for corporations and financial services regulation state that in making the reference to the ALRC, the Attorney-General had regard to various considerations, including 'the Government's commitment in response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry to simplify financial services laws' and 'the need to ensure there is meaningful compliance with the substance and intent of the law'. In particular, the Terms of Reference ask the ALRC to examine 'how legislative complexity can be appropriately managed over time'. A key issue, therefore, is how complexity might be reduced or avoided, and how financial services laws could be simplified. More generally, the Terms of Reference ask the ALRC to consider whether the *Corporations Act* and the *Corporations Regulations 2001* (Cth) could be simplified and rationalised, particularly in relation to:

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

An important finding of the inquiry is that there has been little investment in achieving a coherent and navigable structure for corporations and financial services.[40] This can be contrasted with the position in other jurisdictions, where clearer frameworks, or models, exist.[41]

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[38] Stephen Bottomley, 'Corporate law, Complexity and Cartography' (2020) 35 *Australian Journal of Corporate Law* 142, 159.

[39] Office of the Parliamentary Counsel (UK), *When Laws Become Too Complex: A Review into the Causes of Complex Legislation* (2013) 19.

[40] ALRC Interim Report C (n 18) [4.21].

[41] The UK, for example, has the FSMA Model for financial services regulation, named after the *Financial Services and Markets Act* — and the UK recently reaffirmed its commitment to this model so as to manage the

The lack of a clear framework is most evident in the *Corporations Act*. Although some clarity in design is evident in parts of the Act such as the Market Integrity Rules,[42] these appear in isolation, and without consistency across chapters, let alone the Act in its entirety.

The *Corporations Act* is highly prescriptive, with yet further prescriptive detail dispersed across the *Corporations Regulations* and hundreds of other legislative instruments, usually made by ASIC. The analysis by the ALRC suggests that prescription is both a *cause* and a *symptom* of complexity.[43] This is particularly clear in respect of Chapter 7 of the *Corporations Act*. As noted above, this adopts an over-inclusive approach to the regulation of financial products and financial services, and relies on exclusions, exemptions, and notional amendments to manage that over-inclusiveness.

As noted by the ALRC, an understanding of the definition of 'financial product' requires a reader 'to understand the general functional definition of "financial product", specific inclusions, specific exclusions, and any notional amendments made by the *Corporations Regulations* and ASIC legislative instruments.'[44] The definition is qualified by a list of specific inclusions[45] and a list of specific exclusions.[46] Products can be included or excluded from the definition of 'financial product' by regulations, which can also exclude products from particular provisions of Chapter 7 of the *Corporations Act*.[47] Further, ASIC is able to declare that a specified facility, interest, or other thing is not a 'financial product' for the purposes of Chapter 7.[48] The dynamic nature of the definition of 'financial product' across Chapter 7 increases the complexity of regulatory framework in respect of financial products and diminishes its coherence. The challenges are particularly evident in the context of insurance products. For example, there are inconsistencies between defined terms in the *Corporations Act* and defined terms in the *Australian Securities and Investment Commission Act 2001* (Cth) ('ASIC Act'),[49] and also between the exclusions from the definition of a 'financial product' in s 765A of the *Corporations Act* and the exceptions to the application of the *Insurance Contracts Act 1984* (Cth) in s 9 of the latter Act.[50]

Complexity is also exacerbated by the length of the *Corporations Act*, which is the second longest Commonwealth Act. Chapter 7 of the Act makes up 28% of that length. The ALRC's data analysis indicates that if Chapter 7 were a standalone Act, it would be the 11th longest Commonwealth Act. It could be said that the *Corporations Act* represents the 'worst of both worlds' in terms of being a long Act and having voluminous delegated legislation.

More problematic than the length of delegated legislation is the way that it is used. Both regulations and other legislative instruments made pursuant to the *Corporations Act* are used to create complex conditional exemptions and notional amendments. Also known as 'modifications', notional amendments effectively change the wording of legislation but do not

incorporation/'onshoring' of EU law after Brexit. The EU has the 'Lamfalussy Model' for regulating financial services, named after the Chair of the Committee that created it.

[42] *ASIC Market Integrity Rules (Securities Markets) 2017*.

[43] ALRC Interim Report A (n 15) [3.160].

[44] Ibid [7.18].

[45] *Corporations Act*, s 764A.

[46] *Corporations Act*, s 765A.

[47] ALRC Interim Report A (n 15) [7.26].

[48] *Corporations Act*, s 765A(2).

[49] For example, the health insurance exclusion in ss 12BAA(7)(d) and (8) of the *ASIC Act* is different from the exclusion in ss 765A(1)(c) and (ca) of the *Corporations Act*.

[50] The authors are grateful to Dr Ian Enright for sharing his insights in this regard.

appear on the face of the legislation itself. It is therefore often impossible to determine from reading the text of the primary legislation whether the primary legislation applies 'as written' or is notionally amended by regulations and other legislative instruments. Underscoring the complex nature of the legislative framework for financial services, anecdotal evidence suggests that even experienced practitioners are concerned about 'missing something' when advising on Chapter 7 of the Corporations Act.[51]

No other legislation uses notional amendments to the same extent as the *Corporations Act*. As at 30 June 2022, there were over 1,200 distinct notional amendments that affected over 600 provisions of the *Corporations Act* and *Corporations Regulations*. Over half of these notional amendments potentially affect *all* persons subject to the provision, while another 20% affect a broad group of people. As a result, notional amendments affect a large group of people.

Notional amendments are also a challenge for law-makers in terms of the risks of overlooking things and making mistakes. The ALRC has identified numerous mistakes produced by notional amendments, including identically numbered notional provisions, as well as conflicts between notional amendments and later textual amendments, raising questions as to which version of a section has the force of law.[52] Exemption and modification powers are typically very broad, which means that the law enacted by Parliament can be altered in any number of ways. There are presently approximately 68 of these powers in the *Corporations Act*.

A couple of examples serve to highlight the unknowable or unpredictable nature of notional amendments and the role that they play in producing unnecessary complexity. The first example is s 1012G of the *Corporations Act*. This provision was replaced by a notional amendment in 2005 and has not had any legal effect since then. The 'real' s 1012G is in reg 7.9.15H of the *Corporations Regulations*. The second example is *ASIC Class Order 14/1262*, which notionally amends a provision of the *Corporations Act* that is also notionally amended by reg 7.9.07FA of the *Corporations Regulations*. To understand the instrument and its effect, users must read the original provision of the Act, alongside the subsection notionally inserted by the *Corporations Regulations*, and the additional six sub-sections notionally inserted by *ASIC Class Order 14/1262*.

