



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

30 November 2022

The Hon. Justice S C Derrington
President
Financial Services Legislation
Australian Law Reform Commission
PO Box 12953
George Street Post Shop
Queensland 4003

Email: financial.services@alrc.gov.au

Dear Justice Derrington

Re: Australian Law Reform Commissions Review of the Legislative Framework for Corporations and Financial Services Regulation - Interim Report B

The Financial Planning Association of Australia¹ (FPA) welcomes the opportunity to provide a response to the Australian Law Reform Commission's (ALRC) Review of the Legislative Framework for Corporations and Financial Services Regulation Interim Report B (the Interim Report), which was tabled by the Attorney-General, the Hon Mark Dreyfus KC MP on 30 September 2022.

The FPA welcomes the Commission's work to identify and provide practical solutions to improve the operation and structure of the Corporations Act 2001 and associated subordinate regulations and legislative instruments to simplify and support the professional services provided by the financial planning profession for the benefit of Australian consumers.

We would welcome the opportunity to discuss with the Commission the issues raised in our submission. Please contact me on [REDACTED] or [REDACTED] if you have any questions.

Yours sincerely

[REDACTED]

Ben Marshan CFP LRS
Head of Policy, Standards and Innovation
Financial Planning Association of Australia

¹ The Financial Planning Association (FPA) is a professional body with more than 12,000 individual members and affiliates of whom around 10,500 are practising financial planners and 5,207 are CFP professionals. Since 1992, the FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of the Future of Financial Advice reforms.
- The FPA was the first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- We built a curriculum with 18 Australian Universities for degrees in financial planning through the Financial Planning Education Council (FPEC) which we established in 2011. Since 1 July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- When the Financial Adviser Standards and Ethics Authority (FASEA) was established, the FPEC 'gifted' this financial planning curriculum and accreditation framework to FASEA to assist the Standards Body with its work.
- We are recognised as a professional body by the Tax Practitioners Board.



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

FPA SUBMISSION
REVIEW OF THE LEGISLATIVE FRAMEWORK
FOR CORPORATIONS AND FINANCIAL
SERVICES REGULATION - INTERIM REPORT B

Australian Law Reform Commission

30 November 2022





INTRODUCTION

The FPA congratulates the Australian Law Reform Commission (ALRC) for the detailed, thorough, well-considered and impressive work presented in Interim Report B (the Report) of its Review of the Legislative Framework for Corporations and Financial Services Regulation. The ongoing dialogue between the ALRC, the FPA and the financial services sector more broadly continues to be a constructive demonstration of the ALRC's willingness to listen and understand the excessive burden created by the current regulatory framework on all users of the law.

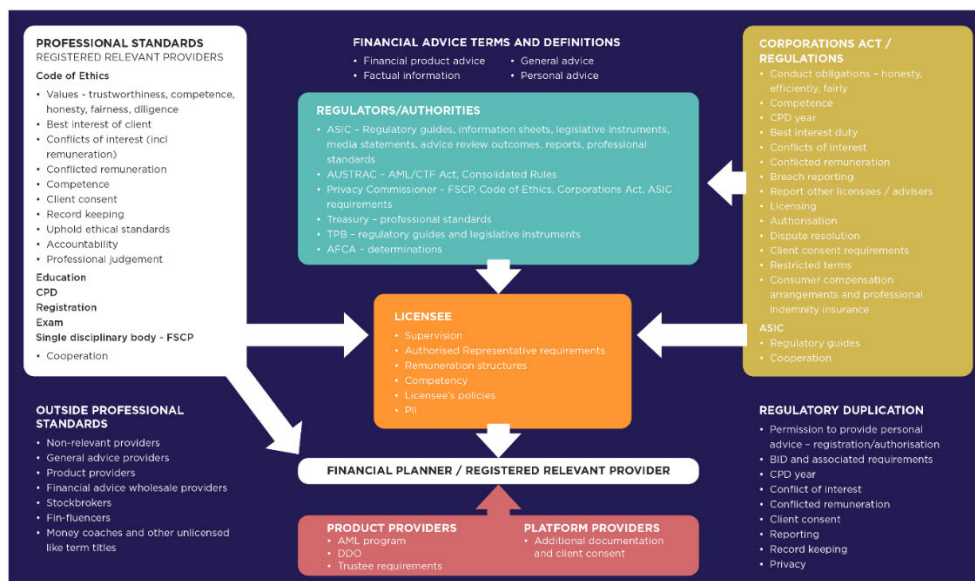
The corporations and financial services laws applicable to the provision of financial advice are currently being examined by two separate government reviews considering equally vital and distinct elements of the law. The ALRC's Review greatly complements the Quality of Advice Review (QOAR) led by Independent Reviewer, Michelle Levy, which is examining the financial advice obligations in the law and *"how the regulatory framework could better enable the provision of high quality, accessible and affordable financial advice for retail clients"*.

