FSC FINANCIAL SERVICES COUNCIL

Australian Law Reform Commission - Financial Services Legislation Inquiry: *ALRC Report 139*

FSC Submission

2 December 2022

Contents

1. About the Financial Services Council

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

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

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

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2. Executive Summary

The FSC welcomes the opportunity to respond to Interim Report B **(**ALRC Report 139) **(Report)** of the Australian Law Reform Commission's **(ALRC)** Inquiry into financial services legislation **(Inquiry**).

The FSC agrees the law should be simpler and easier to navigate, and congratulates the ALRC on the detailed work done to identify the current problems of complexity and accessibility, and to suggest solutions. The FSC recognises that reform of the Corporations Act 2001 **(Corporations Act** or **Act)** and related legislation is an important and substantial task that will take considerable time.

The FSC agrees there is merit in the goal of simplifying the Corporations Act. However, the FSC opposes the increased delegation of concurrently exercisable power to the Minister and ASIC as proposed by the ALRC. The FSC makes the following key points.

- *Consider establishing a new law-making body*. The FSC does not agree that power to prepare the Scoping Order and the rulebooks should be delegated to the Minister and ASIC concurrently. The proposed checks and balances would not in practice be sufficient. Instead, the FSC suggests that the ALRC explore establishing a new, separate formal body that makes delegated legislation. It would comprise delegates from Treasury (representing the Minister) and ASIC, plus potentially an independent Chair drawn from a panel of legal and industry technical experts. The specific composition and powers of such a body, including mechanisms for deadlock, would need further consideration.
- *Do not delegate more law-making power to ASIC*. The FSC does not agree with the principle that ASIC should be given broader powers than it currently has under the Corporations Act. It seems that the proposed new legislative hierarchy would give ASIC excessive law-making power with the only oversight and control being disallowance in the Parliament. While a similar model has been adopted by the Financial Conduct Authority in the UK, our institutions and processes in Australia are not the same and, consistent with the doctrine of separation of powers in our constitutional model, ASIC's role is more appropriately to enforce and administer the law, rather than to make it.
- *Introduce a binding mechanism to coordinate ASIC and the Minister*. The FSC does not support the proposal that the Minister and ASIC can each make delegated legislation concurrently (see above - Consider e*stablishing a new law-making body).* However, if such a proposal proceeds, we submit it would need a binding mechanism to coordinate decisions and resolve inconsistencies. An unenforceable protocol would not be an improvement on the current situation where ASIC has been effectively making law through class orders, and could in fact be worse, given the more general rule-making power that is proposed. It is in our view highly improbable that ASIC and the Minister will always adhere to an unenforceable protocol when their viewpoints, interests or goals diverge.

- *Do not establish a Rules Advisory Committee*. Instead, effective public consultations (involving the subject matter experts that would sit on such a Rules Advisory Committee) should be mandatory.
- *Provide a detailed implementation plan*. The FSC recommends that the ALRC provide a more detailed implementation plan, mapping out stages of reorganising the Corporations Act that are achievable within each term of Government, and how interlinked provisions will be amended and/or signposted so that changed sections do not adversely affect other laws. Translational tables will be needed so that users can find equivalent provisions. It is hoped that this may be addressed in the final report in late 2023.
- *Provide a detailed cost-benefit analysis*. The FSC recommends that a cost-benefit analysis is prepared. Clearly there would be a significant amount of work to do to transform the current legislative framework. A detailed analysis of the time and resources involved needs to be provided. The anticipated benefits must be weighed against the opportunity costs involved and competing priorities facing the Government – what other work could Parliament undertake instead that could be equally or more beneficial to Australia?
- *Do not include evidential provisions in the rulebooks*. The FSC does not think it would be appropriate to adopt 'evidential provisions' as outlined in the Report.

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

3. FSC Comments

Proposal B1

The legislative hierarchy of Chapter 7 of the Corporations Act 2001 (Cth) should be amended, in a staged process, to implement a legislative model that incorporates Proposals B2–B9.

The legislative hierarchy should comprise:

a. an Act legislating fundamental norms and obligations, and other provisions appropriately enacted only by Parliament;

b. a Scoping Order (a single consolidated legislative instrument) containing exclusions, class exemptions, and other detail necessary for adjusting the scope of the Act; and

c. thematic 'rulebooks' (consolidated legislative instruments) containing rules giving effect to the Act in different regulatory contexts as appropriate.

The FSC considers that simplification of the Corporations Act is a worthy goal. However, we have significant concerns regarding the delegation of powers to the Minister and ASIC, as noted in B8 and B9 below.

Provide a cost-benefit analysis. The FSC recommends that a cost-benefit analysis is prepared. Clearly there would be a significant amount of work to do to transform the current legislative framework. A detailed analysis of the time and resources involved needs to be provided. The anticipated benefits must be weighed against the opportunity costs involved and competing priorities facing the Government – what other work could Parliament undertake instead that could be equally or more beneficial to Australia?

Proposal B2

Chapter 7 of the Corporations Act 2001 (Cth) should be amended to include a power to:

a. exclude classes of products and services or exempt classes of persons from provisions of Chapter 7 of the Act; and

b. set out detail that adjusts the scope of any provisions in Chapter 7 of the Act;

in the Scoping Order.

