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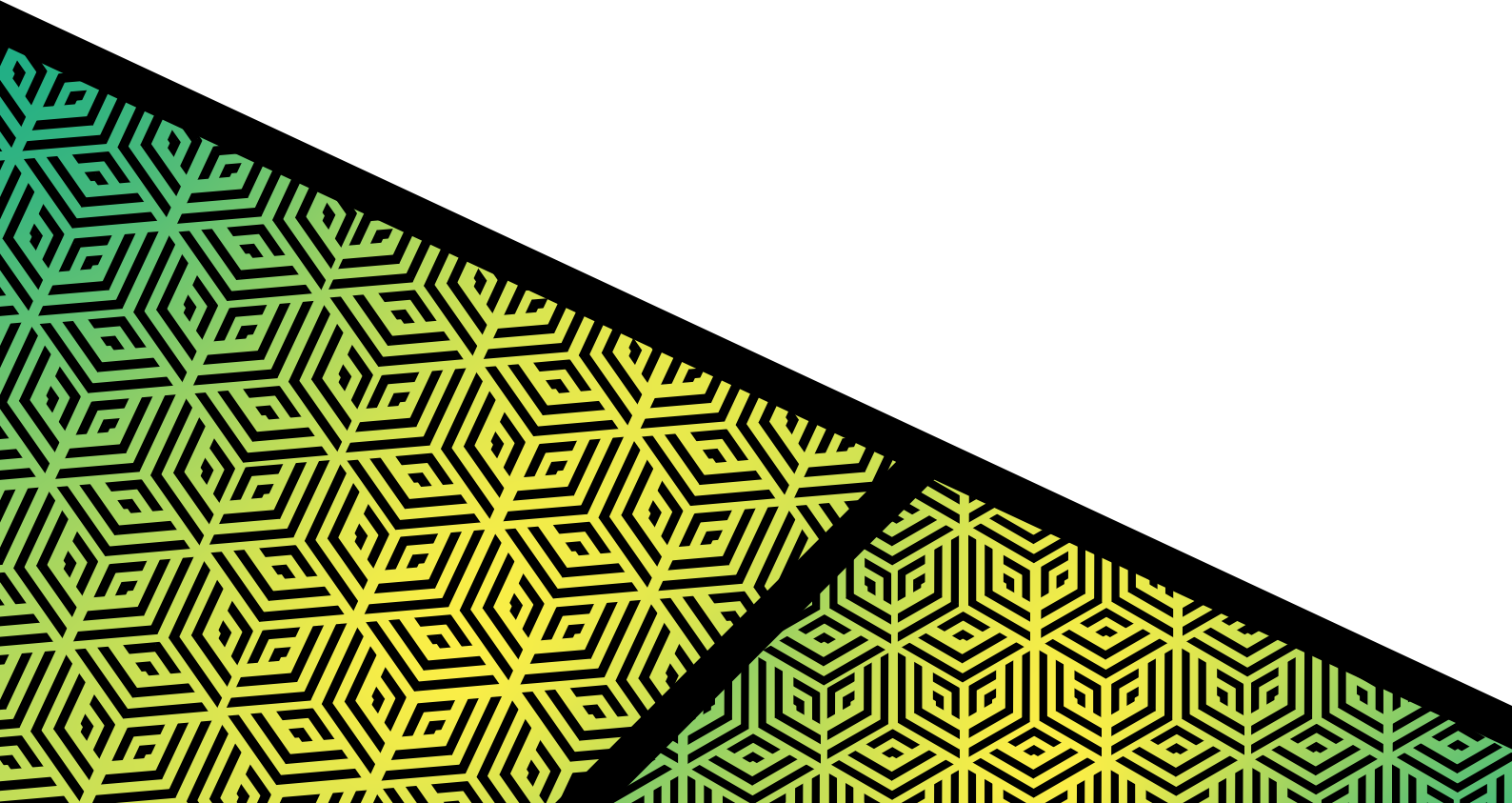
Australian Law Reform Commission

BACKGROUND PAPER FSL10

# LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Reflecting on Reforms II – Submissions to  
Interim Report B

January 2023



This discussion of the submissions received in response to Interim Report B is the 10th in a series of background papers to be released by the Australian Law Reform Commission ('ALRC') as part of its Review of the Legislative Framework for Corporations and Financial Services Regulation ('the Inquiry').

These background papers are intended to provide a high-level overview of topics of relevance to the Inquiry. Further background papers will be released throughout the duration of the Inquiry, addressing key principles and areas of research that underpin the development of recommendations.

The ALRC is required to publish one further Interim Report during the Inquiry, and this Report will include specific questions and proposals for public comment. A call for further submissions will be made on the release of this Interim Report. In the meantime, feedback on the background papers is welcome at any time by email to [financial.services@alrc.gov.au](mailto:financial.services@alrc.gov.au).

**[View the Financial Services Legislation Background Paper Series.](#)**

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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# REFLECTING ON REFORMS II – SUBMISSIONS TO INTERIM REPORT B

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## Introduction

1. Stakeholder feedback is crucial in assisting the ALRC to develop its recommendations for simplification of corporations and financial services legislation. In this Background Paper, the ALRC provides an overview of the feedback it has received, by way of formal submissions, on questions and proposals outlined in Interim Report B. This feedback will inform the development of proposals in Interim Report C, as well as recommendations for reform made in the ALRC's Final Report.

2. The purpose of this Background Paper is to provide a foundation for further discussions with stakeholders as the ALRC continues to develop its proposals for reform. It is the second background paper of its kind for this Inquiry, and follows the same format as Background Paper FSL6 *Reflecting on Reforms – Submissions to Interim Report A*.

3. Interim Report B was published on 30 September 2022, and submissions were invited until 30 November 2022. In total, the ALRC received 20 submissions from a range of stakeholders, including industry participants, industry representatives, consumer representatives, academics, and legal practitioners. A list of submissions and download links are included in [Appendix A](#).<sup>1</sup>

4. The first section of this Background Paper gives an overview of the level of support expressed in submissions for each proposal in Interim Report B. The next two sections summarise the feedback in response to specific proposals and questions, including:

- why submissions supported, or did not support, proposals; and
- key issues raised regarding the design or implementation of the proposed reforms.

5. The final section briefly outlines feedback received in relation to the six recommendations included in Interim Report B.

6. The ALRC will continue to conduct consultations and host public webinars to facilitate ongoing engagement. Feedback is also welcome at any time by email to: [financial.services@alrc.gov.au](mailto:financial.services@alrc.gov.au).