We are encouraged that the ALRC has been liaising with Ms Levy as the current regulatory environment for the provision of financial advice is excessively complex and burdensome on users of the law. Financial planners are faced with regulatory duplication in the Corporations Act 2001 created by both the structure of the legislative hierarchy and the obligations contained in the financial advice related provisions. This significantly impacts the affordability and accessibility of financial advice for consumers.

The Corporations Act contains duplicated requirements applying to the individual planner, either directly or via obligations placed on the licensee. As demonstrated in the following schematic, this duplication is exacerbated as the obligations placed on financial planners under the *Corporations Act 2001* licensee obligations and the *Financial Planners and Advisers Code of Ethics 2019* are heavily influenced by the licensee and others who then apply additional requirements on financial planners.



Current financial advice regulatory requirements



The concurrently run reviews highlight that duplication in the law exists on two levels:

- unnecessary repetition of identical provisions such as those identified in Interim Report B; and
- specific obligations placed on the same provider through multiple applications of 'like' obligations, such as the financial advice requirements on financial planners as depicted in the above schematic.

The ALRC package of proposals to simplify the legislative hierarchy to improve navigability of the law and remove duplication is vital to the success of the recommendations of the QOAR.

As discussed in Background Paper 5 of this Review, history has shown that every regulatory reform has layered additional requirements on top of the existing obligations, without removing or simplifying how the obligations work together:

The architecture of Chapter 7 of the Corporations Act has struggled to adapt to new policy positions rooted in shifting regulatory philosophies.policymakers have rarely been willing to undertake the difficult task of reviewing and revising earlier policies and regulatory philosophies. Instead, new law has been built upon the old. This has been a significant source of legislative complexity — and one which, under the current legislative architecture, drafters alone can do little to reduce.²

The financial planning profession have continued to deal with the reality and impact of this issue in all elements of operating financial advice businesses and providing advice to help clients under the requirements Chapter 7. The FPA strongly encourage the ALRC to include in its Final Report to Government, its considerations for the implementation of its recommendations and proposed legislative hierarchy by Government, Parliament, and regulators.

Our submission responds to recommendations, proposals and questions posed in the Report from the perspective of financial planners and their clients as users of corporations and financial services law.

² Australian Law Reform Commission, Risk and Reform in Australian Financial Services Law (FSL5), 21 March 2022, page 2

FPA RESPONSE TO INTERIM REPORT B

INTERIM REPORT B RECOMMENDATIONS

Technical Simplification

Recommendation 14

Redundant and spent provisions in corporations and financial services legislation should be repealed, including:

- *spent transitional provisions;*
- *spent legislative instruments;*
- *redundant definitions;*
- *cross-references to repealed provisions; and*
- *redundant regulation-making powers.*

FPA response

The FPA supports the recommendation to repeal redundant and spent provisions in the corporations and financial services legislation based on the implementation methodology outlined in *Interim Report B — Additional Resources: Recommendations 14 and 15 — Redundant Provisions Note*.

The suggested Treasury review and implementation of the redundant provisions detailed in the *ALRC-FSL-B-Redundant-provisions-database* would assist in reducing the complexity of the legal framework for corporations and financial services legislation.

Recommendation 15

The Department of the Treasury (Cth) and the Australian Securities and Investments Commission should establish an ongoing program to:

- *identify and facilitate the repeal of redundant and spent provisions; and*
- *prevent the accumulation of such provisions.*

FPA response

The FPA supports the recommendation for ASIC and Treasury to establish an ongoing program to ensure redundant and spent provisions continue to be identified and repealed.

It is important that the OPC and Treasury continue the positive engagement they have established with industry, including the FPA, as part of their existing law improvement program to identify and repeal redundant provisions.

Given the pace of legislative development, we believe this process should ideally be conducted annually or at a minimum bi-annually.

Recommendation 16

Corporations and financial services legislation should be amended to address:

- *unclear or incorrect provisions;*
- *outdated notes relating to 'strict liability'; and*
- *outdated references to 'guilty of an offence'.*

FPA response

The FPA supports the of amending the corporations and financial services legislation as per recommendation 16. The examples included in *Interim Report B — Additional Resources: Recommendation 16 — Drafting Improvements Note* highlights the additional complexity such drafting can create, such as:

Reg 7.6.07A, Corporations Regulations 2001 - Section 923C of the Corporations Act has been amended since the notional amendments in reg 7.6.07A were made. The amendments to the Corporations Act and the notional amendments conflict and raise questions as to which version of s923C has the force of law.

However, care is needed to ensure that amending unclear provisions does not result in unintended consequences, overly prescriptive obligations or changes the policy intent of the provision.