ASIC regulatory guidance, which sits alongside the legislation, adds another layer of potential complexity. The 205 Regulatory Guides issued by ASIC are, in total, almost triple the number of pages of the *Corporations Act* itself. This does not include the 200 additional 'Information Sheets' also issued by ASIC. Regulatory Guidance can be both a symptom, and cause, of complexity. Consultees have told the ALRC that they sometimes treat ASIC-issued guidance as though it were the law,[53] which is problematic for several reasons. A clearer legislative model would necessitate less guidance.

[51] Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL 1, June 2021) 1: 'Many stakeholders have identified navigability of the law to be a key concern – it is too difficult to locate relevant parts of the law, and even experienced lawyers cannot always be confident that they are taking into account all relevant provisions and instruments on a particular issue without "missing something".'
[52] See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) ('ALRC Interim Report B') [6.29].
[53] ALRC Interim Report A (n 15) [3.16].

B Potential solutions

A key proposal in the ALRC's Interim Report B is the adoption of a new legislative model in terms of where law is located within the legislative hierarchy, and also who makes rules. The ALRC has identified problems in the legislative hierarchy of Chapter 7 of the *Corporations Act* as being at the core of its complexity.[54] The ALRC's proposed legislative model addresses that complexity, including by removing the need to make notional amendments and by consolidating hundreds of pieces of delegated legislation.[55] The legislative model would comprise three elements:

- First, the Act, containing provisions appropriately enacted only by Parliament;
- Secondly, a Scoping Order, which would operate as a single consolidated legislative instrument and contain exclusions, class exemptions, and other detail concerning the scope of the Act; and
- Thirdly, thematic 'rulebooks', which would operate as consolidated legislative instruments and contain rules giving effect to the Act in different regulatory contexts such as disclosure and licensing.[56]

Further, consistent with the current position where delegated legislation can typically be made at the instigation of both the Minister (through regulations) and ASIC, the ALRC has proposed that the Scoping Order and rules be amended concurrently by both the Minister and ASIC.[57]

One of the key findings from the ALRC's empirical research is that corporations and financial services legislation in Australia makes less use of delegated legislation (as a percentage of the primary legislation) than other regulatory regimes in which technical expertise, flexibility, and adaptability are important. Examples include civil aviation and maritime regulation. Accordingly, there appears to be scope to make more effective use of delegated legislation.[58]

Submissions from stakeholders indicate broad support for the proposed model and the potential for the proposed model to achieve a more adaptive, efficient and navigable legislative framework as contemplated by the Terms of Reference.[59] Importantly, the proposed model would remove the need for extensive notional amendments. Both the model, as well as other features that are set out in more detail in Interim Report B, would enable better oversight of delegated legislation.

It is interesting to note that the aspect that has generated concern from stakeholders is the proposal in Interim Report B that rule-making powers be vested concurrently in the Minister and ASIC and that a protocol be entered into between both of them in relation to the exercise of rule-making powers.[60] One of the concerns that has been expressed is that this would vest ASIC with greater rule-making power than it currently has, particularly in relation to matters that fall within the domain of policy. By contrast, the proposal envisages that ASIC's rule-

[54] Ibid [3.112]–[3.144]; [7.153]–[7.164]; ALRC Interim Report B (n 52) [6.7]–[6.48].
[55] ALRC Interim Report A (n 15) [7.168]–[7.169]; ALRC Interim Report B (n 52) [2.7]–[2.18]; [2.42]–[2.50].
[56] The model is not just about taking things out of the Act and putting them somewhere else; it is also about finding the right 'home' for necessary detail in a principled and consistent way. There are some matters in delegated legislation that more appropriately belong in the Act.
[57] Interim Report B (n 52) ch 2.
[58] Ibid [6.18].
[59] ALRC, 'Reflecting on Reforms II – Submissions to Interim Report B' (ALRC Background Paper FSL10, January 2023) [10]–[12].
[60] Ibid [37]–[38].

making powers would be tightly circumscribed by the primary legislation and would deal more with technical rules for implementing the provisions of the primary legislation than with matters of policy.

As noted above, ASIC already has extensive powers to exempt and modify. It has also engaged in direct rule-making in areas such as derivative transaction rules and financial benchmark rules. It is easy to overlook the extensive nature of ASIC's existing rule-making powers, partly because of the tendency to see exemption and modification powers as a necessary tool to deal with the over-prescriptive and over-inclusive nature of the *Corporations Act*. To the label 'the notional legislator', as coined by Bottomley in respect of ASIC,[61] might be added the label 'the hidden legislator'.

C Metrics of complexity

In Interim Report A, the ALRC discussed the use of metrics as 'potential quantitative measures of the complexity of a legislative feature.'[62] Examples given were metrics 'relating to the complexity of definitions', which 'include the number of defined terms and the number of times they are used in a legislative text.'[63] When a variety of metrics are applied to the *Corporations Act*,[64] the ALRC has found that the *Corporations Act* 'often stands in a class of its own for potential complexity.'[65]

Bottomley has written about the need for caution in relation to the use of metrics as levers to reduce complexity:

> It is possible to identify certain factors within the system that are likely to contribute to greater (or reduced) complexity, but we cannot determine the extent to which systemic complexity will change if those factors are addressed. This observation is relevant to the current ALRC inquiry which, in its first Interim Report … presents a detailed empirical analysis of legislative complexity in the Corporations Act, based on a number of metrics, defined as 'potential quantitative measures of the complexity of a legislative feature'. All these things are measurable, and have the potential to add to difficulty in using the legislation (noting that there is a range of users). But whether they can be used as levers to reduce complexity is a different question. Caution must be exercised in constructing elaborate metric analyses of complexity, as appears to be the case in the ALRC Interim Report A, lest this lead to overly optimistic diagnoses about the possibility of reducing systemic complexity as opposed to complicatedness.[66]

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[61] Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker' (2011) 39 *Federal Law Review* 1.

[62] ALRC Interim Report A (n 15) [3.29].

[63] Ibid. For further details on metrics, see ALRC Interim Report A (n 15) [3.28] and ALRC Background Paper FSL2 (n 4) [8] and [68]. The metrics include features that have been discussed in this article: duplication and redundancy, which include 'duplicated or overlapping obligations and prohibitions (eg multiple misleading and deceptive conduct prohibitions)'; legislative hierarchy, including the number of legislative instruments that notionally amend the Act; extensive cross-referencing; the complex use of conditional statements (such as 'if', 'where', etc.); and the proliferation of exclusions and exemptions. In addition to its work on metrics, the ALRC launched a DataHub in December 2022, which contains data sets in respect of Australian legislation, including corporations legislation. The ALRC DataHub 'is intended to provide a resource for researchers, legal practitioners, businesses, Parliamentarians, non-government organisations, and government departments and agencies.' See <https://www.alrc.gov.au/datahub/>.

[64] These included metrics 'such as length, structural intricacy, obligations, conditional statements, potentially duplicative provisions, prescription, language, and thematic diversity' (ALRC Interim Report A (n 15) [3.29]).

[65] Ibid [3.51].

[66] Bottomley (n 13) 435.