The FSC understands the ALRC proposal is to have a Scoping Order as a single, consolidated legislative instrument which contains exclusions and class exemptions from the financial services regulatory regime, as well as other detail that is used to adjust the scope of the regulatory regime.

We note the goal of reducing the number of exclusions and exemptions that would be required from Chapter 7 of the Corporations Act. The FSC considers that an efficient and reliable mechanism for effecting exclusions and exemptions is increasingly important, particularly given the accelerating pace of technological change and innovation. In that context, the FSC has the following comments on the proposed Scoping Order.

Structural exclusions and exemptions. The ALRC states[1] in paragraph 2.23 that there would be a process of consolidating and rationalising existing exclusions and class exemptions, and then including only those that are "structural" in nature in primary legislation, while leaving those that remain the Scoping Order. The question of what is "structural" in nature for any given situation is clearly important. Yet the answer may not always be readily apparent. Stakeholders will not always agree[2]. We would suggest that the process of determining or categorising what are "structural" exclusions or class exemptions should be given further consideration, with a default presumption that it should be done in consultation with industry and relevant stakeholders, utilising available data where practicable. Otherwise, it would be difficult to determine which of the proposed exclusions or exemptions affect a substantial proportion of the regulated population and consumers. And even then, this proposal raises the question, what would the default position be with respect to borderline or undetermined cases – would they be placed in the primary legislation or the Scoping Order? And once they have been allocated to, for example, primary legislation, how easy would it be to transfer a provision to the Scoping Order (or vice versa) in response to changing circumstances or new information becoming available?

Sunsetting periods. The ALRC proposes that the contents of the Scoping Order should be subject to a 10-year sunsetting period, noting that sunsetting aims to ensure that delegated legislation is kept up to date, remains fit-for-purpose and ensures that parliamentary oversight, particularly in respect of exclusions and exemptions from primary legislation, is maintained. We submit that the ALRC should consider and explain further whether there are some areas of law contained in the Scoping Order (or indeed a rulebook) where the default position would be that they should sunset pursuant to a different period.

Amending the Scoping Order. The practicalities of how instruments which amend the Scoping Order are textually integrated with the Scoping Order will need to be given greater consideration in the light of available technology and timing constraints. For example, is it envisaged that there will be an online "master document" Scoping Order which is revised, updated and hyperlinked every time it is amended by way of an instrument? If so, this poses further practical questions: will this occur in real time, which persons would do it, what would the consequences be (for example, in terms of legal validity or enforceability) if there is a technological or administrative problem during the process, etc?

Proposal B3

Chapter 7 of the Corporations Act 2001 (Cth) should be amended to include a power vested in the Australian Securities and Investments Commission to exempt a person from provisions of Chapter 7 of the Act by notifiable instrument (commonly known as 'individual relief').

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[1] Paragraph 2.23, Page 17 of the Report

[2] For example, the introduction in 2021 of the new breach reporting regime and design and distribution obligations involved numerous decisions as to which elements of the new law should be contained in the Act, regulations, ASIC legislative instruments or ASIC regulatory guides. Stakeholders have not always agreed on the results and some have asked for changes which would involve moving a particular provision from one level of the legislative hierarchy to another.

The FSC agrees that the ability to grant individual relief should be retained by ASIC in the proposed legislative model to address atypical or unforeseen circumstances, so long as ASIC's powers to impose obligations are not expanded.

We note that Section 1099[3] in the draft Act in Prototype Legislation B, which contains a proposed empowering provision directed at individual relief, provides:

"1099 Specific exemptions by ASIC

(1) ASIC may, by notifiable instrument, exempt a specified person:

(a) either generally or as otherwise specified in the instrument; and

(b) either unconditionally or subject to specified conditions;

from a specified provision of:

(c) this Chapter; or

(d) Chapter 7A (Disclosure about financial products and financial services); or

(e) financial services rules".

Empowering provision for ASIC is too wide. We note that the current regime does not contain a single empowering provision of this nature, but rather contains a number of separate empowering provisions that collectively deal with a number of specific issues. For example, the Future of Financial Advice (FoFA) reforms require financial planners and licensees to comply with a number of measures that ASIC is not empowered to exempt them from. There are gaps in ASIC's existing powers that it would be helpful to solve, such as the lack of power to give individual relief in relation to meetings. We note that the proposed empowering provision is drawn widely. The FSC does not agree with the principle that ASIC alone should be given broader powers than it currently has under the Corporations Act, unless they are constrained to deal only with unintended consequences of the law in the context of particular circumstances. The appropriate constraint could be achieved by amending section 1099(1) to say that "ASIC may, by notifiable instrument, **upon request by a person**, exempt that specified person: …"

Proposal B4

Chapter 7 of the Corporations Act 2001 (Cth) should be amended to require that:

a. every legislative instrument made under the power set out in Proposal B2; and

b. every notifiable instrument made under the power set out

[3] Page 19 of the Prototype Act

in Proposal B3;

must be accompanied by a statement explaining how the instrument is consistent with relevant objects within Chapter 7.

