12 April 2024

Senate Standing Committees on Economics
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Canberra ACT 2600

By email to: economics.sen@aph.gov.au

INQUIRY: TREASURY LAWS AMENDMENT (FINANCIAL MARKET INFRASTRUCTURE AND OTHER MEASURES) BILL 2024 [PROVISIONS]

ASX welcomes the opportunity to make a submission to the Senate Standing Committee on Economics' inquiry into the provisions of the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (**the Bill**). The Bill will introduce two sets of important reforms for the financial system, related to the regulation of financial market infrastructure and resolution during a crisis, and implementation of standardised, internationally-aligned reporting requirements for climate-related financial disclosures.

ASX is supportive of the measures contained in the Bill and has engaged with policymakers in the development of the legislation. ASX made submissions to the consultations on the exposure draft legislation for both aspects of the Bill. For the Committee's reference, ASX's submissions are **attached**.

Strengthening Australia's FMI regulatory framework

ASX supports the reforms to increase the resilience of the financial system, particularly where the reforms will bring Australia into alignment with international counterparts. The introduction of a crisis resolution regime and the broader streamlining and enhancement of the Australian Securities and Investments Commission's (**ASIC**) and the Reserve Bank of Australia's (**RBA**) supervisory powers aligns Australia's regulatory regime with that of other G20 jurisdictions as recommended by international bodies.

ASX has engaged constructively with policymakers through the development of the reforms and preparation of the Bill. A number of issues raised in ASX's submission have been addressed in the Bill as introduced to Parliament.

ASX's comments on the exposure draft legislation (as detailed in the **attached submission**) were targeted to ensure the efficient and effective operation of the reforms, in line with the policy intention, as well as to strike an appropriate balance between the proposed powers and appropriate safeguards.

While not all matters raised in the submission on the exposure draft legislation have been addressed, ASX considers the legislation as introduced to Parliament has been amended to address a range of issues. ASX understands that the RBA intends to publish guidance material following the passage of the legislation regarding the use of the powers in practice, which may provide further certainty to stakeholders about the operation of the regime.

Climate related financial disclosure

As articulated in ASX's submission to the exposure draft legislation, ASX supports the introduction of a mandatory climate-related financial disclosure regime in Australia that closely aligns with the global baseline set by the International Sustainability Standards Board. The successful implementation of such a regime is important for companies, investors and the financial system, and the strength of Australia's regime will have meaningful implications for Australia's position in the international financial landscape and the attractiveness of Australia as an investment destination for global capital.

ASX notes that the Bill includes a longer transition period than articulated in the exposure draft legislation, with Group 1 entities being required to report for financial years that commence on or after 1 January 2025. However, ASX remains concerned about the ambitious timeframe for implementation and submits that there should be a minimum of 12 months between the finalisation of the Australian Accounting Standards Board's (**AASB**) climate disclosure standards and the commencement of the first reporting period under the proposed reporting regime.

Under the Bill, entities will need to prepare a climate statement, prepared in accordance with the Australian Sustainability Reporting Standards (**ASRS**) developed by the AASB. The AASB published its draft standard *SR1 Australian Sustainability Reporting Standards – Disclosure of Climate-related Financial Information* for consultation in October 2023, with consultation closing on 1 March 2024. At the time of this submission, the final AASB standard has not been published, with the AASB'S current Work Program indicating it is currently 'considering feedback' and the next milestone date is 'on going'.

Rushed implementation would not only negatively impact reporting entities, investors and efficient capital allocation, but may undermine the credibility of the regime and jeopardise Australia's attractiveness as an investment destination for global capital. Further information is contained in ASX's submission to the draft legislation (**attached**).

ASX welcomes the opportunity to discuss the issue raised in this submission, or the attached submissions further. If you have any questions, please contact Shelby Brinkley, Senior Policy Adviser (or) or myself on the details below.

Kind regards

Diane Lewis
GM, Regulatory Strategy and Executive Advisor

Attachments

- Attachment A – ASX submission to exposure draft legislation for financial market infrastructure reforms
- Attachment B – ASX submission to exposure draft legislation for climate-related financial disclosure

9 February 2024
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ASX RESPONSE TO CONSULTATION ON EXPOSURE DRAFT LEGISLATION: FINANCIAL MARKET INFRASTRUCTURE REGULATORY REFORMS

ASX Limited (**ASX**) welcomes Treasury's consultation on the exposure draft legislation to implement the financial market infrastructure reform package (**FMI reforms**) and appreciates the opportunity to provide detailed comments. As a key provider of critical financial market infrastructure (**FMI**), ASX considers that effective regulation is essential to the overall stability of the economy, preventing excessive volatility, systemic failures and other disruptions that could have cascading effects on the broader financial system.

Under the existing regulatory framework, FMIs are subject to a high level of regulation and scrutiny, which reflects the importance of FMIs within the financial system and to the broader economy. While ASX considers that the existing regulatory framework for FMIs has proven to be robust (tested through the challenges of the Global Financial Crisis and the COVID-19 pandemic), ASX also acknowledges Australia's lack of a legislated crisis management regime with step-in powers for the regulators. This was identified by the Council of Financial Regulators (**CFR**) in 2011 as a regulatory "weakness". International standards and guidelines, such as those set by the International Organization of Securities Commissions (**IOSCO**) and the Committee on Payments and Market Infrastructures (**CPMI**) emphasise the importance of having robust crisis management regimes for FMIs.

ASX notes the significant policy work and consultations that have led to the FMI reform package and current exposure draft legislation, including the iterative consultations undertaken by CFR. In its July 2020 Advice to Government, CFR identified potential limitations of the regulatory framework and noted that, combined with the current heightened global risk environment and systemic importance of FMIs, reforms to manage the risks associated with FMIs and promote reliability and integrity were required. As financial markets are increasingly interconnected globally, adhering to international standards and best practices in financial market infrastructure regulation is of significant importance.