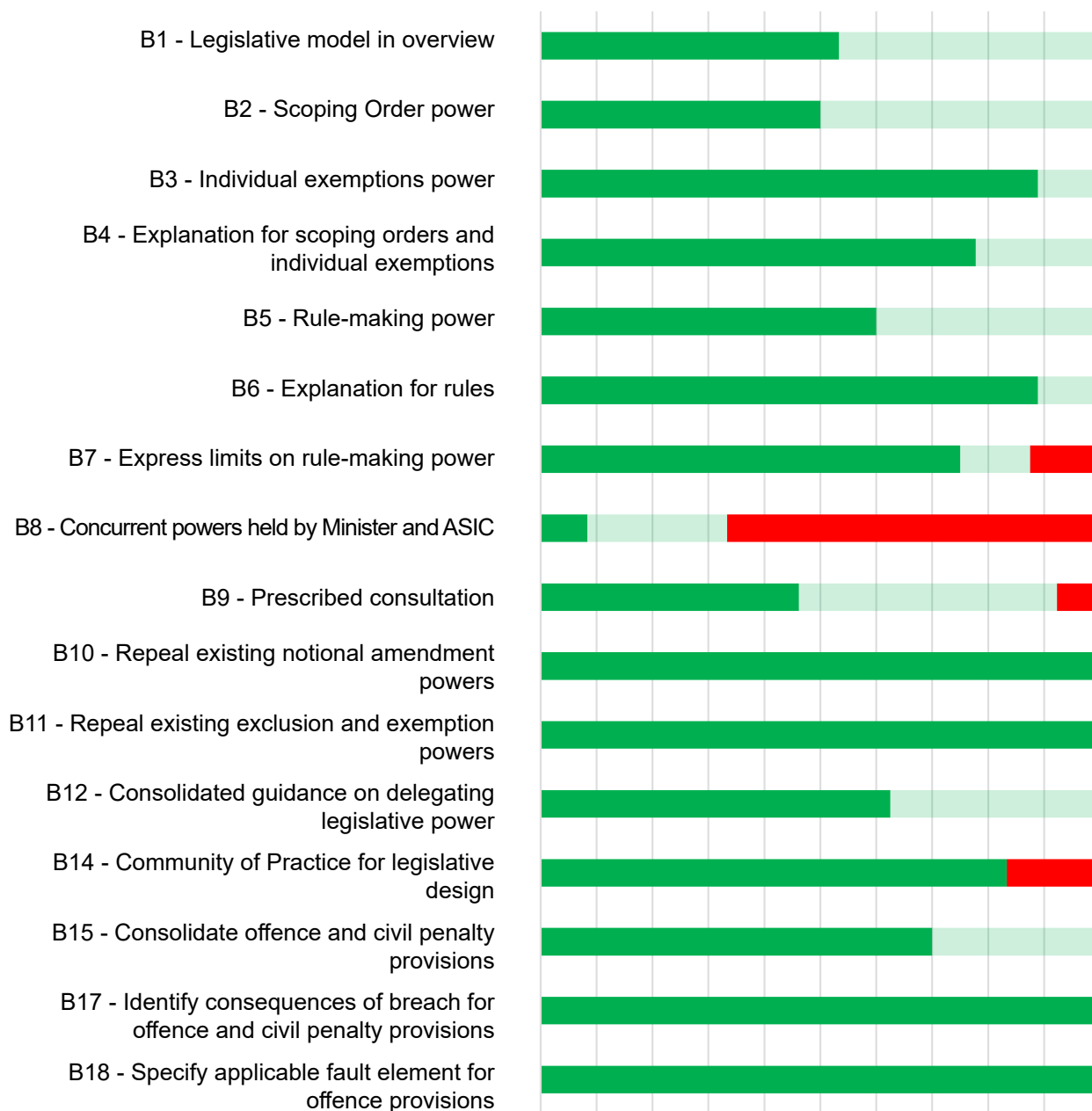
## Overview: Support for proposals

7. The degree of support expressed for specific proposals in Interim Report B is illustrated by [Figure 1](#) below. Stakeholders supported the majority of proposals, although as discussed further below, some submissions highlighted issues for the ALRC to consider and to clarify in further developing these proposals.

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1 As 56 submissions were received in response to Interim Report A, the numbering allocated to submissions in response to Interim Report B begins at 57.

**Figure 1: Support for Interim Report B proposals<sup>2</sup>**



<sup>2</sup> The underlying data for Figure 1 appears in the table at [Appendix B](#). That table shows the number of submissions by level of support and the total number of submissions that expressed a view in relation to each Proposal.

## Feedback on the proposed legislative model for financial services

8. Proposals B1–B11 relate to the ALRC’s proposed legislative model for the regulation of financial services. Proposal B1 describes the model in overview, Proposals B2–B9 outline the key elements of the model, and Proposals B10–B11 set out reforms that would form part of implementing the model.

9. In summary, the proposed legislative model aims to establish a simpler, more coherent, and navigable legislative hierarchy for Chapter 7 of the *Corporations Act*. It does this by creating:

- a de-cluttered Act of Parliament, which contains key obligations, prohibitions, powers, serious offences, significant civil penalties, and other provisions appropriately enacted only by Parliament — so as to embody the core policy of the regulatory regime;
- a consolidated legislative instrument (‘Scoping Order’) containing the vast majority of exclusions and exemptions from the Act (these are currently spread across the legislative hierarchy) and other detail necessary for adjusting the scope of the Act; and
- thematically consolidated rules, which for convenience may be labelled ‘rulebooks’, containing prescriptive detail (which are also currently spread across the legislative hierarchy).

10. Overall, submissions endorsed the legislative model proposed by the ALRC, with concerns largely focused on the allocation of delegated law-making power between the Minister and ASIC as delegated law-makers under the model.

### The proposed legislative model in overview

**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.

11. All submissions that commented on the ALRC’s proposed legislative model expressed support or qualified support for the model.<sup>3</sup>

<sup>3</sup> See, eg, Financial Planning Association of Australia, *Submission 59*; Australian Banking Association, *Submission 61*; Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre, *Submission 62*; Stockbrokers and Investment Advisers Association, *Submission 63*; M Nehme, *Submission 64*; ASX, *Submission 65*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*; Australian Retail Credit Association, *Submission 71*; P Hanrahan, *Submission 72*; Insurance Australia Group Limited, *Submission 73*; MinterEllison, *Submission 74*; Law Council of Australia, *Submission 75*.

12. Stakeholders largely agreed with the ALRC that the proposed legislative model would improve the navigability of financial services legislation.<sup>4</sup> For example, the Customer Owned Banking Association believed the model would enable users ‘to navigate and have confidence that they have found all the key provisions they need on a given issue’.<sup>5</sup> ANZ observed that the model would ‘define where each type of rule would belong’, ‘reduce the number of legislative instruments’, and ‘allow the law to be amended more flexibly without the need to rely on notional amendments’.<sup>6</sup>

13. The Property Council of Australia observed that compared to the existing legislative framework, the proposed legislative model ‘provides a clearer and more efficient regulatory hierarchy regime’ which would be ‘capable of delivering the broad overarching policy objectives of the legislation while remaining flexible’.<sup>7</sup> The Property Council of Australia identified the regulation of internally managed stapled groups as an illustration of the current legislative complexity. According to the Property Council of Australia, if implemented alongside substantive policy reforms, the proposed legislative model ‘would provide a legislative framework that could help to reduce the unnecessary regulatory complexity and inaccessibility that currently applies to internally managed stapled groups’.<sup>8</sup>

14. Some submissions queried whether the proposed ‘three-tier’ model — comprising an Act, a Scoping Order, and rulebooks — could be reduced to ‘two tiers’ by combining the contents of the Scoping Order and rulebooks into a single legislative instrument.<sup>9</sup> Doing so would further reduce the number of places a reader would need to look to find the law. In the ALRC’s view, while this approach may be possible under the proposed legislative model, there are potential downsides to adopting a ‘two-tier’ approach that do not outweigh the benefits of a ‘three-tier’ model. The ALRC will further consider how navigating between the three ‘tiers’ and different instruments can be made easier.