The need for caution is justified, particularly in the context of systemic complexity, where the range of factors to be taken into account is broader than the legislative features examined by the ALRC for the purposes of its inquiry.[67] That said, the ALRC has referred to metrics only as potential measures of complexity and has explained that the use of metrics to measure legislative complexity 'should make it possible to identify particularly complex areas of legislation, and potentially to measure the implications of any proposed amendments in terms of reducing (or increasing) legislative complexity.'[68] The use of metrics in this way assists in distinguishing between 'necessary' complexity and 'unnecessary' complexity and determining what, if anything, might be done to enhance coherence.

IV CHARITIES REGULATION

In seeking to understand – and ideally remedy – complexity and complicatedness in the charities sector, it is important to be conscious of the distinctive nature of the charitable sector. This distinctiveness results from the voluntary nature of much participation, the hybrid public-private nature of charitable entities, the core focus on pursuit of purpose, the need for charities to be accountable to many stakeholders in a number of ways, and the need to balance accountability with avoidance of overly complex and burdensome requirements that may discourage volunteering and philanthropy.[69] The sector has been the subject of multiple inquiries and recommendations,[70] some of which have been implemented and some not. The most significant was the creation of the Australian Charities and Not-for-profits Commission ('ACNC') and ACNC regime, as outlined below.

The focus of the analysis in this Part is on remedying unnecessary complexity arising from the applicable governance and ACNC regulatory frameworks, although recommendations are also made in relation to helping charities to navigate and manage regulatory complexity generally. It is important to recognise that, apart from governance challenges and regulation of charities as charities, many other challenges face charities due to the vast increase in regulation in so many areas. These include, for example, new laws relating to safeguarding, occupational health and safety, terrorism, money laundering, whistleblowing, fundraising, privacy, and tax.[71] Increased government intervention and regulation in so many aspects of charities' activities are causing enormous challenges. A key issue for the Federal Government, in light of its stated

[67] In addition to rules and standards, the factors relevant to systemic complexity as examined by Bottomley include 'corporate and financial practices', and 'the regulatory process by which rules and standards are implemented and enforced.' Bottomley (n 13) 419.
[68] ALRC Interim Report A (n 15) [3.29].
[69] For discussion see Rosemary Teele Langford, 'Purposes and Public Benefit' in Daniel Halliday and Matthew Harding (eds), *Charity Law: Exploring the Concept of Public Benefit* (Routledge, 2022) 279; Matthew Harding, 'Independence and Accountability in the Charity Sector' in John Picton and Jennifer Sigafoos (eds), *Debates in Charity Law* (Hart, 2020) ch 2.
[70] For summary and critical analysis see Myles McGregor-Lowndes, 'Are There Any More Recommendations Worth Implementing from Nearly 30 Years of Commonwealth Nonprofit Reform Reports?' (Report, The Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, February 2023). There have been a number of reviews and the need is to action some key recommendations - but see also Australian Government, Department of Social Services, *Development of the Not-for-profit Sector Development Blueprint* <https://www.dss.gov.au/communities-and-vulnerable-people-programs-services/the-blueprint-expert-reference-group-berg-latest-updates>.
[71] See, e.g., Australian Government, 'Other Regulators' *Australian Charities and Not-for-profits Commission* <https://www.acnc.gov.au/for-charities/manage-your-charity/other-regulators>.

commitment to 'being a true partner to charities',[72] is assisting charities to navigate and cope with the explosion of regulation.

A Causes of complexity in the charities sector

In 2012, with the advent of the ACNC, a new governance and regulatory framework was introduced into Australia.[73] As part of this new regime charitable entities are subject to certain 'Governance Standards' with which they must comply in order to be registered and remain registered with the ACNC.[74] In particular, under Governance Standard 5 charitable entities are required to take reasonable steps to make sure that the people who govern them (known as 'responsible entities' or 'responsible persons')[75] are subject to a number of duties. These relate to care and diligence, good faith and furthering purposes, disclosing certain conflicts of interest, avoiding misuse of position and of information, ensuring that the financial affairs of the charity are managed responsibly and avoiding insolvent trading.[76] A key drawback is that these duties are imposed on the entity rather than on the individuals – entities need to make sure that their responsible persons are subject to these duties by way of, e.g., the constitution, a letter of appointment or board charter. In conjunction with the introduction of Governance Standard 5 the duties in ss 180–83 and 191–193 of the *Corporations Act 2001* (Cth) were turned off for directors of charitable companies.[77] Commentators have criticised the resultant decrease in accountability and there have been proposals for these duties to be turned back on.[78] Charities that operate or partner with others overseas are also subject to four External Conduct Standards,[79] which in some cases add significant conceptual and practical complexity.

(i) Multilayered governance duties

The result is that responsible persons are subject to multiple layers of duties. These include general law duties (which have not been turned off), statutory duties arising from the charitable entity's form,[80] the indirect duties arising from Governance Standard 5 and duties arising from

[72] The Andrew Leigh, Assistant Minister for Competition, Charities and Treasury, 'Historic Charities Consultation Begins' (Media Release, 2022) <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/historic-charities-consultation-begins>.

[73] See *Australian Charities and Not-for-profits Commission Act 2012* (Cth); *Australian Charities and Not-for-profits (Consequential and Transitional) Act 2012* (Cth); *Australian Charities and Not-for-profits Commission Regulations 2022* (Cth).

[74] *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 25-5(3)(b), 45-10(1), 50-10(1); *Australian Charities and Not-for-profits Commission Regulations 2022* (Cth) divs 45, 50.

[75] The term 'responsible person' is defined in *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 205-30 and includes, for example, directors of charitable companies, trustees of charitable trusts and management committee members of incorporated associations.

[76] *Australian Charities and Not-for-profits Commission Regulations* 2022 (Cth) reg 45.25(2).

[77] *Corporations Act 2001* (Cth) s 111L.

[78] See Rosemary Teele Langford and Miranda Webster, 'Misuse of Power in the Australian Charities Sector' (2022) 45 *University of New South Wales Law Journal* 70; Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review – Report and Recommendations 2018* (2018) 9, 12, 46-48, 50 ('ACNC Review')*.*

[79] *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) regs 50.20(2), 50.25(2), 50.30(2), 50.35(2).

[80] For detailed tables see 'Statutory Provisions – Australia – Good Faith, Proper Purposes, Care' and 'Statutory Provisions – Australia – Conflicts and Profits' <https://law.unimelb.edu.au/centres/mccl/research/projects/projects/restoring-public-trust-in-charities>; see also Langford and Webster, 'Misuse of Power' (n 78).

codes, funding agreements and grant documents. These duties often overlap, but are rarely the same.[81]

It is well recognised that this multilayered governance framework – and, in particular, the model adopted by Governance Standard 5 – is problematic due to gaps in coverage and disjointed interaction with other legislation. It is at times incoherent. The panel reviewing the ACNC in 2018 noted:

> The Panel heard that the current system of different governance requirements is complex and confusing. It is unreasonable to expect volunteer directors working in the sector to understand and comply with multiple jurisdictional and sometimes inconsistent governance requirements. While there are common themes across the competing governance requirements, such as the duties to act honestly and avoid conflicts, the expression of those duties differs between them and imposes an unacceptable level of red tape.[82]

There are therefore rule of law concerns in that it is not always possible for those who are subject to the laws to be able to understand those laws. This concern is exacerbated by the fact that many responsible persons act in a voluntary capacity.