Consequences for not providing a statement of consistency. The ALRC states that the purpose of the requirement to have the Minister or ASIC explain how the creation of any exclusion or exemption is consistent with the objects of Chapter 7 of the Corporations Act, to "provide transparency and normative guidance regarding the creation of exceptions to generally applicable legislation"[4]. The FSC has concerns that this exercise may become simply more red tape and a box ticking exercise unless there are consequences for failing to provide a statement of consistency in appropriate form.

Statement of completeness. In addition to a statement of consistency, one further requirement that we suggest could be considered by the ALRC is a paragraph pointing the reader to other exclusions or exemptions which could be relevant to the class of persons or (individual) in connection with the particular issue at hand. This would have the purpose of enhancing of the certainty and navigability of the law and giving some comfort to the reader where they could start to look further for other additional instruments that could have a bearing on their situation.

Refusal to provide individual relief. We also suggest it would be worth ALRC outlining under what circumstances the Minister or ASIC would be required to formally explain the reasons for a refusal to grant an exclusion or exemption in a particular circumstance (which we anticipate would be similar to ASIC's current practice of publishing periodic reports on relief).

Proposal B5

Chapter 7 of the Corporations Act 2001 (Cth) should be amended to include a power to make 'rules'.

The FSC has significant concerns as to how a power to make rules can be effectively circumscribed and monitored. While the goal of creating self-contained legislative instruments that can be understood without needing to be read alongside the Act or another legislative instrument has merit, we have serious reservations with how the delegated legislation making process can be properly monitored and controlled. We appreciate that currently either ASIC or the Minister can make delegated legislation, but under the proposed structure of the Corporations Act the Scoping Order and rule book would have much greater scope, making it more important that it is now to have a robust structure for making delegated legislation.

See in particular our concerns raised in this submission in response to Proposal B8 and our alternative proposal to establish a new, separate law-making body,

Proposal B6

Chapter 7 of the Corporations Act 2001 (Cth) should be amended to require that the explanatory statement accompanying every legislative instrument made under

[4] Paragraph 2.26, page 64 of the Report

the power in Proposal B5 must address explicitly how the instrument furthers relevant objects within Chapter 7.

Noting that this proposal is similar to Proposal B4, we refer the reader to our response to Proposal B4 above.

Proposal B7

Rules made under Chapter 7 of the Corporations Act 2001 (Cth) should not contain matters more appropriately enacted in primary legislation, particularly:

a. serious criminal offences, including offences subject to imprisonment, and significant civil penalties;

b. administrative penalties; and

c. powers enabling regulators to take discretionary administrative action.

The FSC agrees that these matters should remain the domain of primary legislation. We would suggest more detail and consolidated guidance is provided as to how determinations will be made as to what are "serious" offences and "significant" civil penalties in any particular case. To the extent these matters are delegated, it would be preferable to have limited power delegated to the Minister (rather that ASIC). Any potential role for ASIC in dictating public law sanctions in the form of penalties (offences, civil penalties and infringement notices), even if they are considered minor, should be treated with great caution and consulted on widely before it is taken further.

Proposal B8

The powers set out in Proposal B2 and Proposal B5 should be vested in:

a. the Minister; and

b. the Australian Securities and Investments Commission.

A protocol between the Minister and the Australian Securities and Investments Commission should coordinate the exercise of the powers.

The FSC submits that the proposal to vest significant powers in the Minister and ASIC to make a Scoping Order and rules raises a number of serious concerns, as further elaborated below. Because of these concerns, the FSC's view is that the powers set out in Proposal B2 and Proposal B5 should not be vested in the Minister and ASIC in the manner described. Instead, we propose that Government establish a new separate formal body that makes delegated legislation – see the last sub-heading of this section "*An alternative model – establish a new law-making body".*

We first expand on our concerns with the ALRC proposals in the following paragraphs.

Risk of Parliament delegating too much legislative power. We note that traditionally Parliament's role is to determine matters of important policy and political significance. By delegating powers to make law in a Scoping Order and in rulebooks, the FSC submits there

is a significant risk of delegating too much legislative power. The Minister currently exercises the power to make Corporations Regulations under specific provisions of the Act. Although the FSC recognises the need to simplify and better organise the regulations, there are concerns that the "financial services rules" will take on a greater role than the regulations under the new model, with the reduction of content in the Act itself. If the proposed model is implemented, additional checks and balances must be built into the process. Reliance on disallowance by Parliament is not sufficient. It is a worthy goal to make delegated legislation more nimble in a fast-changing environment, but not at any cost.

Oversight of ASIC difficult. With regard to ASIC in particular, while it is both a regulator (law-enforcer) and law-maker, its law-making role is theoretically confined to making technical rules, or dealing with matters of detail and instruments that should not involve matters of "policy". However, in practice this line has sometimes blurred. For example, arguably, the class orders and subsequent legislative instruments that ASIC made in connection with the Foreign Financial Services Provider (**FFSP**) regime involved significant matters of policy which departed from established guidelines on allocating matters in the legislative hierarchy[5]. ASIC has also imposed positive obligations on the regulated population, which amount to quasi-legislative regimes, through class orders in the areas of custody and investment platforms. Under the ALRC proposed new legislative hierarchy, given the seemingly greater scope of law-making power to be held by ASIC, it will be even more important to establish clear boundaries and guardrails to ensure that any actions taken by ASIC are appropriately monitored and reviewed to ensure that matters of policy are dealt with by Parliament. Even if they are put in place, the FSC has concerns that in practice these boundaries and guardrails will not be effectively enforced.