15. Several submissions commented on implementation of the proposed model, and emphasised the importance of a clear implementation roadmap so as to manage potential transition costs.<sup>10</sup> The Australian Banking Association, for example, noted that it ‘would welcome a moratorium on further regulatory change’ during the implementation process, as well as ‘an opportunity to comment on the proposed order and timing for implementation’.<sup>11</sup> The Financial Services Council observed that it would be important to undertake a ‘comprehensive scoping exercise’ to ensure that implementation could be planned appropriately.<sup>12</sup> The Financial Services Council also suggested that implementation should be staged

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.<sup>13</sup>

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4 See, eg, Customer Owned Banking Association, *Submission 57*; Financial Planning Association of Australia, *Submission 59*; Australian Banking Association, *Submission 61*.

5 Customer Owned Banking Association, *Submission 57*.

6 ANZ Banking Group, *Submission 67*.

7 Property Council of Australia, *Submission 76*.

8 *Ibid.*

9 Australian Banking Association, *Submission 61*; Law Council of Australia, *Submission 75*.

10 Australian Banking Association, *Submission 61*; Financial Services Council, *Submission 66*; ANZ Banking Group, *Submission 67*; Insurance Australia Group Limited, *Submission 73*; Law Council of Australia, *Submission 75*.

11 Australian Banking Association, *Submission 61*.

12 Financial Services Council, *Submission 66*.

13 *Ibid.*

16. Submissions also recognised that the proposed legislative model could be implemented concurrently with future policy reforms, such as any changes arising out of the Quality of Advice Review.<sup>14</sup> The ALRC will further discuss implementation of its proposed reforms in the Final Report.

17. Proposals B10 and B11, which relate to the repeal of existing exemption and notional amendment powers, would be consequent upon implementing the proposed legislative model.<sup>15</sup> Submissions that expressly commented on Proposals B10 or B11 recognised this, and noted the importance of properly managing the transition process.<sup>16</sup> For example, MinterEllison noted that there would ‘need to be appropriate transitional and savings provisions to ensure an effective transition to the new legislative hierarchy’.<sup>17</sup>

18. Some submissions also commented upon the role of regulatory guidance alongside the law that comprises the proposed legislative model.<sup>18</sup> The Financial Planning Association, for example, expressed the view that ‘guidance has played a key role in the current regulatory framework that has created the tick-a-box compliance culture that exists today’ and that guidance is ‘used by industry as the legal requirements that must be met’.<sup>19</sup> In their joint submission, Dr Bednarz and Professor Weatherall identified an example of ASIC regulatory guidance that may, in their view, suggest that regulated entities act incompatibly with aspects of the law relating to privacy in order to meet their obligations under financial services law.<sup>20</sup>

### Specific aspects of the proposed legislative model

19. Some submissions commented in further detail on specific aspects of the proposed legislative model, encompassed in Proposals B2–B9. These are discussed below.

#### Scoping order and individual relief

20. Proposals B2–B4 aim to provide a mechanism for adjusting the scope of the financial services regulatory regime and providing for individual exemptions in a more navigable and transparent way than is presently the case.

**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.

14 Financial Planning Association of Australia, *Submission 59*; ANZ Banking Group, *Submission 67*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

15 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.95].

16 MinterEllison, *Submission 74*; Law Council of Australia, *Submission 75*.

17 MinterEllison, *Submission 74*.

18 See, eg, Financial Planning Association of Australia, *Submission 59*; Australian Banking Association, *Submission 61*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

19 Financial Planning Association of Australia, *Submission 59*.

20 Z Bednarz and K Weatherall, *Submission 58*.



21. All submissions that addressed Proposal B2 supported or offered qualified support relating to the Scoping Order as part of the proposed legislative model.<sup>21</sup> In general, submissions acknowledged the importance of using delegated legislation to manage the regulatory boundary set by primary legislation.<sup>22</sup> Associate Professor Nehme also recognised that a Scoping Order could improve navigability and comprehensibility of the legislative framework:

Providing a one stop shop for the exclusions and exemptions will facilitate access to the public. It will also provide a level of transparency that is currently lacking as it is challenging for stakeholders, including consumers, to fully grasp the system.<sup>23</sup>

22. Qualified support in relation to Proposal B2 centred on the nature of the power to amend the Scoping Order and drawing the line between matters more appropriately contained in primary legislation or the Scoping Order.<sup>24</sup> The Financial Services Council, for example, noted that in some cases it may be difficult to identify whether an exclusion or exemption is 'structural' in nature so as to warrant its inclusion in primary legislation, rather than in the Scoping Order.<sup>25</sup> While a degree of judgement would be required in each case, the principles for delegating legislative power discussed in Interim Report B would help to make these decisions, as well as consultation during the law-making process.<sup>26</sup>

**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').

23. All submissions that commented on Proposal B3 expressed support or qualified support. Submissions generally considered that ASIC's ability to grant individual relief was important, particularly for managing unintended consequences of the regulatory regime.<sup>27</sup>

24. Some submissions expressed concerns about the potential impacts of exemptions in particular cases. Nehme noted that grants of individual relief may often impact people other than the applicant, and suggested that 'no action letters' offer an alternative approach.<sup>28</sup> The Law Council of Australia also noted that the power to grant individual exemptions

should be limited to circumstances where the affected person requests the relief and consents to the issue of the notifiable instrument. ASIC should not be able to issue instruments under this power which impose conditions without the affected person's consent.<sup>29</sup>

21 See, eg, Financial Planning Association of Australia, *Submission 59*; Stockbrokers and Investment Advisers Association, *Submission 63*; Institute of Financial Professionals Australia, *Submission 69*; Insurance Australia Group Limited, *Submission 73*; MinterEllison, *Submission 74*.

22 Financial Planning Association of Australia, *Submission 59*; Financial Services Council, *Submission 66*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*; Insurance Australia Group Limited, *Submission 73*; MinterEllison, *Submission 74*.

23 M Nehme, *Submission 64*.

24 Australian Banking Association, *Submission 61*; Financial Services Council, *Submission 66*; ANZ Banking Group, *Submission 67*.

25 Financial Services Council, *Submission 66*.

26 See, for example, the Financial Services Council's observations regarding consultation: *Ibid*.

27 Australian Banking Association, *Submission 61*; Financial Services Council, *Submission 66*; P Hanrahan, *Submission 72*; MinterEllison, *Submission 74*; Law Council of Australia, *Submission 75*.