The key reason for this multilayered system and for the indirect (rather than direct) application of duties to individuals is constitutional. In contrast to the federal regime for the regulation of corporations and financial services under the *Corporations Act* there has not been a referral of State power to the Commonwealth to facilitate a fully federalised regime for charities. There are, in fact, doubts as to the constitutionality of the ACNC regime.[83] A particular issue is that the ACNC has only limited jurisdiction over responsible persons themselves – hence the imposition of Governance Standard 5 on the entity.[84]

(ii) Constitutional limitations and a narrow regulatory framework

In addition, the ACNC's regulatory actions are constrained by the constitutional limitations underlying the ACNC legislation and the resultant narrow regulatory framework. For example, certain of the ACNC's enforcement powers (e.g. powers to issue formal warnings, give directions, accept enforceable undertakings, apply for injunctions, and to suspend or remove responsible persons) can only be applied to 'federally regulated entities'[85] or to charities that operate outside Australia or partner with others who are operating outside of Australia. Constitutional uncertainty means that the ACNC may resort to revoking a charity's registration, although the ACNC has also increasingly been using compliance agreements. Such agreements appear to be a sensible way of dealing with the constitutional limitations, but can also be

[81] See, e.g., Rosemary Teele Langford, 'Conflicts and Coherence in the Charities Sphere: Would a Conflict by Any Other Name Proscribe the Same?' (2020) 14 *Journal of Equity* 1.
[82] ACNC Review (n 78) 47.
[83] See Nicholas Aroney and Matthew Turnour, 'Charities Are the New Constitutional Law Frontier' (2017) 41(2) *Melbourne University Law Review* 446.
[84] For outline see Langford and Webster, 'Misuse of Power' (n 78) 84-5.
[85] Under s 205-15 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), a 'federally regulated entity' is defined as any of the following: '(a) a constitutional corporation; or (b) a trust, all of the trustees of which are constitutional corporations; or (c) a body corporate that is taken to be registered in a Territory under s 119A of the *Corporations Act 2001* (Cth); or (d) a trust, if the proper law of the trust and the law of the trust's administration are the law of a Territory; or (e) an entity, the core or routine activities of which are carried out in or in connection with a Territory.'

problematic due to issues of voluntariness and power imbalance. The ACNC's powers are also limited in relation to charities classified as 'basic religious charities'.[86]

The ACNC's limited enforcement powers can be compared with those of other regulators such as ASIC and the Charity Commission for England and Wales.[87] The limitations on the ACNC's powers are somewhat mitigated by the fact that most charitable entities are regulated via form or sector in addition to being regulated by the ACNC. For example, there is legislation relating to trusts, corporations, incorporated associations, Aboriginal and Torres Strait Islander Corporations and cooperatives.[88]

The key lacunae are the ability of a regulator to act against directors of charitable companies, the lack of comprehensive duties for committee members of charitable incorporated associations and the gap in relation to responsible persons of basic religious charities. Elsewhere, Langford and Webster have summarised the key weaknesses of the ACNC framework to be the very limited possibilities for pursuing individuals; the very limited power against charities that are not federally regulated entities (and difficulties in assessing whether an entity is a federally regulated entity); and the lack of power to protect a charity's assets once the charity has been deregistered.[89] At the same time, the overlap of regulatory requirements leads to complexity and increased red tape – the multiple, duplicative and (at times) inconsistent regulatory requirements raise concerns in relation to excessive and inefficient regulation.

In addition, the ACNC is subject to very restrictive secrecy provisions, which in broad terms prohibit the disclosure of information provided by charities to the ACNC, subject to exceptions.[90] These secrecy provisions, which are stricter than those applicable to other Australian regulators and to charities regulators in overseas jurisdictions,[91] make it difficult to fully appraise the ACNC's enforcement approach.[92] They also inhibit transparency, accountability, deterrence and compliance, creating unpredictability and uncertainty and therefore regulatory complexity. The recent announcement that the ACNC has been allocated funding to allow publication of deidentified reasons for decisions to accept or refuse applications for registration of charities in certain circumstances is therefore a welcome initial measure.[93]

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[86] For the definition see *Australian Charities and Not-for-profits Act 2012* (Cth) s 205-35. Basic religious charities are not required to comply with the Governance Standards. Additionally, even if the charity is a federally regulated entity or subject to the external conduct standards, the ACNC's suspension and removal powers do not apply where an individual is a responsible person of a basic religious charity.

[87] See, e.g., Miranda Webster and Rosemary Teele Langford, 'Comparison of Enforcement Powers of the Charity Commission for England and Wales and the ACNC' <https://law.unimelb.edu.au/centres/mccl/research/projects/projects/restoring-public-trust-in-charities>.

[88] See Langford and Webster, 'Misuse of Power' (n 78).

[89] Ibid 84-86.

[90] See *Australian Charities and Not-for-profits Commission Act 2012* (Cth) div 150. Exceptions include disclosure in the performance of the duties of an ACNC officer under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth); for the purposes of including information on the ACNC Charity Register; where the information is provided to an Australian government agency (subject to certain conditions being met); if a charity consents and there is a specific purpose for the disclosure; or if the information has already been lawfully made available to the public (e.g. the relevant charity itself publicly discloses information).

[91] See The Treasury (Cth), *Reform of the Australian Charities and Not-for-profits Commission Secrecy Provisions – Recommendation 17 of the ACNC Review 2018* (Consultation Paper, July 2021).

[92] For discussion see Miranda Webster and Rosemary Teele Langford, 'An Analysis of the ACNC's Approach to Compliance and Enforcement' <https://law.unimelb.edu.au/centres/mccl/research/projects/projects/restoring-public-trust-in-charities> 60-61.

[93] See Australian Government, 'ACNC Welcomes New Funding to Enhance Regulatory Transparency in the Federal Budget' *Australian Charities and Not-for-profits Commission* (Media Release, 11 May 2023)

An additional problem is the interface between the ACNC legislation and the *Corporations Act*, particularly as concerns reporting and registers. As mentioned, pursuant to s 111L of the *Corporations Act*, certain provisions of the *Corporations Act* were 'turned off' for charitable companies registered with the ACNC. The intention was that charitable companies incorporated with ASIC would only be required to notify the ACNC when directors were appointed or removed.[94] However, filing and registry requirements have been problematic in practice. One problem, for example, is where lenders seek to rely on out-of-date ASIC registers, potentially requiring charitable companies to update ASIC registers, which may then expose them to an ASIC penalty.[95] These issues have recently been made more complex by amendments to combat illegal phoenixing behaviour[96] and the introduction of Director Identification Numbers. Section 111L has led to other practical problems with meetings and to the inadvertent disapplication of the business judgment rule in the application of common law and equitable duties of care to directors of charitable companies. There is therefore a need to revisit the appropriateness of aspects of the interaction between the ACNC legislation and the *Corporations Act*.