Simpler Law Design - Chapter 8

Recommendation 17

Unnecessarily complex provisions in corporations and financial services legislation should be simplified, with a particular focus on provisions relating to:

- a. *the prescribing of forms and other documents;*
- b. *the naming of companies, registrable Australian bodies, foreign companies, and foreign passport funds;*
- c. *the publication of notices and instruments;*
- d. *conditional exemptions;*
- e. *infringement notices and civil penalties;*
- f. *terms defined as having more than one meaning;*
- g. *definitions containing substantive obligations; and*
- h. *definitions that contain the phrase 'in relation to'.*

FPA response

The FPA supports recommendation 17 in general and provides the following comments in response to specific ALRC suggestions included in *Interim Report B — Additional Resources: Recommendation 17 — Unnecessary complexity note*.

a. the prescribing of forms and other documents

The FPA supports the ALRC's alternative approach to 'prescribed forms' detailed in *Interim Report B — Additional Resources: Recommendation 17 — Unnecessary complexity note* to extend the Modernisation Business Registries (MBR) model of 'data standards' to documents and other data that must be lodged with ASIC or other person or otherwise published. Such a model should:

- grant ASIC a power to make 'ASIC data standards' that support technological neutrality in how documents and data are provided to ASIC or other person or publication
- require a document or other data to be lodged with ASIC or other person to 'meet any requirements of the ASIC data standards'
- include the form and content of documents, such as document templates, in the ASIC data standards
- require ASIC to:
 - consult on the development of the ASIC data standards, including template forms
 - make the ASIC data standards and templates accessible and dynamic as part of the upgrade of ASIC's portal and website
 - undertake periodic reviews of the efficiency and effectiveness of the ASIC data standards.

The advice fee consent requirements in the Corporations Act provide an example of the unintended consequences of the current requirements. Under an ongoing fee arrangement, a consumer may pay their financial planner via the deduction of advice fees from a financial product held by the consumer. For this to occur the consumer must provide written consent for the fee deduction to the product provider.

Product providers prepared for the 1 July 2021 commencement of the advice fee consent changes with each entity creating unique forms that are only compatible with their own systems. This has resulted in consumers and financial planners needing to complete and submit a different consent form for each product (which can include several forms for even the one product provider). Depending on the consumer's portfolio, this can be multiple forms.

This creates significant inefficiencies and regulatory risk for the financial planning profession. Consumers become frustrated with the need to fill in and sign so many forms for the same purpose.

Giving ASIC powers to create and publish prescribed forms consolidated in 'ASIC data standards' as part of the MBR reforms would provide efficiencies for all parties by reducing the number of forms to be completed and used for compliance and record keeping purposes. One standard form should be used by all participants.

The FPA recommends the ALRC extend recommendation 17 to include 'like phrases' to 'prescribed forms' where the provisions share the same intent. For example:

Section 962T of the Corporations Act - Requirements relating to consent:



- (1) ASIC may, by legislative instrument, determine requirements for the giving of consent to deductions from an account for the purposes of this Subdivision.
- (2) Without limiting subsection (1), the instrument may require that:
 - (a) a specified form, or specified form of words, must be used for giving consent; or
 - (b) a consent must include specified information.

Section 962X of the Corporations Act - Obligation to keep records of compliance:

- (1) A fee recipient in relation to an ongoing fee arrangement must keep records sufficient to enable the fee recipient's compliance with this Division in relation to the ongoing fee arrangement to be readily ascertained.
- (2) The regulations may specify records that the fee recipient must keep as part of the obligation in subsection (1).

Corporations Regulation 7.7A.11AA - Compliance records required to be kept by fee recipients sets detailed prescriptive requirements under s962X of the Act.

This ALRC's proposed approach has the potential to improve the readability of the Act and the accessibility of the prescriptive standards, and may be more robust and adaptive over the long term.

e. *infringement notices and civil penalties;*

The FPA supports the simplification of the infringement notices and civil penalties regime in the corporations and financial services laws.

The current structure of the infringement notices and civil penalties in the Corporations Act limit users' understanding of the application of penalties to the provisions in the law.

The FPA commends the ALRC for its considered discussion of the penalties and prohibitions regime.

Recommendation 18

Generally applicable notional amendments to corporations and financial services legislation should be replaced with textual amendments to the notionally amended legislation.

FPA response

The FPA supports:

- the ALRC recommendation to replace applicable notional amendments to the corporations and financial services legislation with textual amendments to the notionally amended legislation;
- the extension of Treasury's Law Improvement Program to include notional amendments contained in the Corporations Regulations and notional amendments in ASIC legislative instruments that are not sunseting, as suggested in *Interim Report B — Additional Resources: Recommendation 18 — Notional amendments note*; and



- the use of the ALRC database and *Recommendation 18 — Notional amendments note: Appendix A* to assist the Law Improvement Program in identifying notional amendments that can be replaced with textual amendments.

We strongly agree with the ALRC that:

Notional amendments, whether in regulations or ASIC legislative instruments, are a very complex law design tool and hinder the readability and findability of the law. Notional amendments should be minimised in favour of textual amendments.