Concurrent exercise of powers by the Minister or ASIC problematic. The Report makes the important point[6] that in Chapter 7 of the Corporations Act, the existing law-making powers of the Minister (usually exercisable by regulations) and ASIC generally overlap and may be exercised concurrently. This is most evident in relation to exemption and modification (notional amendment) powers, which overlap in respect of significant areas of regulation. Prototype Legislation B illustrates how the existing allocation of powers could be simplified by enacting a single empowering provision relating to each of scoping orders and rules and conferring those powers on the Minister and ASIC concurrently.

The FSC submits that the recommendation for the exercise of powers "concurrently" should be reconsidered. It will not address the problem with the current situation of ASIC imposing obligations on the regulated population outside the formalities of an accountable law-making process. It is not logically consistent for the ALRC to express concerns about ASIC making law through class orders, and then afford it untrammelled power to continue that process. The "financial services rules" would be more transparent and accessible than ASIC

[5] See Appendix D *Table of Existing Guidance* in Interim Report B.
[6] Paragraph 2.65 page 76

instruments, but under the doctrine of separation of powers it remains inappropriate for a regulator to be making law as opposed to enforcing, administering and advising government. ASIC's views in developing legislation are important but could be expressed through a joint committee (see below).

Protocol or other administrative arrangement should be enforceable. In terms of coordinating the law-making functions exercisable by ASIC and the Minister, the ALRC proposal is to implement a "protocol or other administrative arrangement". But the ALRC envisages that the protocol would not be enforceable as between the Minister and ASIC. The assumption appears to be that adherence to the protocol would nonetheless happen, as it would be "*mutually beneficial to both the Minister and ASIC, as well as important for maintaining public confidence in the regulatory system*"[7]. The FSC is sceptical of this assumption and we would welcome the ALRC providing further detail as to the basis of this assumption. It is in our view highly improbable that ASIC and the Minister will always adhere to an unenforceable protocol when their viewpoints, interests or goals diverge. It is quite possible that they may fail to consult altogether. Or that, if they do consult, they will not be able to agree in any number of respects. ASIC and the Minister have historically often been in disagreement with regards to a number of matters and as to what the preferred approach should be to law-making, and there is no reason to believe that these disagreements will cease.

Difficulties with cooperation between the Minister and ASIC. A well-known example of the Minister and ASIC taking different approaches is the regime applying to FFSPs. Over recent years, ASIC has consulted and embarked on a course of action in relation to FFSPs which ASIC implemented by way of class orders (notably, the introduction of a dedicated FFSP licensing regime and a narrowing of existing exemptions), only for that approach to be revisited and questioned by Treasury. This then led to a new Treasury led consultation process under the former Government, proposed new legislation (now lapsed), and now under a new Labor Government continuing general uncertainty for business that has been ongoing for several years. This is an example of ASIC moving in a direction that Treasury did not agree with which resulted in Treasury then taking steps to materially halt and change direction, all of which had a seriously detrimental impact on Australia's reputation as an international financial centre. Financial services businesses and their advisors are still unclear (after several years) as to what direction the regulatory regime will take next and what are the intentions of the Minister and ASIC.

Inconsistent concurrent exercise of legislative power. Similarly, the ALRC states[8] "*inconsistencies between regulations and ASIC-made legislative instruments are avoided by cooperation and sensible practice, and should rarely occur*". The FSC disagrees with this assumption. Again, we would caution against being too optimistic when it comes to the

[7] Paragraph 2.73, page 78. Also see paragraph 2.69 which asserts that the overlap "should, as is presently the case, be managed by administrative and political processes".
[8] Paragraph 2.75, page 78 of the Report

Minister and ASIC being able to concurrently exercise law-making power under a new legislative framework without this resulting in inconsistences.

Legal fall-back mechanism. In our view, a legal "fall-back" mechanism to resolve differences between the Minister and ASIC should be incorporated in the legislative model, an idea raised in the Report with which we agree. While this mechanism will need to be appropriately circumscribed, it must also balance this with a need to maintain appropriate oversight and accountability of the regulator. It could be incorporated in our alternative proposed new separate law-making body (see below).

Protocol should be mandatory. Notwithstanding the issue of enforceability, it is not entirely clear whether the suggestion is for the protocol to be nonetheless a set of mandatory provisions that the Minister and ASIC will be required to have regard to, or merely a set of recommendations or guide to best practice when exercising law-making power. If there were no separate law-making body (see below) so that a protocol is necessary, the FSC suggests that it be of mandatory application. If it is merely a type of guidance for law-makers to follow we would submit that this would not provide the requisite level of comfort that the protocol can effectively coordinate the delegated law-making process. We note in this regard that the Report contemplates that "*adherence or non-adherence to any protocol would not affect the validity of any delegated legislation*", so it is not clear to us what the consequences of non-adherence would be. The FSC submits that non-adherence should have clear and material consequences.