A further complexity caused by the deactivation of some provisions of the *Corporations Act* is confusion as to remedies available to members for breach of directors' duties. However, it has been shown elsewhere that the oppression and statutory derivative actions are still available (and do not require proof of breach of the *Corporations Act)*.[97] Indeed, the oppression action is an attractive option in circumstances where charities depart from, or change, their purposes or where responsible persons act inconsistently with their duties.

(iii) Regulatory burden

In addition to the complexity of governance duties and the limitations on ACNC regulatory power, there is also deep and widespread concern about complexity and undue regulatory burden more generally, as well as constant calls for reduction of red tape. For example, practical problems are caused by duplicative reporting, overlapping administrative and compliance burdens, lack of harmonisation of applicable legislation and inconsistency across the regulatory landscape.[98] As stated by the Panel reviewing the ACNC legislation:

<https://www.acnc.gov.au/media/news/acnc-welcomes-new-funding-enhance-regulatory-transparency-federal-budget.>.

[94] McGregor-Lowndes (n 70) 5.

[95] Ibid.

[96] See *Corporations Act* s 203AA; McGregor-Lowndes (n 70) 6.

[97] See Langford and Webster, 'Misuse of Power' (n 78); Rosemary Teele Langford, 'Use of the Corporate Form for Public Benefit: Revitalisation of Australian Corporations Law' (2020) 43(3) *University of New South Wales Law Journal* 977.

[98] For discussion see Christine Ryan, Cameron Newton and Myles McGregor-Lowndes, 'How Long Is a Piece of Red Tape? The Paperwork Reporting Cost of Government Grants' (Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, Working Paper No CPNS 39, March 2008); Myles McGregor-Lowndes and Ann O'Connell, *Council of Australian Governments, Regulatory Impact of Potential Duplication of Governance and Reporting Standards for Charities* (January 2013); Ernst & Young, 'Research into Commonwealth Regulatory and Reporting Burdens on the Charity Sector' (30 September 2014 available on the ACNC website); Deloitte Access Economics, 'Australian Charities and Not-for-profits Commission Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation' (Final Report 23 February 2016).

> Australia currently has eight separate jurisdictions whose regulatory regimes impact upon registered entities, with Commonwealth regulatory requirements through the ACNC Acts overlaying each of these regimes.
>
> Separate bodies in the States and Territories are responsible for different parts of charities and not-for-profits regulation. Therefore, while the various regimes in the States and Territories contribute to the cost of compliance, the requirement to report to more than one regulator within one jurisdiction also adds to this cost, although this is not unique to the sector.
>
> Charities and not-for-profits, as with entities in other sectors, are required to report to one body with respect to their incorporation, and others for matters such as fundraising, taxes and tax concessions, consumer law and fair trading, raffles and gaming and financial reporting. While it may not be appropriate to seek to combine all of these functions into one agency, the sheer number of regulators that charities or not-for-profits operating nationally may have to contend with clearly creates unnecessary burden.[99]

These concerns are backed up by empirical research conducted in 2020-21 by Langford and Anderson in which a persistent theme was the problems caused by complexity, inconsistency, and change such as proliferation of standards within and across governments and multiple reporting requirements, as well as the burden of red tape.[100]

Moves have, however, been made towards a harmonised national fundraising regime.[101] In addition, reporting thresholds were recently increased[102] thus reducing the compliance burden for a number of charities.

(iv) Summary

In summary, Australia's current regulatory regime for charities could be described as a 'half-way' or intermediate option in that, for constitutional reasons, the ACNC does not have full power over charitable entities and has very little jurisdiction in relation to individuals who run charities. This intermediate or compromise position is also reflected in the unsatisfactory interface between the ACNC legislation and the *Corporations Act*, which causes difficulties for charitable companies and the third parties who deal with them. The fact that that the ACNC does not have full regulatory power in relation to charitable entities and those who govern charities means complexity, and at times incoherence and uncertainty, as well as duplicated reporting requirements at various levels. In short, complexity has increased rather than decreased with the advent of the ACNC. Rather than performing the role of a 'one-stop-shop', as was represented to the sector prior to its introduction, there are concerns that the ACNC is instead operating as 'another shop'.

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[99] ACNC Review (n 78) 111. Further regulatory burden has been experienced by some charitable entities due to noticeable increased compliance focus and activity by the ACNC (which was partly in response to recommendations made in an Australian National Audit Office report and to government concern in relation to public benevolent institutions) – see Webster and Langford, 'An Analysis of the ACNC's Approach to Compliance and Enforcement' (n 92) 55-7), sparking concerns that inconsistency, delays and regulatory mindset have added to the regulatory burden. In this respect, funding the ACNC to undertake empirical testing of trust and confidence (as recommended below) would be beneficial.

[100] Rosemary Teele Langford and Malcolm Anderson, 'Restoring Public Trust in Charities: Empirical Findings and Recommendations' (2023) 46(2) *University of New South Wales Law Journal* 535.

[101] 'Agreement Reached on Reform of Charitable Fundraising Laws – Joint Media Release' (Media Release, Andrew Leigh MP, Danny Pearson MP, February 2023). <https://www.andrewleigh.com/joint_media_release_agreement_reached_on_reform_of_charitable_fundraising_laws_thursday_16_february_2023>.

[102] https://www.acnc.gov.au/tools/webinars/changes-charity-size-and-reporting-thresholds.

That said, the ACNC has brought important benefits, including recognition of the identity and importance of the sector, a very valuable charities register, as well as provision of advice for charities. Indeed, as discussed below in relation to guidance, the ACNC could play an increased role in helping charities in our increasingly complex regulatory landscape.

B Potential solutions

As highlighted in the above Parts, there is a need to combat unnecessary complexity in the charities sector by reducing or removing different parts or elements that cause overlap, duplication, and inconsistency. It is, however, also important to recognise that the diversity of charitable organisations and the nuances necessary in the regulation of such diverse organisations mean that some complexity is inherent and therefore necessary. Measures to simplify regulatory approaches and requirements, including by identifying and removing unnecessary complexity, therefore need to be carefully calibrated. The measures in this Part are discussed at a high level only and are outlined for the purpose of identifying ways in which the objective of reducing unnecessary complexity in charities regulation might be achieved. They also reflect the extent to which such an outcome is likely to be dependent on reforming the broader regulatory ecosystem.