The *ALRC-FSL-B-Notional-amendments-database* includes multiple amendments applicable to AFS licensees and the provision of financial advice. The ‘findability’ of these notional amendments has a sizeable impact on the complexity of the financial advice regime and add to the cost of providing financial services to consumers, especially retail clients.

Enhancing Navigability - Chapter 9

Recommendation 19

The Australian Securities and Investments Commission should publish additional freely available electronic materials designed to help users navigate the legislation it administers. Such materials should include annotated versions of the Corporations Act 2001 (Cth), National Consumer Credit Protection Act 2009 (Cth), and Australian Securities and Investments Commission Act 2001 (Cth).

FPA response

The FPA supports the recommendation that ASIC publish additional freely available electronic materials including annotated versions of the legislation it administers. This would greatly improve the transparency of changes in the law and assist all users of the financial system.

INTERIM REPORT B PROPOSALS AND QUESTIONS

Overarching comments:

The FPA supports the intent and concept of the overall package to reform the legislative hierarchy of the corporations and financial services legislation, associated subordinate regulations and legislative instruments. The following response to the proposals highlights some observations for the ALRC's consideration.

The Proposed Legislative Model - Chapter 2

Proposal B1

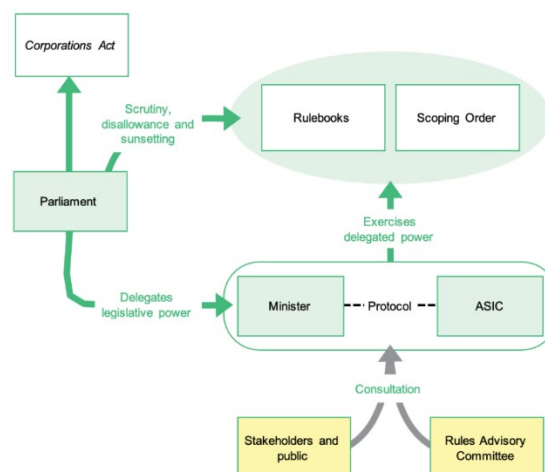
The legislative hierarchy of Chapter 7 of the Corporations Act 2001 (Cth) should be amended, in a staged process, to implement a legislative model that incorporates Proposals B2–B9. The legislative hierarchy should comprise:

- an Act legislating fundamental norms and obligations, and other provisions appropriately enacted only by Parliament;*
- a Scoping Order (a single consolidated legislative instrument) containing exclusions, class exemptions, and other detail necessary for adjusting the scope of the Act; and*
- thematic 'rulebooks' (consolidated legislative instruments) containing rules giving effect to the Act in different regulatory contexts as appropriate.*

FPA response

As stated in Interim Report B, the ALRC proposes a legislative model for financial services regulation that relies on moving much of the existing prescriptive detail in the Corporations Act to coherently structured delegated legislation.

Figure 1: The proposed legislative model



The FPA commends the ALRC for its well-considered and holistic proposal. We support the proposed legislative hierarchy as it has the potential to significantly simplify the navigation of the corporations and financial services legal requirements for all users.

- The proposed legislative hierarchy will make it easier for users of the law to find the provisions relevant to the product or service being provided.
- Financial planners studying for the Financial Adviser Exam have been hindered in their efforts to navigate the relevant laws and regulations due to the historical layering of regulatory reforms on top of existing obligations.
- Currently finding provisions relevant to financial advice with absolute certainty as to the accuracy of the provision is extremely problematic for those operating under the legal framework.

Application to financial advice

The FPA supports the application of the proposed legislative hierarchy to the provision of financial advice. The proposal is in line with FPA's recommendations in our response to ALRC Interim Report A, and further clarified in our response to background papers FSL5 and FSL6, which calls for the separation of the legal obligations placed on the individual financial planner practitioner from the requirements that apply to the AFS licensee and product provider.

Financial advice provisions should be clearly separated for Relevant Providers and AFS Licensees, either in separate rulebooks or distinct chapters within a combined Financial Advice Rulebook, for example.

FINANCIAL PLANNER / FINANCIAL ADVISER (RELEVANT PROVIDERS) RULEBOOK	AUSTRALIAN FINANCIAL SERVICES LICENSEE RULEBOOK
<ul style="list-style-type: none"> • Provide personal financial advice <ul style="list-style-type: none"> – Professional standards – Education and training – Exam – Continuing professional development • Code of Ethics • Relevant Providers annual registration • Qualified tax relevant provider obligation • Obligations to Single Disciplinary Body <ul style="list-style-type: none"> – Note: refer to Single Disciplinary Body Rulebook • Best interest obligations • Appropriate financial advice disclosure and documentation • Appropriate product disclosure if recommending or replacing product/ class of product • Ongoing fee arrangements and remuneration requirements • Client consent • Restricted terms – s923C • Financial advice reportable situations requirements • Financial advice record keeping • Client money rules • Obligations to cooperate <ul style="list-style-type: none"> – Single Disciplinary Body – AFCA 	<ul style="list-style-type: none"> • Hold AFSL <ul style="list-style-type: none"> – Responsible for financial advice provided under the license – Support relevant providers to meet obligations in Financial Planner Rulebook – General advice – Authorise representatives • Reportable situations requirements • Complaints handling (IDR/EDR) process • Consumer remediation • Professional indemnity insurance • Record keeping • Licensee and product disclosure / documentation • Licensee competency • General obligations • Conflict of interest requirements • Requirements for non-relevant providers <ul style="list-style-type: none"> – Best interest duty – Client consent – Obligations for providing a tax financial advice service <ul style="list-style-type: none"> ○ TPB registration • Responsible manager