28 M Nehme, *Submission 64*.

29 Law Council of Australia, *Submission 75*.

**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.

25. All submissions that commented on Proposal B4 were either supportive or offered qualified support.<sup>30</sup> Submissions noted that Proposal B4 would facilitate transparency and improved scrutiny of delegated law-making.<sup>31</sup> According to Nehme, Proposal B4 (and the similar Proposal B6, discussed below) would ‘ensure that the legislative instruments remain consistent with the objects of Chapter 7’ and ‘raise a level of transparency to stakeholders by providing them with justification behind the use of the legislative instruments’.<sup>32</sup>

26. The Australian Banking Association suggested that Proposal B4 could be extended to apply to existing exemption and modification powers, so that

the accompanying statement for each instrument must also include a version of the relevant legislative provisions as modified, to enable the modifications to be clearly identified, as well as a clear statement which sets out the circumstances in which the modifications will apply.<sup>33</sup>

### Rules and rulebooks

27. Proposals B5–B7 aim to accommodate necessary prescriptive detail and to provide flexibility in the legislative framework in a more coherent and navigable way than is currently possible.

**Proposal B5** Chapter 7 of the *Corporations Act 2001* (Cth) should be amended to include a power to make ‘rules’.

28. Stakeholders generally supported or expressed qualified support for Proposal B5.<sup>34</sup> Some submissions specifically noted the potential for thematic rulebooks to make the law easier to access, navigate, and understand.<sup>35</sup>

29. In setting out an alternative law-making model with some similarities to the ALRC’s proposed model,<sup>36</sup> Insurance Australia Group Limited suggested that any rule-making power should be subject to a requirement that rules be made to a specified standard, such as that they be ‘clear, concise and effective’.<sup>37</sup> Insurance Australia Group Limited also suggested appropriate review and oversight to ensure such a standard is met.<sup>38</sup>

30 See, eg, Financial Planning Association of Australia, *Submission 59*; Australian Banking Association, *Submission 61*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*; Law Council of Australia, *Submission 75*.

31 M Nehme, *Submission 64*; ANZ Banking Group, *Submission 67*; Law Council of Australia, *Submission 75*.

32 M Nehme, *Submission 64*.

33 Australian Banking Association, *Submission 61*.

34 See, eg, Financial Planning Association of Australia, *Submission 59*; Australian Banking Association, *Submission 61*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*; MinterEllison, *Submission 74*; Law Council of Australia, *Submission 75*.

35 Financial Planning Association of Australia, *Submission 59*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

36 See [43] below.

37 Insurance Australia Group Limited, *Submission 73*.

38 Ibid.

30. Qualified support in relation to Proposal B5 centred on the scope of any rule-making power and accountability for its exercise. Nehme, for example, suggested that unless the power to make rules were limited to ‘technical issues’, then increased accountability mechanisms and constraints would be required.<sup>39</sup> The Financial Services Council also noted that it had ‘significant concerns as to how a power to make rules can be effectively circumscribed and monitored’.<sup>40</sup> The scope of the rule-making power contemplated by Proposal B5 is discussed further below in the context of Proposal B8, and will also be further considered by the ALRC in the Final Report.

**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.

31. Consistent with submissions on the similar Proposal B4, submissions that addressed Proposal B6 were either supportive or offered qualified support.<sup>41</sup>

32. Commenting on Proposals B4 and B6, the joint submission of the Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre suggested that ‘the objects of Chapter 7 of the *Corporations Act* be updated to specifically reference consumer protection, including the protection of consumers experiencing disadvantage or vulnerability’.<sup>42</sup> The joint submission of the Centre for Women’s Economic Safety, Flequity, and Southeast Community Links also suggested that the objects of Chapter 7 include protecting vulnerable consumers.<sup>43</sup> The ALRC will further discuss the use of objects clauses in the Final Report.

**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

powers enabling regulators to take discretionary administrative action.

33. Submissions generally supported Proposal B7,<sup>44</sup> however two submissions proposed alternative approaches. Nehme observed that having ‘penalties (even minor ones) spread over two different documents may lower awareness of the penalty regime’.<sup>45</sup> Nehme suggested that sanctions should appear in primary legislation only, with the ability for provisions of primary legislation to reference more detailed rules where necessary.<sup>46</sup>

39 M Nehme, *Submission 64*.

40 Financial Services Council, *Submission 66*.

41 See, eg, Financial Planning Association of Australia, *Submission 59*; Australian Banking Association, *Submission 61*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*; Law Council of Australia, *Submission 75*.

42 Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre, *Submission 62*.

43 Centre for Women’s Economic Safety, Flequity, and Southeast Community Links, *Submission 70*.

44 See, eg, Financial Planning Association of Australia, *Submission 59*; Australian Banking Association, *Submission 61*; Financial Services Council, *Submission 66*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*; Law Council of Australia, *Submission 75*.

45 M Nehme, *Submission 64*.

46 Ibid.

34. MinterEllison proposed ‘a somewhat different approach’, and suggested that

the Act should require financial service providers to comply with the rules. Failure to comply with the rules should give rise to criminal sanctions (where intentional or reckless) and civil penalties. We would expect the penalties for failure to comply with a rule to reflect the current penalties in the Act for serious contravention.<sup>47</sup>

35. In recognition of the potentially high penalties that may attach to prescriptive rules, MinterEllison suggested that it would be appropriate for the rule-maker ‘to have the power to “dial down” the penalty that would otherwise apply for breach of a rule’.<sup>48</sup>

### **The law-making roles of the Minister and ASIC**

36. Proposals B8 and B9 relate to how delegated legislation (that is, in the form of the Scoping Order and the rules) is made under the proposed legislative model. These proposals reflect the existing policy in Chapter 7 of the *Corporations Act* that delegated legislation may generally be made both at the instigation of the Minister (by way of regulations) and by ASIC (in the form of legislative instruments). Importantly, the proposals aim to accommodate this policy in a way that produces more navigable legislation than is currently possible.

**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.

37. Proposal B8 generated a wide range of responses from stakeholders. Those diverse views reflect the observation, discussed in Interim Report B, that the question of how to allocate law-making responsibility between government and an independent regulator is a perennial issue.<sup>49</sup> For example, Professor Black has observed that

in democratic states, at least, there is a continual debate as to how much power should be delegated to regulators, who should be involved in their decision making, how they should be called to account, by whom and with what consequences.<sup>50</sup>

38. The majority of submissions did not support vesting concurrent power to make scoping orders and rules in the Minister and ASIC. MinterEllison, for example, stated its ‘primary concern is that having two authorities with equal power to adjust the boundaries to the regime and to make rules will diminish the authority of both’.<sup>51</sup> MinterEllison was also concerned that concurrent law-making powers could lead to ‘responsibility-shifting or “passing the buck”’, and that the Minister’s ability to effectively override any rules made by ASIC would ‘significantly diminish [ASIC’s] authority and independence’.<sup>52</sup> The Australian Retail Credit Association thought that the proposed legislative model would

47 MinterEllison, *Submission 74*.

48 Ibid.

49 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [2.68]; [4.22]–[4.32].

50 Julia Black, *Constitutionalising Regulatory Governance Systems* (LSE Law, Society and Economy Working Papers No 02/2021, London School of Economics and Political Science, 2021) 2.