There are two key ways of managing and reducing complexity in governance and regulation of charities. The first is a full referral of power to the ACNC to enable it to be responsible for more aspects of the regulation of charitable entities. The second is to strengthen the statutory duties applicable to directors of charitable companies and management committee members of charitable incorporated associations and then to assume that charitable companies and incorporated associations are compliant with Governance Standard 5 in terms of ensuring that responsible entities or responsible persons are subject to the relevant governance duties.[103] The ACNC/ASIC interface could also be remedied in one of two ways – either the ACNC register could contain all details for charitable companies or the ASIC register could be more complete, although the interface issue is more complex than this for a number of reasons.

Whichever of these two options is adopted, a set of central governance standards for responsible persons would bring significant benefits – operating either as a set of legislative duties or as a set of central principles. The other governance duties of responsible persons could be organised around these central principles. Such a principles-based approach would arguably bring significant benefits, as further outlined below. Serious consideration should also be given to the introduction of a specialist legal structure for charities and changes could also be made to the scheme of ACNC guidance, as further outlined below.

The ACNC secrecy provisions should be adjusted, subject to adequate safeguards. Several submissions have been made as to how the secrecy provisions could be amended whilst still protecting charities and those who run them.[104] The sector would also welcome the Commissioner's interpretation statements being kept up to date and subject to regular consultation and review to ensure they reflect the current law. These measures would bring certainty and predictability, thus combating complexity and enhancing coherence.[105]

[103] In this respect see also ACNC Review (n 78) 9.
[104] For detail on the consultation see The Treasury (Cth), 'Reform of the Australian Charities and Not-for-profits Commission Secrecy Provisions – Recommendation 17 of the ACNC Review' (Web page) <https://treasury.gov.au/consultation/c2021-190067>.
[105] There is also widespread support in the sector for test case funding, which would enhance certainty.

(i) Referral of power

As mentioned, the first, and most effective, way of reducing complexity would be a referral of State power to the Commonwealth to facilitate a national regulatory framework for Australian charities overseen by the ACNC.[106] The ACNC Review Panel stated:

> Australia currently has eight separate jurisdictions whose regulatory regimes impact upon charities and not-for-profits, with the Commonwealth Government's regulatory requirements, through the ACNC Acts and the tax system, overlaying each of these. This results in inconsistency, complexity and inefficiency for charities. The Panel is strongly of the view that a national scheme is the best option for the sector going forward, especially in areas such as governance, fundraising and registration. In the absence of a national scheme, the sector will continue to be subject to an unacceptable level of unnecessary red tape.[107]

This would enable provision and application of one set of duties for all responsible persons (onto which others could be added), one set of regulatory consequences for all registered charities and a nationally consistent rule on what is a charity. Referral of power by the States would also facilitate the introduction of a specialist legal structure for charities, discussed below.

(ii) Alternatives

Pending such referral of power, and because such referral is potentially unrealistic in political terms, the following measures can be suggested to reduce complexity.

The first is to reactivate the duties in ss 180–183 and 191–193 of the *Corporations Act* for directors of charitable companies and for charitable companies to be assumed to be compliant with ACNC Governance Standard 5 given the application of these duties. Secondly, it is recommended that each State and Territory enact comprehensive governance duties (equivalent to those in ACNC Governance Standard 5) for responsible persons of charitable incorporated associations either by harmonisation of State and Territory incorporated associations legislation (which appears to be unlikely in practical terms) or by adoption of a separately enacted set of statutory governance duties. Charitable incorporated associations could then be assumed to be compliant with ACNC Governance Standard 5. These measures would dispense with the need for the imposition of the indirect governance duties in Governance Standard 5 via, e.g., a charity's constitution, deed or appointment letter. It would also enhance accountability by providing a regulator with standing to take action against individual responsible persons in sufficiently serious circumstances. Examples of regulators could be ASIC or the respective State and Territory consumer affairs departments or equivalents.

The third measure is to introduce an optional new legal structure specifically designed for Australian charities, which has been referred to elsewhere as the 'Australian Charitable Incorporated Organisation' (ACIO).[108] In constitutional terms, this could be achieved either

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[106] The referral could be a restricted text-based reference, similar to those references used to support the *Corporations Act* and *Australian Securities and Investment Commission Act 2001* (Cth), and the prevention of terrorism laws under part 5.3 of the *Criminal Code 1995* (Cth). The reference could be limited in time and subject to termination by proclamation.

[107] ACNC Review (n 78) 8; see also Langford and Webster, 'Misuse of Power' (n 78).

[108] For details see Rosemary Teele Langford and Miranda Webster, 'The Australian Charitable Incorporated Organisation: A Reform Proposal' (2023) 39 *Company and Securities Law Journal* 347, 361.

via legislation supported by a State referral of power under s 51(xxxvii) of the *Australian Constitution* (either via a separate piece of legislation or an amendment to the *Australian Charities and Not-for-profits Commission Act 2012* (Cth)) or via a separate chapter in the *Corporations Act*.[109] The new regime could be administered by both the ACNC and ASIC, with the ACNC as lead specialist regulator and with close coordination between the two regulators.[110] The legislation would set out duties of senior officers (as well as members), remedies and standing, and restrict future amendments to the ACIO's constitution that would change the ACIO's purposes from being charitable. The new ACIO regime could be made attractive to encourage existing entities to migrate to this new form. This could include a deeming provision to facilitate migration, plain English drafting, and clear guidance on establishing, governing and running ACIOs, as well as simpler registration and filing requirements.[111]

The fourth measure is the development of five central governance principles applicable to responsible persons. The diversity of the charities sector means that additional duties and requirements would be imposed on responsible persons based on factors such as the legal form adopted by the particular charity and requirements applicable to the additional sector(s) in which the charity operates (e.g. health, education, religion etc). In this sense there is necessary complexity in the governance duties that are appropriately imposed on responsible persons of Australian charities. Central principles would therefore form core irreducible standards around which other applicable duties could be organised.

It has been demonstrated elsewhere that the complex system of governance duties and requirements of responsible persons can be condensed into five core principles.[112] The principles encompass the general law and statutory governance duties imposed on responsible persons of charities, as well as the indirect duties in Governance Standard 5. These principles in turn correspond largely to the central duties of fiduciaries (albeit that these duties are not all characterised as fiduciary in nature) grounded in a purpose-based governance model. Purpose is at the core of charitable entities and plays a fundamental role in the governance of charities – indeed, on one view, duties of those who govern charities are owed to the purposes rather than to the charity itself.[113]

The central principles would consist of requirements to exercise powers in good faith in the way the responsible person considers would further the charity's purposes;[114] to act for proper purposes; to avoid or manage unauthorised conflicts of interest; to avoid unauthorised profits from, or misuse of, position (including information from position); and to exercise care and diligence (which incorporates a requirement to prevent insolvent trading). The use of central

[109] See ibid, 362.