Preparing and amending the protocol. The ALRC should provide further detail as to how it envisages the process for preparing and finalising the protocol would work, and what processes should be put in place to monitor its ongoing effectiveness and fitness for purpose. For example, would there be public consultation with industry and other relevant stakeholders prior to the initial adoption of the protocol, and/or when it is amended. If it is felt by the Minister or ASIC (or third parties) that it should be changed, how will this be done? Alternatively, a structural approach to embedding effective decision-making may be adopted. See below.

Amendments to the Scoping Order and rules. The ALRC recognises that in the context of amending the proposed scoping order and rules under the new legislative hierarchy[9] "*coordination and careful management would be needed to maintain coherence and consistency within legislative instruments amended by more than one law-maker. A protocol should facilitate this. Furthermore, OPC could be engaged to assist and provide advice for this purpose*." But little detail is provided as to how such coordinated and careful management would be provided. The FSC has concerns that this process will be problematic and difficult to manage successfully. An alternative approach we suggest below is to only have a new, separate body as delegated legislation law-maker.

[9] Paragraph 2.79, page 79

Exclusive law-making power. The Report also raises the possibility of exclusive law-making power being granted by Parliament to either the Minister or ASIC by way of inserting an additional enabling provision for the purposes of the relevant Part[10]. While conceptually this idea in our view may have merit depending on the case, it raises the problem of how to select the particular areas of law-making that should be granted to one or the other, and the processes that would need to be suggested (or prescribed) in making such a selection (and any subsequent deselection). As a general matter, the FSC does not support any additional law-making power being granted to ASIC and any exceptions to this should be very limited and tightly constrained.

Additional oversight mechanisms should apply to ASIC. The FSC recommends that the ALRC consider further whether additional oversight mechanisms should apply to ASIC.

We note that Report states[11]:

"In light of the proposed framework surrounding the law-making powers to be delegated to ASIC, as well as the more general oversight mechanisms that apply to ASIC, the ALRC does not propose that additional oversight mechanisms be applied. Applying further constraints may reduce responsiveness and flexibility, without clear benefits"

We do not agree with the assessment that additional oversight mechanisms will not be needed. While we agree that monitoring and review by the Parliamentary Joint Committee on Corporations and Financial Services, participating in the Senate Estimates process, and review by the Financial Regulator Assessment Authority all provide oversight mechanisms, these existing mechanisms are far from perfect under the current regime. It is all the more important to examine how these would operate under a new legislative hierarchy given the proposal to convey wide general powers on ASIC as both law-maker and law-enforcer[12].

The FSC submits that the ALRC should consider alternative models with stronger oversight mechanisms, including the possible approach suggested below.

An alternative model – establish a new law-making body

One possible way to address the concerns expressed regarding the delegation of increased legislative power concurrently to ASIC and the Minister would be to establish a new separate formal body that makes, and is responsible for maintaining, delegated legislation. It would comprise delegates from Treasury (representing the Minister) and ASIC, plus potentially an independent Chair drawn from a panel of legal and industry technical experts. The

[10] Ibid Paragraph 2.67
[11] Ibid Paragraph 2.76, page 78
[12] That said, the FSC submits that a person should not be given expanded options to judicially challenge a provision in a rulebook (for example, on the grounds that it is outside the objects of the Act). The FSC submits the options available to the public to have a rule (or provision in the Scoping Order) challenged legally should not change from the current position (court challenges of constitutional or administrative law validity). The FSC is concerned that appropriate rights to challenge delegated legislation must be properly balanced against the risk of excessive litigation.

provisions of the Scoping Order and the rulebook would be subject to disallowance in the Parliament. This would give ASIC significant input into the rules, but not the power to make them alone. Such a body could also incorporate a legal "fall-back" mechanism to resolve differences between the Minister and ASIC, an issue raised by the ALRC.

The specific composition and powers of such a body, including mechanisms for deadlock, would need further consideration, but a built-in mechanism for Treasury and ASIC to jointly arrive at decisions seems far preferable to unresolved inconsistencies with no binding mechanism for governance and conveying additional law-making power on ASIC.

Proposal B9

Chapter 7 of the Corporations Act 2001 (Cth) should be amended to:

a. establish an independent 'Rules Advisory Committee';

and

b. require the Minister and ASIC to consult the Rules Advisory Committee and the public before making or amending any provisions of the Scoping Order or rules.

The FSC does not support a Rules Advisory Committee (or similar) being established by the Corporations Act which must be consulted by the Minister or ASIC (as the case may be) before scoping orders or rules are made

Meaningful public consultations should suffice. The FSC submits that instead of a Rules Advisory Committee (or similar), public and transparent consultations processes, that allow all impacted parties to come forward are more appropriate and have been the longstanding approach in Australia. A public consultation process should already capture all relevant stakeholders. The FSC is not persuaded that the government should provide resources and status to a Rules Advisory Committee, thus privileging this group of stakeholders over others. The ALRC suggests that it would comprise representatives from industry groups, consumer groups, and legal experts such as practitioners and academics and possess sufficient technical expertise to effectively assist the Minister and ASIC in their delegated law-making functions. However, the FSC submits that a properly convened and managed public consultation process would involve such experts anyway. It is however important to ensure that they are given the opportunity for meaningful and genuine consultation, with realistic timelines for feedback and discussion.