51 MinterEllison, *Submission 74*.

52 Ibid.

introduce the ability for the Minister's office to have a direct and significant impact upon the operation of laws, in terms of both the scope of the law(s) and the rules which will be required to be complied with, in order to ensure legislative compliance. These are significant powers, which we consider are more appropriately exercised by either the legislator or alternatively, an entity which is not subject to the political persuasions and views of a single minister and their portfolio.<sup>53</sup>

39. Other concerns relating to Proposal B8 centred on the perceived breadth of the powers to make scoping orders and rules, which in the view of some stakeholders renders the powers inappropriate for conferral on ASIC.<sup>54</sup> This issue is discussed further below.

40. A small number of submissions indicated support or qualified support for Proposal B8.<sup>55</sup> Submissions expressed reservations about how to manage coordination between the Minister and ASIC,<sup>56</sup> the potential influence of industry lobbying,<sup>57</sup> and whether ASIC would have adequate resources to perform the law-making functions allocated to it.<sup>58</sup> In their joint submission, the Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre preferred that ASIC be granted sole rule-making power:

An independent regulator with resources available to conduct transparent investigations and consultations should be sufficient to wield this power alone. Additionally, the provision of concurrent powers can risk creating confusion and double handling, which would seem directly contradictory to this review's focus on simplification and disentangling.<sup>59</sup>

41. By contrast, some submissions expressed a preference for the powers to make scoping orders and rules to be conferred on the Minister alone.<sup>60</sup> The Financial Planning Association of Australia and the joint submission of Chartered Accountants Australia and New Zealand, CPA Australia, the Financial Planning Association of Australia, the Institute of Public Accountants, and the SMSF Association, for example, expressed concern that if the law-making powers were conferred on ASIC, there would be 'a lack of "separation of duty" between who is making the law and who is enforcing it'.<sup>61</sup> Both submissions suggested that if law-making powers were granted to ASIC, then delegated legislation made by ASIC should be subject to Ministerial approval and disallowance.<sup>62</sup> The Customer Owned Banking Association also expressed concern regarding accountability and transparency, observing:

ASIC is not directly accountable to Parliament in the same way that the Minister is and are at best only partially accountable through Parliament's committee system. The committee system's limited ability to allow Parliamentarians to directly hold bureaucrats accountable in the same way as they can with the Minister on the floor of Parliament is of concern especially as more power is granted to these executive agencies over time.<sup>63</sup>

42. As an alternative to concurrent powers, MinterEllison suggested a division of delegated law-making responsibilities between the Minister and ASIC. MinterEllison expressed the view that the power to make rules should be conferred on one authority: an independent regulator such as

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53 Australian Retail Credit Association, *Submission 71*.

54 Financial Services Council, *Submission 66*; Law Council of Australia, *Submission 75*.

55 Australian Banking Association, *Submission 61*; Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre, *Submission 62*; Stockbrokers and Investment Advisers Association, *Submission 63*; M Nehme, *Submission 64*.

56 Australian Banking Association, *Submission 61*; Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre, *Submission 62*.

57 Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre, *Submission 62*.

58 M Nehme, *Submission 64*.

59 Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre, *Submission 62*.

60 Customer Owned Banking Association, *Submission 57*; Financial Planning Association of Australia, *Submission 59*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

61 Financial Planning Association of Australia, *Submission 59*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

62 Financial Planning Association of Australia, *Submission 59*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

63 Customer Owned Banking Association, *Submission 57*.

ASIC.<sup>64</sup> MinterEllison suggested that the power to make scoping orders should be conferred on the Minister, because

it would be appropriate for the Government to have the authority to set the boundaries for the [regulatory regime], which can be set in first instance through the Act, and amended through the Scoping Order.<sup>65</sup>

43. Insurance Australia Group Limited also suggested an alternative approach, setting out a number of design principles and features that could be adopted in reforming the financial services regulatory regime. Insurance Australia Group Limited suggested that, in summary:

- ‘regulations should only be used for limited and specific purposes’, such as adjusting the boundaries of the regulatory regime. This could include, for example, specifying the types of regulated financial services or products, and providing exemptions to the licensing regime;
- a dedicated financial services conduct regulator may also propose regulations in some circumstances; and
- a dedicated financial services regulator ‘should be empowered to make rules to impose specific requirements, where appropriate, that must be complied with in relation to particular activities’.<sup>66</sup>

44. The Financial Services Council did not support conferring the power to make scoping orders and rules on the Minister or ASIC, and instead suggested establishing a new law-making body.<sup>67</sup> The Financial Services Council suggested that such a body ‘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’.<sup>68</sup> The new body would be charged with making, and maintaining, delegated legislation.

45. A similar law-making body was also proposed by the Law Council of Australia in its submission responding to Interim Report A, and reiterated in its response to Proposal B8.<sup>69</sup> The Law Council of Australia suggested that such a body could comprise ‘two members from ASIC, two from Treasury and a Chair who is an independent expert’, could report to the Senate Economics Legislation Committee, and ‘could be supported by an advisory committee which has significant input from external legal and industry experts’.<sup>70</sup> The ALRC will further consider the appropriate allocation of law-making responsibility for financial services regulation, but notes that creating any new law-making body would require revisiting existing policy settings.

46. The views of both the Financial Services Council and the Law Council of Australia appear to be underpinned by a perception that the delegated law-making powers contemplated by Proposals B2 (power to make ‘scoping orders’) and B5 (rule-making power) would be more expansive than existing powers under Chapter 7 of the *Corporations Act*. The Financial Services Council expressed concern that rules ‘will take on a greater role’ than regulations currently perform, and that the proposed powers would allow ASIC to deal with matters of ‘policy’.<sup>71</sup> In respect of ASIC, the Financial Services Council stated that

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

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64 MinterEllison, *Submission 74*.

65 Ibid. MinterEllison suggested that there may be ‘merit in giving the regulator a back-up authority to make changes to the Scoping Order’, but that ‘primacy be given to the Minister in this area’.

66 Insurance Australia Group Limited, *Submission 73*.

67 Financial Services Council, *Submission 66*.

68 Ibid.

69 Respectively, Law Council of Australia, *Submission 49*; Law Council of Australia, *Submission 75*.

70 Law Council of Australia, *Submission 75*.

71 Financial Services Council, *Submission 66*.

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.<sup>72</sup>

47. Similarly, the Law Council of Australia recognised there is an ‘existing problem with ASIC making law through [delegated legislation]’, but noted that

an unrestricted power for ASIC to make rules in the context of a rule book which has broader scope than ASIC’s existing law-making activities may carry greater risk of unaccountable executive action than the existing model. ...

ASIC’s role should be in administration and enforcement of the law and providing guidance and facilitating activities where the law has unintended consequences. It would be concerning if ASIC was a quasi-legislator but had limited effective accountability for such function.<sup>73</sup>

48. By way of clarification, while there may be challenges in drafting appropriately worded empowering and authorising provisions, the legislative model proposed by the ALRC does not anticipate or necessitate an expansion of delegated law-making powers. As discussed in Interim Reports A and B, the powers to make scoping orders and rules are not intended to be as broad and unfettered as existing notional amendment powers.<sup>74</sup> The ALRC will further consider the scope of delegated law-making powers under the proposed legislative model in the Final Report.