[110] For assessment of how charitable incorporated organisations have worked in practice in England and Wales, as well as insights into how to set up an optimal regime for such legal vehicles, see Danielle Mawer, 'A Tale of Two Jurisdictions: Critical Reflections on Charity Law and Regulation in Australia and England and Wales' in Rosemary Teele Langford (ed)**,** *Governance and Regulation of Charities: International and Comparative Perspectives* (Edward Elgar, 2023, forthcoming).

[111] There is also merit in calls for the review or repeal of Governance Standard 3, which requires charities to not act in a way that, under Commonwealth, State or Territory law, could be dealt with as an indictable offence (being a serious crime that is generally tried by a judge and jury) or a breach of law that has a civil (not criminal) penalty of 60 penalty units or more. See ACNC Review (n 78) 9.

[112] For detail see Rosemary Teele Langford, 'Empowering and Enabling Charity Governors: Loyalty to Purpose' (Melbourne Law School Research Paper, June 2023).

[113] *Lehtimäki v Cooper* [2020] UKSC 33 [50], reported as *Children's Investment Fund Foundation (UK) v Attorney General* [2022] AC 155.

[114] For consideration of alternatives see Langford and Webster, 'The Australian Charitable Organisation' (n 108) 363-6.

(fiduciary) principles is supported by the fact that recent empirical research has demonstrated that Australian responsible persons have a good understanding of the concept of conflict of interest[115] and by detailed critical analysis demonstrating the appropriateness of imposing fiduciary duties on responsible persons of charities.[116] Articulating a core set of fiduciary-based principles in the charities sphere would bring clarity and coherence and foster loyalty.[117] Moreover, the provision of central core principles would establish a common basis for all responsible persons, regardless of the legal structure of the particular charity. Reemphasis of the fiduciary nature of the role, and of diligent and faithful furtherance of charitable purpose, would assist in highlighting the seriousness of taking on the role of responsible person in the charities sector and being responsible for public funds. In fact, recognition of the fiduciary nature of responsible persons' position would also assist in bringing a measure of accountability in the context of charities that are less subject to regulation such as religious charities.[118]

Other statutory duties and governance requirements (which, as mentioned, vary according to the legal form that each charity takes and the sector/s in which the charity operates) could be linked to, and organised around, these central principles. An online workbook could be developed linking responsible persons' statutory and soft law obligations to the central standards and providing examples, scenarios, diagrams and links to appropriate guidance and training (further described below). Empirical research indicates that provision of such a guide would be welcomed by Australian responsible persons.[119]

Another option that has been considered to enhance governance in the charities sector and potentially also reduce complexity is the introduction of a Charity Governance Code, as exists in England and Wales. Given the already complex nature of Australia's charity regulatory framework and considering feedback from interviews, introduction of a Charity Governance Code is not recommended. A further measure that exists in England and Wales – at least for charitable companies but also likely for other charitable entities – is the imposition of duties on members of charitable entities. Recognition or introduction of such duties in Australia is not, however, recommended for several reasons, not least because of complexity.[120]

(iii) Guidance

In terms of guidance and training, which aid in combating complexity and uncertainty, the ACNC's recent introduction of eLearning modules is to be commended.[121] The following additional measures are recommended. The first is the introduction of 'Five Minute Guides'[122] and short animated podcasts on governance and other matters essential to running a charity, to

[115] See Langford and Anderson, 'Restoring Trust' (n 100) 362.
[116] Rosemary Teele Langford, 'Charities and the Fiduciary Paradigm' (2022) 16 *Journal of Equity* 146.
[117] In this respect the wording of the indirect duties in Governance Standard 5 should arguably be reconsidered.
[118] See Langford, 'Empowering and Enabling Charity Governors' (n 112) 7, 22; Langford and Anderson, 'Restoring Trust' (n 100) 575, 578.
[119] Empirical research by Langford and Anderson showed that responsible persons would welcome assistance with understanding and complying with their governance duties, with the most popular options being a detailed online guide setting out all the governance duties of responsible persons (with an optional self-evaluation tool); a Charity Governance Code (combined with diagnostic tool) and practical examples and scenarios showing how the duties are applied. See Langford and Anderson, 'Restoring Trust' (n 100) 549, 558-60, 578.
[120] Langford, 'Charities and the Fiduciary Paradigm' (n 116) 169.
[121] Australian Government, 'Online Learning' *Australian Charities and Not-for-profit Commission* (Web page) <https://www.acnc.gov.au/tools/online-learning>.
[122] See The Charity Commission, '5-minute Guides for Trustees' *Gov.UK* (Web page, 19 February 2021) <https://www.gov.uk/government/collections/5-minute-guides-for-charity-trustees>.

complement the ACNC's current guidance and eLearning. Ideally these would be connected via hyperlink to more detailed ACNC guidance at relevant points, with provision of diagrams, examples and scenarios. In this respect the myriad helpful guidance provided by the ACNC (and available via its website) in relation to governance could be organised around, and hyperlinked to, either these Five Minute Guides or to a central simple outline such as, for example, an adaptation of the ACNC's 'Governance for Good'[123] or the Charity Commission for England and Wales's 'The Essential Trustee'.[124] These Five Minute Guides could include one that sets out the five central governance principles applicable to responsible persons, with links to other related statutory duties. Another of these Five Minute Guides should cover the challenging topic of related party transactions, particularly given the arguable unsuitability of AASB 124 in the charities context.[125]

The Five Minute Guides should also ideally be promoted. Empirical research shows that there is a particular need to raise awareness amongst younger responsible persons and those from smaller charities and religious charities.[126] In this respect, insights could be gained from the Charity Commission for England and Wales's Redesign Program and subsequent recent initiatives. These have involved reviewing and improving the clarity of existing guidance, developing Five Minute Guides, testing of draft guidance during its development on trustees each year, using empirical research to determine which groups of trustees need to be targeted, and adopting marketing approaches to make trustees aware of the guidance. It is recommended that the ACNC be given funding to undertake empirical work (in relation to, for example, trust and confidence and effectiveness of guidance) and data analysis to increase its data and research capability. This would in turn assist the ACNC in meeting its second objective, namely to support a robust, vibrant, independent and innovative Australian not-for-profit sector.

There are, in fact, a number of excellent resources available to responsible persons[127] and awareness of these resources could also arguably be heightened. Given that research commissioned by the Charity Commission for England and Wales shows that trustees who

[123] Charity Commission for England and Wales, 'The Essential Trustee: What You Need to Know, What You Need to Do' (CC3, 3 May 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/866947/CC3_feb20.pdf>.