Failure to consult with Rules Advisory Committee. If a Rules Advisory Committee is established, the FSC has concerns with the proposal that failing to consult with it and the public should not affect the validity of delegated legislation. While we recognise that this reflects the present position under the generally applicable Legislation Act regime and other existing requirements in the Corporations Act, we note that under the new legislative model the Minister and ASIC would have a materially expanded role in making delegated legislation. It would seem reasonable to consider further whether, at least for some categories of delegate legislation, a failure to consult should render the legislation invalid.

Even if the position remains that a failure to consult would not result in the relevant legislation being invalid, this raises the question what other consequences (if any) should or would flow from failing to consult. The Report does not appear to address this. If the legislation remains valid, would there be nonetheless other adverse consequences for the Minister or ASIC if they fail to consult? If so, then it would be helpful to provide further detail as to the current potential options under consideration by the ALRC. If not, is it then still reasonable for the ALRC to assume[13] that "*consultation with the Committee and the public should act as a normative constraint on delegated law-making power, as well as providing transparency and enhancing scrutiny of the law-making process*".

We would submit that, at the very least, if there is a failure to consult, the Minister or ASIC, as the case may be, should be required to publish reasonably detailed justification for not consulting, and such justification should be subject to appropriate review.

Differences regarding whether or how to consult. The Report does not appear to address the situation where there is disagreement between the Minister and ASIC as to whether (or how) to consult. For example, what would happen if ASIC wanted to take forward a particular law-making activity but not consult on it, while the Minister was in agreement that ASIC take forward that particular activity but on condition that a consultation process is taken forward. See also our response to Proposal B8 regarding the proposed "protocol". A failure to consult should have meaningful consequences. Without these, it is not clear to us that proper consultation will take place, and if a failure to consult results in poorly designed or implemented law, this will most likely give rise to adverse impacts for businesses and consumers which need to be remedied, at a cost.

Costs of Rules Advisory Committee. As to the question of costs, the Report is silent as to how such an advisory committee would be funded. The FSC is of the view that it should not be funded by financial services industry participants, given its overarching clear benefit and importance to the public generally. The FSC notes that financial services industry participants already pay significant sums in respect of other regulatory activities (notably pursuant to the ASIC Industry Funding Model, to APRA via the Financial Institutions Supervisory Levies, the proposed Compensation Scheme of Last Resort, and various professional industry associations, to name a few).

Regulatory guidance. On the issue of ASIC regulatory guidance raised in this section of the Report, a reduction in the volume of regulatory guidance issued by ASIC would be beneficial. Any scope for reduction not only in the volume of materials identified as 'Regulatory Guides' by ASIC, but also in other types of guidance, such as 'Information Sheets', could also be helpful. That said, we anticipate that to achieve this goal, affirmative steps will need to be taken to purposely reduce the volume of regulatory guidance. We do not think it will simply happen of its own accord, and there is a risk that the new legislative model will simply see a new set of equally voluminous regulatory guides published to

[13] Paragraph 2.90, page 82

accompany it. Regulatory guidance is important, but it is more useful if it is succinct and clear, and does not simply recite the law.

Staged Transition and Implementation

The FSC recommends that the ALRC provide a more detailed implementation plan, mapping out stages of reorganising the Corporations Act that are achievable within each term of Government, and how interlinked provisions will be amended and/or signposted so that changed sections do not adversely affect other laws. Translational tables will be needed so that users can find equivalent provisions. It is hoped that this may be addressed in the final report in late 2023.

The FSC agrees it is appropriate to consider implementing the proposed legislative model in stages by focusing on particular themes of regulation in Chapter 7 of the Corporations Act. We agree that financial product disclosure, or discrete aspects of financial product disclosure regulation, would be a suitable first candidate for reform. However, we would caution against attempting to deal with even this discrete (but exceedingly complex) theme without a thorough and comprehensive scoping exercise to make sure that all changes that need to be addressed are in fact addressed at the appropriate time to effect a seamless transition to the new legislative model for that theme. If there are gaps or issues overlooked, the consequences could be materially adverse as well as costly and time consuming to remedy.

One example from recent history to be avoided is that of the changes to tax law. The re-writing of the Income Tax Assessment Act has effectively resulted in two Acts for many years. Any new work needs to be completed in carefully planned tranches to reduce uncertainty of how the law should be applied.

One question to consider is the scale of the initial first phase transition, and how much preparation takes place before that first phase is implemented. For example, instead of only dealing with financial product disclosure, the ALRC could seek to also simultaneously implement a new model AFSL regime. This would presumably take longer, and require more preparation. But the potential benefit would be that the more time is taken to prepare and the more themes are implemented under the new model at the same time, the less risk there would be of ineffective partial implementation of any one theme and necessary elements being inadvertently left out. We would also expect there will be additional synergies and efficiencies in dealing with two or more topics together. It will, however, be important to stage the implementation so that each particular element can be designed and delivered within a term of Government, so that there is the political will to bring the successive tranches of legislation to the Parliament, and ultimately to complete the task.