There should be dedicated sections that allow all users to easily find all the responsibilities of the:

- AFSL holder
- Individual professional practitioner
- Regulator
- Single Disciplinary Body (financial services and credit panel)
- AFCA
- Product provider

This would help planners to be able to understand the obligations licensees are responsible for versus the requirements that they as practitioners are responsible for, and vice versa. Importantly, there must be clear delineations of responsibilities between financial planners and the obligations product providers are responsible for. Consumers should also be able to differentiate between responsible parties more clearly, particularly in relation to services provided by financial planners and product providers.

The current state of the financial advice regulatory environment makes it appropriate for prioritisation for transitioning to the proposed legislative hierarchy. As noted by this Review and many others, the current regulatory environment for the provision of financial advice is excessively complex. There is also significant duplication of the obligations within the Corporations Act that exacerbates this complexity and regulatory burden (as discussed in the Introduction of this submission).

Given the concurrent Quality of Advice Review (QOAR) being undertaken by Michelle Levy, consideration should be given to the implementation of the recommendations stemming from the QOAR within the ALRC's Final Report.

Rulebooks

The concept of thematic rulebooks will undoubtedly improve navigation and should therefore make it easier to understand and improve the overall accessibility of the laws.

There are a number of potential 'themes' within the corporations and financial services law which could result in a large amount of thematic Rulebooks. Careful consideration is necessary when identifying appropriate themes under which to consolidate legislative instruments into Rulebooks to ensure the intent and benefits of the proposed legislative hierarchy is realised. Depending on how the current provisions are categorised and consolidated into Rulebooks will determine whether the proposal clarifies or further confuses the navigation of the law for users.

The identification of thematic Rulebooks should require appropriate consultation with the public (i.e. all stakeholders) and the Rules Advisory Committee, and be subject to the requirements set in the Draft Guidance for Delegating Legislative Power in Attachment E of the Report.

Safeguards

The ALRC proposal suggests that prescriptive requirements should be contained within the Rules. One benefit of this proposal is that changes to the requirements in the Rules would not be rushed through in legislation where there is often little time for full consideration of the detail and identification of unintended consequences. Conversely, this also restricts Parliamentary oversight of the substantive provisions set in the Rules.

The safeguards included in the ALRC proposed legislative hierarchy are vital to the success of the model and must be implemented as a fundamental part of the package. The FPA supports the safeguards as detailed in the Draft Guidance in Interim Report B based on the Legislation Act and the views of the Delegated Legislation Scrutiny Committee.

Parliamentary scrutiny

The FPA supports the inclusion of parliamentary scrutiny in the proposed legislative hierarchy by making the establishment and changes to Rules and Scoping Orders subject to disallowance and sunseting requirements. Parliamentary scrutiny provides a vital safeguard for the development of legal obligations.

However, previously the last-minute use of disallowance motions close to regulatory commencement dates has caused the financial planning profession to incur significant expense, time, and regulatory uncertainty to unwind systems changes and compliance measures to meet new requirements.

On 19 March 2014, the Australian Government introduced the Corporations Amendment (Streamlining of Future Financial Advice) Bill 2014 (Bill) outlining the following changes to the FOFA reforms:

- Removing the 'catch-all' element of the 'safe harbour' for the best interests duty and further amendments to the best interests duty to facilitate scaled advice.
- Removing the requirement for fee disclosure statements to be sent to pre-1 July 2013 clients.
- Removing the opt-in obligation for ongoing fee arrangements entered into after the commencement of the Amendment Regulations.
- Exempting general advice from conflicted remuneration in some circumstances.

Most of these changes were implemented through the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (the Streamlining FOFA Regulation), which commenced on 1 July 2014.

Changes to the Statement of Advice (SOA) requirements were also implemented through the Corporations Amendment (Statements of Advice) Regulation 2014 (SOA Regulation), which was to commence on 1 January 2015. The SOA Regulation was repealed on 16 December 2014 by the Corporations (Statements of Advice) Repeal Regulation 2014.