49. In contrast to other submissions, Professor Hanrahan expressed the view that the question of who should make delegated legislation in the financial services context is a ‘second-order issue’.<sup>75</sup> A more important question is whether prescriptive detail should form part of the law (and therefore be enforceable as such) or instead appear in unenforceable guidance.<sup>76</sup> According to Hanrahan, if something is to be ‘law’, then so long as

the scrutiny (including disallowance) and the proper processes (including consultation and impact analysis) to which they are subject as lawmakers is the same, the task should fall to the branch that is best resourced to do the work and closest to the people affected by it. In many situations this is likely to be ASIC, which is subject to various oversight mechanisms but which would also benefit, in my opinion, from having independent non-executive Commission members and dividing into specialist Divisions, both of which are permitted under its current Act.<sup>77</sup>

50. The ALRC acknowledges the concerns expressed by stakeholders regarding Proposal B8, and will further consider the allocation of delegated law-making powers under the proposed legislative model in the Final Report.

**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.

51. The majority of submissions that commented on Proposal B9 were supportive or offered qualified support.<sup>78</sup>

72 Ibid.

73 Law Council of Australia, *Submission 75*.

74 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [10.92]–[10.97]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) ch 2.

75 P Hanrahan, *Submission 72*.

76 Ibid.

77 Ibid.

78 See, eg, Australian Banking Association, *Submission 61*; ASX, *Submission 65*; ANZ Banking Group, *Submission 67*; MinterEllison, *Submission 74*.

52. Submissions unanimously considered consultation to be an important part of the law-making process. Comments and concerns regarding Proposal B9 largely centred on appropriate composition of the proposed Rules Advisory Committee.<sup>79</sup> The Financial Planning Association of Australia, for example, noted that '[e]nsuring diverse and appropriate representation on the Rules Advisory Committee will benefit all users of the law'.<sup>80</sup> Nehme noted that 'an independent body that can provide a voice to different stakeholders should be encouraged', and thought that consultation with the Rules Advisory Committee could 'increase transparency, accountability and public confidence in the system'.<sup>81</sup> The Stockbrokers and Investment Advisers Association recognised 'the importance of legal experts and industry groups being represented on the Rules Advisory Committee due to their technical and subject matter knowledge and expertise', but expressed concern regarding the inclusion of consumer representative groups.<sup>82</sup> According to the Stockbrokers and Investment Advisers Association:

While it may be appropriate for the consumer voice to be considered at the policy level ... there is no benefit in including consumer groups on a body that is dealing with technical legal and drafting issues.<sup>83</sup>

53. In response to this view, it would be helpful to clarify the consultation process contemplated by Proposal B9. The ALRC envisages that, similar to existing consultation processes, consultees would be invited to comment on both substantive and technical aspects of proposed scoping orders and rules. This would include the Rules Advisory Committee, and so its role would not be confined to *only* technical legal or drafting issues.

54. Insurance Australia Group Limited and MinterEllison both expressed the view that, except in the case of an emergency, failure to adequately consult before making scoping orders or rules should provide grounds for invalidating the resulting delegated legislation.<sup>84</sup> For example, according to MinterEllison:

The regulator should be held to the same high standards that apply to financial sector participants. Unless the regulator has made a formal determination of urgency, there is no excuse for not undertaking consultation. We acknowledge that it is difficult to assess the adequacy of consultation beyond certain key process obligations (e.g. the minimum period for consultation). However, there should be a mechanism to have the rule-making process reviewed including whether there is adequate consultation.<sup>85</sup>

55. The Financial Services Council supported mandatory consultation, and suggested that in cases where the Minister or ASIC fails to consult, they 'should be required to publish a reasonably detailed justification for not consulting, and such justification should be subject to appropriate review'.<sup>86</sup> The Financial Services Council did not, however, support the establishment of a Rules Advisory Committee, and suggested instead that mandatory consultation with the public — which would include subject matter experts who may otherwise sit on an advisory committee — would be sufficient.<sup>87</sup>

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79 Financial Planning Association of Australia, *Submission 59*; Australian Banking Association, *Submission 61*; Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre, *Submission 62*; Stockbrokers and Investment Advisers Association, *Submission 63*; Australian Retail Credit Association, *Submission 71*; P Hanrahan, *Submission 72*.

80 Financial Planning Association of Australia, *Submission 59*.

81 M Nehme, *Submission 64*.

82 Stockbrokers and Investment Advisers Association, *Submission 63*.

83 Ibid.

84 Insurance Australia Group Limited, *Submission 73*; MinterEllison, *Submission 74*.

85 MinterEllison, *Submission 74*.

86 Financial Services Council, *Submission 66*.

87 Ibid.



## Feedback on other proposals and questions

### Principled use of the legislative hierarchy

**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.

**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?

56. Proposal B12 is directed at ensuring that those who design legislation follow a principled and consistent approach when considering whether, and how, to delegate legislative power. At present such guidance is dispersed and, in some respects, incomplete.

57. There was broad support from stakeholders regarding the desirability of consolidated guidance on the delegation of legislative power.<sup>88</sup> For example, in their joint submission, Chartered Accountants Australia and New Zealand, CPA Australia, the Financial Planning Association of Australia, the Institute of Public Accountants, and the SMSF Association wrote that they 'support the proposal', and suggested that such guidance should be published in 'an accessible form and location' to enhance transparency.<sup>89</sup> Nehme considered that the 'development of expertise and awareness of the limitation of delegated legislative power is needed before ASIC, Treasury or the Minister are entrusted with such power' as the powers discussed above.<sup>90</sup> The Financial Services Council agreed that guidance is currently 'spread across a number of publications ... and should be consolidated'.<sup>91</sup>

58. Those who recognised the need for guidance also generally supported the ALRC's Draft Guidance contained in Appendix E to Interim Report B, although some stakeholders raised issues for further consideration. For example, the Australian Banking Association was 'generally supportive of the nature of the draft guidance' but considered that 'appropriate consultation on the resulting legislative instruments will be necessary to determine their effectiveness'.<sup>92</sup> King Irving considered that the principles contained in the Draft Guidance adequately guide how delegations of legislative power should be expressed and are set out with 'sufficient clarity', but considered that it may be appropriate to provide some additional detail on the rationale behind some of the principles.<sup>93</sup> The joint submission of the Centre for Women's Economic Safety, Flequity, and

88 See, eg, Financial Planning Association of Australia, *Submission 59*; Australian Banking Association, *Submission 61*; Stockbrokers and Investment Advisers Association, *Submission 63*; Law Council of Australia, *Submission 75*; MinterEllison, *Submission 74*.