Proposal B10

As part of the staged implementation of the proposed legislative model, existing powers to omit, modify, or vary relevant provisions of Chapter 7 of the Corporations Act 2001 (Cth) by regulation or other instrument should be repealed.

We have no particular comments at this stage on this proposal.

Proposal B11

As part of the staged implementation of the proposed legislative model, relevant existing powers to:

a. exclude products or services; and

b. exempt a person or class of persons;

from the operation of all or specified provisions of Chapter

7 of the Corporations Act 2001 (Cth) by regulation or other instrument should be repealed.

We have no particular comments at this stage on this proposal.

Proposal B12

The Attorney-General's Department (Cth), in consultation with the Office of Parliamentary Counsel (Cth) and the Department of the Prime Minister and Cabinet, should publish and maintain consolidated guidance on the delegation of legislative power.

The present range of guidance spread across a number of publications is not easy to navigate and should be consolidated, however we would submit that it needs to be considered further and would request more detail is provided in due course. See also our comments below.

Question B13

Does the Draft Guidance included in this Interim Report:

a. adequately capture the principles that should guide the design of provisions that delegate legislative power;

b. adequately capture the extent to which it is appropriate for delegated legislation to specify the content of offences or civil penalty provisions otherwise created by an Act; and

c. express the applicable principles with sufficient clarity?

The Draft Guidance generally sets out the relevant principles clearly.

The FSC has a number of observations to make as follows.

We note that the Draft Guidance states[14]:

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[14] Paragraph E.3, E.6, Page 248, Appendix E

The purpose of this guidance is to help all of those involved in designing, drafting, and scrutinising enabling legislation. This guidance is therefore directed toward a wide readership, including policy-makers, legislative drafters (and their instructors), civil society, and Parliamentarians…. This guidance does not directly address how a power to make delegated legislation should be exercised, nor how delegated legislation should be drafted and made. The Instruments Handbook provides detailed guidance on these issues"

Delegates should be consulted. The FSC submits that the delegate of delegated power should also be a person to whom the Draft Guidance is directed, to provide a better overview and understanding of the delegated legislation process. We would also query how and when the Instruments Handbook will be reviewed and revised in conjunction with the publishing of the Draft Guidance to ensure proper alignment and consistency.

The Draft Guidance goes on to make the point[15] that "*that when considering the scope of a delegated law-making power, **it may assist** to consult those responsible for implementing or administering the Act, and those who will be responsible for making delegated legislation. Doing so would help identify the extent of the powers that are necessary and the circumstances in which they may be exercised….*"

The FSC would suggest that the wording should be stronger than "may assist", for example providing that the default position would be to consult, subject to certain exceptions. If the delegate of power is consulted when framing the scope of the delegated law-making power this should assist in avoiding unintended consequences.

Notional amendments. We agree with the position that notional amendment (or 'modification') powers pose a greater risk to the separation of powers and democratic legitimacy than many other powers and that delegated legislation should not be permitted to notionally amend the text of offence provisions. However, we would go further and suggest that notional amendments as a general matter should be dispensed with altogether, or at the very least severely limited. To the extent they are used, they need to be made easier to find and navigate and positive steps should be taken in this regard. While we broadly agree with the guidance provided in connection with the use of notional amendments on pages 257/258 of the Report, as general comment too many of these paragraphs are simply "suggestions" rather than requirements (for example, consulting specific stakeholders likely to be affected should be a requirement rather than merely a safeguard to be considered).

Mandatory enforceable consultation processes. The FSC notes that section 17 of the Legislation Act requires a rule-maker to be satisfied that any reasonably practicable and appropriate consultation has taken place before making a legislative instrument. However, the fact that non-compliance does not affect the validity or enforceability of a legislative instrument could take on greater significance under the new legislative hierarchy given the added importance of delegated legislation.

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[15] Paragraph E.25, Page 255

In this regard, the ALRC comments[16]:

Creating a judicially enforceable requirement to consult would be a significant departure from the default position provided by the Legislation Act, but may be warranted when consultation is particularly important.

The Draft Guidance goes on to discuss the merits of specific enforceable consultation processes beyond those in the Legislation Act have been previously raised by the Bills Scrutiny Committee, including where Parliament delegates its legislative power in relation to significant regulatory schemes. The FSC anticipates that these will be of greater importance in the new legislative hierarchy.

The FSC submits that further consideration be given to making a judicially enforceable requirement to consult with particular groups the default position in certain circumstances under the new legislative hierarchy. Further, consultation should be for a reasonable time and genuinely take reasonable and logical feedback into account in the outcome.

Proposal B14

In order to support best practice legislative design, the Office of Parliamentary Counsel (Cth) should establish and support a Community of Practice for those involved in preparing legislative drafting instructions, drafting legislative and notifiable instruments, and associated roles.

The FSC has concerns with how this would work in practice and how it could be funded efficiently with appropriate guardrails in place with respect to costs, procedures, membership and operations. We suggest this be considered further and more detail provided.

Proposal B15

In order to implement Proposal B1, offence and penalty provisions in corporations and financial services legislation should be consolidated into a smaller number of provisions covering the same conduct.