The Streamlining FOFA Regulation was disallowed by the Senate on 19 November 2014, meaning that the FOFA provisions reverted back to their position prior to the commencement of the Streamlining FOFA Regulation. A number of these regulations were reinstated by the Corporations Amendment (Revising Future of Financial Advice) Regulation 2014, which commenced on 16 December 2014.

The industry had been adhering to these Regulations for nearly five months with significant finances and time invested in establishment, training and ongoing compliance costs. The disallowance motion risked placing the entire financial services industry immediately into breach of the law, whereas the amendments contained in the Regulation ensured the FoFA reforms remained intact in a sensible way that reduced red tape and maintained vital consumer protections.

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.

FPA response

The FPA supports in principle the concept of a single consolidated legislative instrument containing exclusions, class exemptions and other detail necessary for adjusting the scope of the Act in a Scoping Order; and that the Scoping Order sits outside the primary legislation.

The FPA supports the concept and role of a Scoping Order if it were to be established under the ALRC's Draft Guidance for Delegating Legislative Powers. As stated in the Draft Guidance:

There must be good reasons to delegate a power of exclusion or exemption.³

The FPA agrees that "Exclusions or exemptions are another specific example of delegated legislation that may adjust the scope or change the operation of an Act in potentially significant ways"⁴.

While delegating legislative powers for exemptions and exclusions can provide vital flexibility and improve the adaptability of the regulatory requirements to respond quickly to unforeseen issues and conditions to maintain the stability of the financial system, equally it must ensure consumer protections are not eroded or competitive advantaged created.

The delegation of power for exemptions and exclusions for provisions in Chapter 7 must only be granted with clear safeguards and with strict limitations considered, such as those included in the Draft Guidance:

- *Consistency with the purposes of the Act:* the power must be exercised consistently with, or at least taking into account, the objects of the Act.
- *Criteria or principles for the exercise of power:* when a wide or discretionary power is granted, the Act may set out criteria or guiding principles to limit the discretion.
- *Review process:* there should be a process to review exclusions and exemptions at regular intervals to identify any need to amend the Act. A person that exercises delegated power may also be required to provide an annual report to Parliament detailing the number of times and circumstances in which the power was exercised to ensure appropriate accountability.⁵

³ Pg 258

⁴ E.31

⁵ E.36



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').

FPA response

The FPA supports proposal B3 if the power vested in ASIC to exempt a person from provisions of Chapter 7 of the Act by notifiable instrument were to be established under the ALRC's Draft Guidance for Delegating Legislative Powers.

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 in Proposal B3;*

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

FPA response

The FPA supports proposal B4.

However, while the explanatory statement serves to clarify provisions in the primary legislation or regulations, there have been incidences where such documents have included extensive additional and prescriptive obligations. Requirements within the explanatory statement are 'hidden' and can be easily lost once the Bill is enacted and incorporated into the existing Act.

For example, the Retirement Income Covenant passed Parliament as a Schedule within the Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021. Chapter 17 of the explanatory memorandum to the Bill⁶ included a significant amount of detail as to how trustees would be expected to meet the new requirements in the SIS Act. The new provisions have since been incorporated into the SIS Act. Users of the law must be familiar with the history of the establishment of the Retirement Income Covenant provisions to have knowledge of the importance of the explanatory memorandum and to know which Bill it relates to.

⁶ https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6817_ems_5cff4b6c-34e7-4092-807d-4cc20bac5e27/upload_pdf/JC004201.pdf;fileType=application%2Fpdf#search=%22legislation/ems/r6817_ems_5cff4b6c-34e7-4092-807d-4cc20bac5e27%22



Proposal B5

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

[FPA response](#)

The FPA supports the proposal to amend Chapter 7 of the Corporations Act to include a power to make 'rules'. As discussed in Interim Report B, the power to make 'rules' should apply to all or specified provisions, where appropriate.

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

[FPA response](#)

The FPA supports the proposal for a mandatory explanatory statement to accompany every legislative instrument that must address explicitly how the instrument furthers relevant objects within Chapter 7.

This support is subject to previous comments regarding explanatory statements provided in our response to proposal B4.

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.*

[FPA response](#)

The FPA strongly supports proposal B7.

The following matters would also be more appropriately enacted in primary legislation:

- Stop Orders and Temporary and Permanent Banning Orders
- Provisions that serve to address sector and sub-sector wide systemic issues.

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.

FPA response

There may be culture barriers within the financial system that could hinder the realisation of the full benefits of the proposed legislative hierarchy.

As discussed in the Report, the current legal hierarchy and overly prescriptive requirements in the legislation have led to a tick-a-box approach to compliance by industry, ASIC, AFCA and professional indemnity issuers.

ASIC currently develops regulatory guidance that sets out how the Regulator interprets and will enforce the law. This guidance has played a key role in the current regulatory framework that has created the tick-a-box compliance culture that exists today. ASIC's regulatory guidance is not legally binding. However, the industry believes it is used by ASIC and AFCA as the measure of compliance for enforcement and dispute purposes, and therefore it is used by industry as the legal requirements that must be met.