[124] Australian Charities and Not-for-profits Commission, 'Governance for Good: A Guide for Responsible People' (Web page) <https://www.acnc.gov.au/tools/guides/governance-for-good-acncs-guide-for-responsible-people>. Examples of such hyperlinked guidance can be found in Scotland on the Office of the Scottish Charity Regulator and Scottish Council for Voluntary Organisations websites: see, e.g., <https://www.oscr.org.uk/managing-a-charity/trustee-duties/>; <https://scvo.scot/support/running-your-organisation>.

[125] Development of an accounting standard that is fit for purpose for the charitable sector would also bring benefits – see Rosemary Teele Langford, 'Charitable Companies and Related Party Transactions' (2021) 38 *Company and Securities Law Journal* 91, 108.

[126] See Langford and Anderson, 'Restoring Trust' (n 100) 550, 557, 560, 563, 569, 570, 572, 577; Langford and Anderson, 'Passing the Baton: Emerging Leadership Values, Governance and Responsibility in Australian Charities' (Melbourne Law School Research Paper, August 2023).

[127] See, e.g., 'Responsibilities of the Board and Committee Members, *Justice Connect* (Web page, 31 May 2023) <https://www.nfplaw.org.au/free-resources/who-runs-the-organisation/responsibilities-of-the-board-and-committee-members>.

have read the guidance are better able to manage conflicts of interest,[128] it is important to promote awareness and accessibility of ACNC guidance.[129]

(iv) Other measures

As highlighted earlier in this article, charities face significant practical complexity in the form of a multitude of regulatory requirements and red tape, quite apart from complexity arising from ACNC regulatory and governance frameworks. Several recommendations can be made in this regard. The first is that the ACNC be encouraged to continue its work in supporting the sector by provision of information and links on matters relevant to charities to guide them in complying with myriad obligations imposed by multiple sources.

Second, although increased transparency around related party transactions is to be welcomed, there is evidence that the form that it now takes is causing problems for a number of charities and that use of AASB 124 (and its counterpart, AASB 1060) should ideally be reconsidered. The terms that are employed in these accounting standards are at times complex and ill-fitting when applied to charitable entities, particularly those with religious affiliations. Development of a sector-specific accounting standard and reinvigoration of the National Standard of Accounts are also recommended. [130]

Third, further efforts need to be made to reduce red tape. These could include cooperation by Commonwealth, State and Territory governments in relation to information-sharing practices backed by suitable IT systems. An example is mandating the use of the ACNC Charity Passport in Commonwealth grant guidelines. Red tape in volunteering could be reduced by implementation of free national screening for volunteers, together with provision by governments of insurance for volunteers (perhaps with co-contribution by charitable and not-for-profit entities).

Fourth, there is a need for provision of practical assistance to charities in terms of compliance with non-legal matters, such as finance, tax, human resources, and occupational health and safety requirements.[131] This could be facilitated in several ways such as by grants to sector bodies, establishment of a new charity advice and assistance body[132] or funding of shared services models (on a contract basis). Consultation with the sector on this issue is recommended.

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[128] Yonder, Charity Commission for England and Wales, 'Research and Analysis: Charity Trustee Research 2022' *Gov.UK* (Web page, 14 July 2022) <https://www.gov.uk/government/publications/research-into-public-trust-in-charities-and-trustees-experience-of-their-role/charity-trustee-research-2022>.

[129] Firmer guidance in relation to conflicts of interest is also recommended – see Langford and Anderson, 'Restoring Trust' (n 100) 576.

[130] As to the latter see McGregor-Lowndes (n 70) 8.

[131] It is notable that concerns have been raised as to tensions between the ACNC's objects (see *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15-5(1)) and that the ACNC has not been fully resourced to undertake all three – see Susan Pascoe, 'The Digital Regulator' in Myles McGregor-Lowndes and Bob Wyatt (eds), *Regulating Charities: The Inside Story* (Routledge, 2017) 211, 216; ACNC Review (n 78) 20; Ian Murray, 'Regulating Charity in a Federated State: The Australian Perspective' (2019) *Nonprofit Policy Forum* 1.

[132] Woodward and Marshall have previously recommended the establishment of a new independent not-for-profit advisory body to provide a range of support services (such as auditing, financial and taxation advice and dispute resolution) – see Susan Woodward and Shelley Marshall, *A Better Framework — Not-for-Profit Regulation* (Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2004) 2-4.

VI OBSERVATIONS AND LEARNINGS

As Bottomley has noted, complexity is neither intrinsically good nor intrinsically bad.[133] It is therefore necessary to understand the challenges of complexity and how complexity should best be managed. Ultimately the goal is to achieve coherence and, consequently, greater ease of compliance and enforcement. While acknowledging that metrics cannot be determinative in terms of identifying what is unnecessary complexity, and therefore what should be simplified, this article has suggested that metrics can help to identify complexity and provide a basis on which unnecessary complexity can be assessed and reduced to the extent possible.

Both areas that have been the focus of this article share similarities in terms of managing the 'complexity problem'. These challenges include multiple sources of law and overlapping duties and obligations. At the same time, differences between the two areas should be considered. In the case of corporations and financial services regulation, the existence of notional amendments and an incoherent legislative hierarch model lies at the heart of the challenges concerning coherence and navigability. This is much less of a challenge in charities regulation.

A further area in which charities law and regulation might differ from corporations and financial services regulation is in the users of legislation. The analysis reminds us, however, that although there may be different users of regulatory and legislative frameworks, the issues of coherence and ease of compliance and enforcement are agnostic to the type of user and are equally important to all users.

In the case of charities regulation, the unique nature of the Australian charities sector means that some complexity is necessary to allow for diversity and nuance. Simplicity for the sake of simplicity risks the ability to cater for diversity. Creating a national regime for charities is therefore more challenging than the creation of a national regime for corporations given that charities are much more diverse in nature than corporations. For example, although a set of central governance principles is recommended, it is necessary for additional standards and duties to apply depending on the nature and structure of each charitable entity and the sector in which it operates. On the other hand, there is a great deal of unnecessary complexity in charities regulation due to overlapping and inconsistent requirements. This unnecessary complexity is exacerbated by the overlay of the ACNC regime and problems such as secrecy, unpredictability and inconsistency. This can, and should, be simplified either by harmonisation or by a referral of power, supported by concerted efforts to reduce red tape. Given the importance of the sector and the high percentage of volunteers, it is essential to make the regulatory framework more navigable and to reduce complexity.

One point that is common to each area of regulation is that problems with legislative design can create a high level of unnecessary complexity, particularly as a result of the existence of multiple sources of law and overlapping duties and obligations. This reminds us of the importance of structuring and framing the legislative framework in an appropriate manner – a key area of focus examined by the ALRC in its Interim Report C. It also reminds us that good legislative design is not only a question of simplification, where appropriate, but also a question of rationalisation; namely, removing unnecessary parts or elements to avoid duplication and inconsistencies. Ultimately, an inexorable relationship exists between complexity and coherence and the latter should be used as the tool for assessing and managing the former.

[133] Bottomley (n 13) 420.