89 Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

90 M Nehme, *Submission 64*.

91 Financial Services Council, *Submission 66*.

92 Australian Banking Association, *Submission 61*.

93 King Irving, *Submission 60*.

Southeast Community Links suggested that ‘Safety by Design’ law-making principles may also be considered.<sup>94</sup>

59. MinterEllison broadly supported the Draft Guidance and provided some observations on particular aspects. For example, MinterEllison considered that in the context of financial services regulation, it may (contrary to the generally applicable guidance) be necessary for a regulator to impose obligations or prohibit certain activities by way of delegated legislation.<sup>95</sup> The Financial Services Council also made a number of specific suggestions, including that consideration be given to a ‘judicially enforceable requirement to consult’ before making delegated legislation.<sup>96</sup> Finally, Nehme considered that, under any draft guidance, ‘offences should always be in [primary] legislation’ and not delegated legislation.<sup>97</sup>

**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.

60. Proposal B14 is directed at supporting those who are involved in legislative design and drafting processes, facilitating knowledge-sharing, and promoting best practice.

61. This proposal was supported by almost all submissions that specifically addressed it.<sup>98</sup> For example, Nehme considered that, if implemented, this proposal would ‘promote good practice and would ensure that people are equipped to do their role’.<sup>99</sup> In many instances, according to Nehme, ‘legislative drafting is poor in Australia due to lack of skills or as a result of rushing legislation’.<sup>100</sup> However, Nehme did note that, in order to ensure success, appropriate funding for this proposal would be necessary.

62. The Financial Services Council, however, raised concerns with the proposal, namely ‘how this would work in practice and how it could be funded’. The Financial Services Council suggested that the proposal should be considered further by the ALRC and ‘more detail provided’.<sup>101</sup>

## Offences and penalties

**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.

63. Proposal B15 is intended to address the current multiplicity of prescriptive offence and penalty provisions, many of which overlap.

94 Centre for Women’s Economic Safety, Flequity, and Southeast Community Links, *Submission 70*.

95 MinterEllison, *Submission 74*.

96 Financial Services Council, *Submission 66*.

97 M Nehme, *Submission 64*.

98 See Australian Banking Association, *Submission 61*; Stockbrokers and Investment Advisers Association, *Submission 63*; Law Council of Australia, *Submission 75*; MinterEllison, *Submission 74*.

99 M Nehme, *Submission 64*.

100 Ibid.

101 Financial Services Council, *Submission 66*.

64. There was broad support for consolidating offence and penalty provisions.<sup>102</sup> For example, Nehme considered that '[c]onsolidation of similar offences is recommended as it will ensure a more streamlined system of rules and penalties'.<sup>103</sup> The Stockbrokers and Investment Advisers Association agreed that 'offence and penalty provisions are scattered throughout the legislation' and considered that consolidation 'will greatly assist compliance'.<sup>104</sup> Likewise, MinterEllison agreed that 'the range and number of offences and penalties in Chapter 7 of the *Corporations Act* is unnecessarily large and complex', and that they often 'overlap with other provisions'. However, MinterEllison also suggested that a 'simpler approach' could be to legislate enforceable principles or standards rather than detailed offence provisions.<sup>105</sup>

65. A number of stakeholders urged caution in undertaking any consolidation of provisions. For example, in their joint submission, the Consumer Action Law Centre, Redfern Legal Centre and Financial Rights Legal Centre urged 'caution with respect to this recommendation, particularly in ensuring that any consolidation does not result in gaps'.<sup>106</sup> Similarly, the Financial Services Council wrote that 'particular care needs to be taken' to ensure that only provisions covering the *same*, and not merely *similar*, conduct are removed. The Financial Services Council also thought care should be taken to ensure that 'operational effectiveness' is not undermined.<sup>107</sup>

66. Some stakeholders also raised the question of penalties applicable to any consolidated provisions. Notably, the Financial Services Council queried how the applicable penalties would be determined when consolidating provisions.<sup>108</sup> Further, the joint submission of Chartered Accountants Australia and New Zealand, CPA Australia, the Financial Planning Association of Australia, the Institute of Public Accountants, and the SMSF Association emphasised that any penalties 'must be commensurate to the consumer detriment caused by a breach'.<sup>109</sup>

67. In a recent Background Paper the ALRC outlined how the consolidation of provisions proscribing misleading or deceptive and unconscionable conduct could be achieved.<sup>110</sup> The ALRC welcomes feedback from stakeholders on the ideas outlined in that Background Paper, as well as on other provisions that may be consolidated.

**Question B16** Should rulebooks contain 'evidential provisions' that are not directly enforceable but, if breached or satisfied, may evidence contravention of, or compliance with, other specified provisions of the Act or rules?

68. Question B16 sought feedback on whether 'evidential provisions' would assist users of legislation. These provisions give guidance on the conduct required to meet other enforceable provisions, by outlining circumstances that would generally evidence compliance or non-compliance with those enforceable provisions.

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102 Australian Banking Association, *Submission 61*; Stockbrokers and Investment Advisers Association, *Submission 63*; Law Council of Australia, *Submission 75*.

103 M Nehme, *Submission 64*.

104 Stockbrokers and Investment Advisers Association, *Submission 63*.

105 MinterEllison, *Submission 74*.

106 Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre, *Submission 62*.

107 Financial Services Council, *Submission 66*.

108 Ibid.

109 Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

110 Australian Law Reform Commission, 'All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law' (Background Paper FSL9, December 2022).

69. Submissions responding to Question B16 demonstrated a clear divergence of views. On the one hand, some submissions were generally supportive. For example, MinterEllison said they

strongly support the ability of the regulator to make 'evidential provisions' or safe harbours which enable financial service providers to have certainty that by following the rule they will have met the relevant standard of conduct. We believe that this is an essential element of a principles-based regime where enforceable standards of conduct are legislated by Parliament.<sup>111</sup>

70. Similarly, the Stockbrokers and Investment Advisers Association considered that evidential provisions 'would be very helpful in assisting with the understanding of and compliance with financial services law'.<sup>112</sup> Use of evidential provisions was also supported by King Irving, with the proviso that the included content 'not lose meaning or predictability in what it attempts to prohibit'.<sup>113</sup>

71. On the other hand, there was also some clear opposition and concern. For example, the Law Council of Australia considered that evidential provisions would introduce a 'new concept in Australian law' and 'could produce the complexity and confusion' that arose from the financial advice safe-harbour provision (s 961B(2) of the *Corporations Act*).<sup>114</sup> Likewise, the Financial Services Council 'does not think it would be appropriate' to adopt evidential provisions, including because it may introduce uncertainty and cause confusion.<sup>115</sup> Other stakeholders also feared that such provisions may promote a tick-the-box approach to compliance.<sup>116</sup>

## Simpler law design

**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.

72. Proposal B17 is designed to increase the transparency of offence and civil penalty provisions, which are not always clearly identifiable on their face (and nor are the consequences of breach). This could help increase compliance, reduce unwelcome surprises, and facilitate enforcement.