This is because ASIC often over-reaches with regulatory guidance by including additional requirements that are not in the primary legislation or the regulations, even in circumstances where delegated legislative powers have not been given. For example:

- Corporations Act: S 912B requires compensation arrangements if financial services are provided to persons as retail clients
- Corporations Regulation: REG 7.6.2AAA requires the compensation arrangements if financial services provided to persons as retail clients (Act s 912B) to be professional indemnity insurance
- Regulatory Guidance 126: Table 4 sets a minimum amount of professional indemnity insurance cover requirement of at least \$2 million for any one claim and in the aggregate for AFS licensees with total revenue from financial services provided to retail clients of \$2 million or less. For AFS licensees with total revenue from financial services provided to retail clients greater than \$2 million, minimum cover should be approximately equal to actual or expected revenue from financial services provided to retail clients (up to a maximum limit of \$20 million)

Neither the primary legislation nor the regulations include a provision delegating power to ASIC to set a minimum amount of cover required for a professional indemnity insurance policy to meet the requirement to be 'adequate' under the Act.

Compliance should be driven by a culture of consumer best interest and minimising the risk of consumer harm.

There is a risk that the proposed delegation of power to ASIC could self-perpetuate the existing cultural compliance issues as ASIC would make the rules, interpret the rules into regulatory guidance, and enforce the rules. This would create a lack of 'separation of duty' between who is making the law and who is enforcing it. Even with the safeguards identified in the Draft Guidance for Delegating Legislative Power, such delegations would give ASIC too much power given the current culture.

As the corporations and financial services law has grown since the introduction of the Financial Services Reform Act in 2001, so too has the Regulator's remit. ASIC is now tasked with the responsibility of regulating entities and individuals across an extremely broad range of issues, products, and services. From a regulated person's perspective, the mere magnitude of this work appears to have stretched the resources and capability of the Regulator. Reliance on algorithms for data matching and restricted capacity for human judgement to identify causal issues of potential breaches and systemic issues has exacerbated the tick-a-box compliance culture in the financial services sector.

The FPA supports the appropriate delegation of power vested in the Minister. ASIC should require Ministerial approval for setting Rules and exemptions in the Scoping order. ASIC created rules should be disallowable by Parliament or the Minister

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.*

FPA response

The FPA supports the proposal to amend Chapter 7 to:

- establish an independent Rules Advisory Committee, and
- require the Minister and ASIC consult the Committee and the public before making or amending any Scoping Order or Rules.

Mandatory consultation is vital to ensure transparency in the use of delegated legislative powers and to protect democratic processes in establishing legal requirements.

The establishment and ongoing operation of the proposed Rules Advisory Committee must be funded in whole by the Government. Industry cost recovery should not apply to the Rules Advisory Committee.

An appropriate, consultative, and transparent process should be determined to identify members of the Committee. Consideration should be given to including a panel of Committee members covering a

broad range of expertise in products and services regulated under corporations and financial services law. This should include individual practitioners with experience of interpreting and implementing the legal requirements when helping consumers as well as key knowledge and understanding of regulatory matters. Financial planners have vital client-facing insights that gives them a unique perspective to consider regulatory matters and to critically identify potential unintended consequences from the Rules and Scoping Orders. Ensuring diverse and appropriate representation on the Rules Advisory Committee will benefit all users of the law including the Regulator and the Australian public.

Expert panellists could be called upon to consider and respond to the Minister and ASIC on proposed Scoping Order or Rules, or amendments. This would ensure that market, competitive and practical implementation issues of the proposed Scoping Order, Rules, or amendments, were part of the Committee's considerations.

As the Minister would be an interested party with a legal requirement to consult with the Rules Advisory Committee, consideration should be given as to the appropriate person(s) with the responsibility to appoint the members of the Committee.

Proposal B9 works alongside the Parliamentary scrutiny, disallowance and sunseting suggestions to form a package of proposed safeguards underpinned by the considered Draft Guidance for Delegating Legislative Power, which are vital to protecting consumers and the integrity of the financial system regulatory environment.

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.

FPA response

The FPA supports proposal B10 as it is necessary under the proposed legislative hierarchy model.

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.

FPA response

The FPA supports proposal B11 as it is necessary under the proposed legislative hierarchy model.

What Goes Where Chapter 3

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.

FPA response

The FPA supports the proposal to publish and maintain consolidated guidance on the delegation of legislative power. To enhance transparency of the process and considerations for delegating power and setting or amending Scoping Order and Rules, the consolidated guidance should be published in an accessible form and location for all users of the law.

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?*

FPA response

The FPA commends the ALRC for its thorough and considered Draft Guidance for Delegating Legislative Powers. The Draft Guidance will assist in setting a high bar and consistent standards for delegating powers within the Act and establishing requirements under such powers.