While consolidation of this nature should reduce duplication, we suggest that particular care needs to be taken so that any provisions repealed under any consolidation of provisions cover the "same" conduct and not simply "similar" conduct. In addition, any consolidation should not dilute the operational effectiveness of the provision or result in the purpose of the repealed provision no longer operating as intended in any consolidated form.

The FSC also queries what process would be used to determine a penalty for a consolidated offence (the question being, where two "similar offences" covering the "same conduct" have

[16] Paragraph E.55, page 265

different penalties and are then consolidated into a single offence, what process would determine whether the lower penalty is applied or the higher penalty?)

Question B16

Should rulebooks contain 'evidential provisions' that are not directly enforceable but, if breached or satisfied, may evidence contravention of, or compliance with, specified rules or provisions of primary legislation?

The FSC does not think it would be appropriate to adopt 'evidential provisions' as outlined in the Report. We understand that this approach if followed would be based on the approach under the UK Financial Services and Markets Act, whereby certain rules ('evidential provisions') are themselves unenforceable, but breach of (or compliance with) those rules may evidence a breach of (or compliance with) specified enforceable provisions.

We have several concerns with the proposed use of evidential provisions in Australia, as set out below.

Uncertainty applying evidential provisions. As a general matter, and as noted by the ALRC, the use of such evidential provisions has not been tried in this context in Australia before. There would be considerable uncertainty among industry participants and at law as to their role, how they should be used and applied. There is no Australian case law, drafting convention or judicial guidance as to how to interpret them. There is a risk that introducing them could lead to more, not less complexity in what is already a complex regime. In particular, there is a risk that a breach of an evidential provision could lead to a quasi "presumption of guilt". While the ALRC merely states that breach "may evidence contravention", there is a risk that there will be confusion with how this test should be applied in practice.

UK regulatory landscape is different. As noted in the Report, the UK regulatory landscape is very different from Australia. As we understand it, the bulk of the UK FCA Handbook consists of rules that would attract enforcement action unless they are designated as "evidential provisions" only. The ALRC goes on to state[17] that "*In Australia, the reverse is generally true: an obligation or prohibition does not attract a penalty (criminal or civil) unless it is specifically enacted and the maximum penalty is specified for the particular breach*". This being the case, with the two regimes starting from different default positions, we do not see the same need for introducing the new concept of evidential provisions. Even in the UK, it appears that evidential provisions are relatively little used. As the Report notes[18]:

> "*The use of evidential provisions in the FCA Handbook is relatively infrequent: while the Handbook contains over 5,000 enforceable provisions, and over 5,000 guidance provisions, it contains only 79 evidential provisions. Review of two of the leading UK case databases, ICLR.3 and Westlaw UK, reveals these provisions have been cited in very few published judgments*".

[17] Paragraph 5.58, page 155
[18] Paragraph 5.57, page 155

It is possible to infer from this that it is uncertain how useful they have been and what legal effect they have in the UK. The situation in Australia would likely be even more uncertain. The time and cost of introducing such a concept in Australia needs to be weighed against the likely benefits.

Experience of safe harbour provisions. The FSC is concerned that this may result in a similar situation to the "safe harbour" provisions enshrined in the Corporations Act for certain financial advice providers. Specifically, section 961B(2) of the Corporations Act, which purports to provide a 'safe harbour' for advice providers. ASIC has stated that if an advice provider can show that they have taken the steps in s961B(2), they are considered to have complied with the best interests duty. The result is that to some extent a "box ticking" approach has developed. Yet there is often confusion in terms of the consequences of failing to meet the safe harbour provisions in the Corporations Act. The view is often held that by not meeting the safe harbour provisions (or ticking all the boxes) the result is a failure to comply with the best interests duty. Criticisms of the safe harbour provisions are well-known. For example, the Quality of Advice Review Consultation paper – Proposals for Reform, makes the comment[19]:

> *"Commissioner Hayne was critical of the safe harbour steps because they encouraged a narrow checklist based approach rather than a genuine consideration of what an adviser should do to comply with their duty to act in the best interests of the client…. Consumers do not want lengthy documents, they do not want templated text and they do not want documents filled with information designed to demonstrate the adviser has complied with the safe harbour"*

The FSC is concerned that introducing evidential provisions in a rulebook would lead to similar problems.

Regulatory guidance. In some respects, it seems to us that ASIC regulatory guidance plays a similar role to the guiding role that evidential provisions in the UK appear to provide. Given the potential problems we have outlined above with introducing the new concept of evidential provisions in Australia, we suggest that instead further thought should be given to how regulatory guidance (or similar) could play a guiding role in the development of rulebooks.

Proposal B17

The Corporations Act 2001 (Cth) should be amended so that each offence and civil penalty provision, and the consequences of any breach, are identifiable from the text of the provision itself.

The FSC considers this proposal could in principle help to assist with the navigability of the law.

Proposal B18

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[19] Treasury *Quality of Advice Review Consultation paper – Proposals for Reform (August 2022),* Page 32

Offence provisions in corporations and financial services legislation should be amended to specify any applicable fault element.

The FSC considers this proposal could in principle help to assist with the navigability of the law.

For completeness, we note we do not have any separate comments on the Recommendations contained in the Report on technical simplification, simpler law design or enhancing navigability.