73. This proposal received unanimous support from those who commented on it.<sup>117</sup> For example, the Financial Services Council considered that this proposal 'could in principle help to assist with the navigability of the law'.<sup>118</sup> The Stockbrokers and Investment Advisers Association considered that Proposal B17 would 'improve the readability and navigability of the legislation'.<sup>119</sup>

74. Likewise, a joint submission of Chartered Accountants Australia and New Zealand, CPA Australia, the Financial Planning Association of Australia, the Institute of Public Accountants, and the SMSF Association supported the proposal, noting that, '[u]nder 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'.<sup>120</sup>

111 MinterEllison, *Submission 74*.

112 Stockbrokers and Investment Advisers Association, *Submission 63*.

113 King Irving, *Submission 60*; Australian Banking Association, *Submission 61*.

114 Law Council of Australia, *Submission 75*.

115 Financial Services Council, *Submission 66*.

116 Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre, *Submission 62*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

117 Australian Banking Association, *Submission 61*; Law Council of Australia, *Submission 75*; MinterEllison, *Submission 74*.

118 Financial Services Council, *Submission 66*.

119 Stockbrokers and Investment Advisers Association, *Submission 63*.

120 Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

**Proposal B18** Offence provisions in corporations and financial services legislation should be amended to specify any applicable fault element.

75. Much as with Proposal B17, Proposal B18 is intended to increase transparency and improve the communicative power of the law.

76. This proposal also appeared to be uncontroversial, finding universal support among stakeholders who offered a view on it.<sup>121</sup> For example, the joint submission of Chartered Accountants Australia and New Zealand, CPA Australia, the Financial Planning Association of Australia, the Institute of Public Accountants, and the SMSF Association said that they ‘support the full implementation’ of this proposal.<sup>122</sup> They considered that it ‘would improve user understanding of the offence provisions ... and the applicable fault element’.<sup>123</sup> They also considered that it ‘will greatly simplify the legislation and improve the navigability of the law for those operating under it’.<sup>124</sup>

## Feedback on recommendations

77. Interim Report B also contained a number of recommendations relating to ‘tidying-up’ and better maintaining corporations and financial services legislation. This included recommendations to:

- remove redundant and spent provisions (Recommendations 14–15);
- address unclear or incorrect provisions and various outdated notes and references (Recommendation 16);
- simplify unnecessarily complex provisions (Recommendation 17);
- replace generally applicable notional amendments with textual amendments (Recommendation 18); and
- create freely available resources to help users navigate corporations and financial services legislation (Recommendation 19).

78. Feedback on the ALRC’s recommendations was uniformly positive.<sup>125</sup> For example, MinterEllison said they ‘support all of Recommendations 14 to 19 in Interim Report B’, and the Consumer Owned Banking Association said it ‘broadly supports the recommendations’.<sup>126</sup> Nehme was also supportive, considering that the recommendations were variously ‘a step toward the right direction’, and will ‘simplify the legislative regime’ (amongst other supportive comments).<sup>127</sup> However, Nehme also noted that some of the recommendations would require appropriate resourcing by government.<sup>128</sup>

79. More detailed comments were provided in the joint submission of Chartered Accountants Australia and New Zealand, CPA Australia, the Financial Planning Association of Australia, the Institute of Public Accountants, and the SMSF Association, which supported each recommendation. For example, they considered that the recommended repeal of redundant and spent provisions

121 Australian Banking Association, *Submission 61*; Stockbrokers and Investment Advisers Association, *Submission 63*; Financial Services Council, *Submission 66*; MinterEllison, *Submission 74*; Law Council of Australia, *Submission 75*.

122 Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

123 Ibid.

124 Ibid.

125 Australian Banking Association, *Submission 61*.

126 Customer Owned Banking Association, *Submission 57*.

127 M Nehme, *Submission 64*.

128 Ibid.

would 'assist in reducing the complexity of the legal framework', and that a program to identify and repeal such provisions should 'ideally be conducted annually or at a minimum bi-annually'.<sup>129</sup> In relation to converting generally applicable notional amendments into textual amendments, they observed that the current challenge of finding notional amendments 'has a sizeable impact' on complexity and 'adds to the cost of providing financial services to consumers'.<sup>130</sup> They also considered that provision of navigational resources by ASIC would 'greatly improve the transparency of changes in the law and assist all users of the financial system'.<sup>131</sup>

80. The Stockbrokers and Investment Advisers Association also supported the recommendations, noting that 'tidying up' is 'well overdue', and that notional amendments 'make the law deeply inaccessible', amongst other supportive comments.<sup>132</sup>

81. Commenting more generally on measures aimed at promoting 'regulatory stewardship', Hanrahan observed that such measures would 'only help if [they were] accompanied by a change in culture' within law-making bodies.<sup>133</sup> According to Hanrahan, this would require

a genuine commitment by the Treasury Ministers, the Department, and its agencies to follow proper processes (including meaningful consultation and regulatory impact analysis) in lawmaking, including by dedicating adequate resources to the task. This includes understanding that business regulation is a vital form of economic infrastructure that, like roads and tunnels, needs to be maintained and improved over long timeframes.<sup>134</sup>

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129 Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association, *Submission 68*.

130 *Ibid.*

131 *Ibid.*

132 Stockbrokers and Investment Advisers Association, *Submission 63*.

133 P Hanrahan, *Submission 72*.

134 *Ibid.*

## Appendix A: List of submissions

57. [Customer Owned Banking Association](#)
58. [Z Bednarz and K Weatherall](#)
59. [Financial Planning Association of Australia](#)
60. [King Irving](#)
61. [Australian Banking Association](#)
62. [Consumer Action Law Centre, Redfern Legal Centre, and Financial Rights Legal Centre](#)
63. [Stockbrokers and Investment Advisers Association](#)
64. [M Nehme](#)
65. [ASX](#)
66. [Financial Services Council](#)
67. [ANZ Banking Group](#)
68. [Chartered Accountants Australia and New Zealand, CPA Australia, Financial Planning Association of Australia, Institute of Public Accountants, and SMSF Association](#)
69. [Institute of Financial Professionals Australia](#)
70. [Centre for Women's Economic Safety, Flequity, and South East Community Links](#)
71. [Australian Retail Credit Association](#)
72. [P Hanrahan](#)
73. [Insurance Australia Group Limited](#)
74. [MinterEllison](#)
75. [Law Council of Australia](#)
76. [Property Council of Australia](#)

## Appendix B: Support level data

Proposal	Supportive	Qualified support	Not supportive	Total
B1 – Legislative model in overview	8	7	0	15
B2 – Scoping Order power	5	5	0	10
B3 – Individual exemptions power	8	1	0	9
B4 – Explanation for scoping orders and individual exemptions	7	2	0	9
B5 – Rule-making power	6	4	0	10
B6 – Explanation for rules	8	1	0	9
B7 – Express limits on rule-making power	6	1	1	8
B8 – Concurrent powers held by Minister and ASIC	1	3	8	13
B9 – Prescribed consultation	6	6	1	13
B10 – Repeal existing notional amendment powers	7	0	0	7
B11 – Repeal existing exclusion and exemption powers	7	0	0	7
B12 – Consolidated guidance on delegating legislative power	5	3	0	8
B14 – Community of Practice for legislative design	5	0	1	6
B15 – Consolidate offence and civil penalty provisions	7	3	0	10
B17 – Identify consequences of breach for offence and civil penalty provisions	8	0	0	8
B18 – Specify applicable fault element for offence provisions	7	0	0	7