The FPA suggests consideration be given to any potential role of Regulatory Impact Statements in the Draft Guidance and the proposed legislative hierarchy more generally. As stated by APRA:

The Regulation Impact Statement (RIS) process seeks to assist government officials to move towards 'best practice' regulatory design and implementation by requiring the completion of a detailed cost-benefit analysis.

Preparation of a RIS formalises and documents the steps that should be taken in making regulation. It provides a consistent, systematic and transparent process for assessing alternative approaches to regulatory problems. It includes an assessment of the impacts of the proposed regulation, and alternatives, on different groups and the community as a whole. The primary role of the RIS is to improve government decision-making processes by ensuring



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that all relevant information is presented to the decision maker when a decision is being made.⁷

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.

FPA response

The FPA is not involved in preparing legislative drafting instructions, drafting legislative and notifiable instruments, or an associated role. Feedback on proposal B14 would be more valuable from members of the relevant field.

Offences and Penalties - Chapter 5

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.

FPA response

The FPA supports the proposal to consolidate the number of offence and penalty provisions covering the same conduct as it would remove duplication. However, the penalties must be commensurate to the consumer detriment caused by a breach of the provision.

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?

FPA response

The FPA understands that evidential provisions can assist in demonstrating that a person has followed the spirit and intent of the law when providing products and services to consumers. This can benefit the consumers, AFCA, regulators, and providers.

⁷ <https://www.apra.gov.au/regulation-impact-statements>



The laws applicable to the provision of financial advice have been too prescriptive. As discussed in our previous submissions, the law needs to be more flexibility where possible and black and white where necessary.

We are concerned as to whether evidential provisions may be interpreted by AFCA and ASIC, and met by licensees, in a manner that could lead to more prescription and therefore perpetuate the existing tick-a-box culture. This would undermine the benefits of the package of proposals put forward by the ALRC.

Simpler Law Design Chapter 7

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.

[FPA response](#)

The FPA supports proposal B17 as demonstrated in Prototype Legislation B – Prototype Act and Prototype Rules.

Under the current offence and civil penalty structure it is unclear as to what the penalties are and how they apply to the provisions in the Act.

Proposal B18

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

[FPA response](#)

The FPA supports the ALRC's proposal to amend offence provisions to specify any applicable fault element in the corporations and financial services legislation as appropriate, rather than continued reliance on Chapter 2 of the Criminal Code.

This would improve user understanding of the offence provisions in the corporations and financial services law and the applicable fault element. Ensuring the offence provisions and the fault element (if any) are clear and understandable from the text of the provisions themselves, and consistently contained within the corporations and financial services law will greatly simplify the legislation and improve the navigability of the law for those operating under it, such as financial planners and AFS licensees.

We suggest the alternative 'prospective' implementation approach that identifies fault elements in all future amendments to corporations and financial services legislation only, would increase

inconsistency with two fault element structures operating with these laws. This would further complicate the navigation and readability of the law for users.

The FPA supports the full implementation approach of the ALRC's proposal, noting Treasury's concerns about the significance of such an undertaking.

INTERIM REPORT C

The FPA acknowledges the ALRC's call for issues for consideration for inclusion in Interim Report C in line with Terms of Reference C for the Inquiry:

C. How the provisions contained in Chapter 7 of the Corporations Act 2001 (Cth) and the Corporations Regulations 2001 (Cth) could be reframed or restructured so that the legislative framework for financial services licensing and regulation:

- *is clearer, coherent and effective;*
- *ensures that the intent of the law is met;*
- *gives effect to the fundamental norms of behaviour being pursued; and*
- *provides an effective framework for conveying how the law applies to consumers and regulated entities and sectors.*

Language of the Law

The proposals in Interim Report B present a more coherent regulatory design and hierarchy of laws covering primary law provisions, regulations, class orders, and standards that will undoubtedly improve and simplify the navigation and 'findability' of the corporations and financial services law.

Prototype Legislation B thoroughly demonstrates that simplified navigation can indeed be achieved through the ALRC's package of proposals. However, it also highlights that the language and drafting style of the law has a marked impact on the clarity, coherence and effectiveness of the law for users.

There is language with which law can be made and in which it can be expressed⁸, including the formal written language of law used for legislature. However, this established language is a very complex tool of the law that significantly hinders the readability and findability of the law for those outside the legal fraternity. The impact this has on users' ability to understand the meaning and requirements within the law lends itself to require guidance to interpret its wording.

The more the law needs interpreting through regulatory guidance, the higher the risk of perpetuating reliance on that guidance instead of the law and the tick-a-box culture of compliance.

The FPA would welcome the ALRC's consideration of the impact of the language of the law on the ability to convey clear and coherent obligations for users of the law and deliver effective regulation.

⁸ <https://plato.stanford.edu/entries/law-language/>



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We will endeavour to provide further input to the ALRC's considerations for inclusion in Interim Report C in due course.