ASX is supportive of reforms to increase the resilience of the financial system, particularly where the reforms will bring Australia into alignment with international counterparts. The introduction of a crisis resolution regime and the broader streamlining and enhancement of the Australian Securities and Investments Commission's (**ASIC**) and the Reserve Bank of Australia's (**RBA**) supervisory powers aligns Australia's regulatory regime with that of other G20 jurisdictions as recommended by international bodies, such as the International Monetary Fund in its 2019 Financial Sector Assessment Program for Australia.[1] This will ensure Australia's regulatory arrangements remain consistent with both international guidance and overseas jurisdictions, and supports Australia's international competitiveness as a destination for foreign capital and investment.

[1] International Monetary Fund, Financial Sector Assessment Program Technical Note – Supervision, Oversight and Resolution Planning of Financial Market Infrastructures, February 2019, p. 7.

ASX's comments on the draft legislation are targeted to ensure the efficient and effective operation of the proposed reforms, in line with the policy intention, as well as to strike an appropriate balance between the powers and safeguards.

In considering the draft legislation, ASX is cognisant of the Financial Stability Board's (**FSB**) *Key Attributes of Effective Resolution Regimes for Financial Institutions*, which provides guidance on the core elements necessary for an effective resolution regime. In line with this guidance, ASX proposes that the objects provision of the draft legislation be expanded to include secondary objectives to help guide the use of the broad suite of powers.

Given the core objective of continuity of critical services, ASX's submission makes a number of suggestions for amendments to ensure that there are no impediments to clearing and settlement (**CS**) facilities continuing to provide CS services in the period leading up to and during a crisis event. ASX proposes that key operational staff should not be prevented from undertaking their day-to-day duties once a statutory manager has been appointed. Similarly, the exercise of the crisis resolution powers should not prevent ASX from exercising default and recovery powers, or regular risk management arrangements such as the collection of margin.

Given the breadth and seriousness of the proposed powers, it is also appropriate that the resolution powers are balanced with adequate protections for asset holders. This is a core principle articulated in the FSB's *Key Attributes of Effective Resolution Regimes for Financial Institutions*. ASX considers protections for asset holders should not impede the timely transfer of the shares or business of the facility when necessary in a crisis situation. Rather, these protections should ensure that the decision is only taken as a last resort, that there is an appropriate level of transparency regarding the fair value of the assets via an expert report and that compensation is available to asset holders for any difference between the value realised under a transfer determination and the fair value of the assets.

Similarly, as an appropriate safeguard in light of the significant intervention represented by the transfer powers provided to the RBA under the draft legislation, the Minister's power to determine that ministerial consent is not required prior to a compulsory transfer should be removed. Ministerial consent is a critical accountability mechanism and ensures appropriate government oversight of the use of these powers.

For the effective and efficient operation of the resolution regime, there must also be appropriate protections in place for persons complying with the exercise of the powers under the draft legislation. In particular, ASX submits that additional clarity is required regarding the application of directors' duties during statutory management, particularly when a director is acting with the consent of the statutory manager. With regard to secrecy determinations, ASX also makes a number of suggestions to ensure that the provisions interact appropriately with existing continuous disclosure obligations and ensure that the obligations and duties imposed on entities, officers and employees apply in a coherent manner.

ASX considers that certain powers proposed in the draft legislation go beyond what is necessary to allow the statutory manager to efficiently carry out their functions and powers in resolving a CS facility or are unnecessary in light of other provisions in the exposure draft legislation. With the principles of proportionality and necessity in mind, ASX submits that certain powers of the statutory manager should be removed or limited, including the powers to amend a body corporate's constitution and information gathering powers.

The changes contained in the draft legislation to enhance and streamline ASIC's licensing and supervisory powers are consistent with the recommendations of CFR and supported by appropriate Ministerial and parliamentary oversight where relevant. ASX's submission provides targeted comments to ensure that the legislation operates as intended and that the regulatory regime is fit for purpose.

The issues above are explored in detail in our submission at **Attachment A**. In addition, for convenience please find a summary of our comments on the draft provisions, as well as minor legislative drafting comments at **Attachment B**.

We would welcome the opportunity to discuss the matters raised in this submission in more detail. If you have any questions, please contact me on the details below.

Yours sincerely

Diane Lewis
GM, Regulatory Strategy and Executive Advisor

Attachments:

- Attachment A – ASX submission on the exposure draft legislation
- Attachment B – Summary of ASX comments on provisions of the draft legislation

ATTACHMENT A: ASX submission to financial market infrastructure regulatory reforms exposure draft legislation

1. Crisis management regime

Schedule 1 of the exposure draft legislation establishes an FMI crisis management regime in accordance with CFR's recommendation to the Government in its 2020 Advice. ASX supports the establishment of a regime with clear statutory powers to protect financial system stability and the interests of Australian investors and financial market participants, in the event of a crisis.

The draft legislation provides broad powers to the RBA in the event of a crisis, including powers that extend to related bodies corporate of a CS facility licensee. While broad powers are necessary for an effective crisis response and have been designed in response to the structure of FMIs in Australia, it is important that such powers are balanced with appropriate protections and limitations to prevent potential abuses, ensure accountability and respect individual rights. These safeguards should ensure that a balance of interests are taken into account, and transparency is provided to affected parties.

The principle of necessity should guide the use of these powers, ensuring that they are employed only to the extent required to address a given crisis. In addition, the powers and their use should be proportional to the severity of the crisis at hand. Excessive or overly broad powers can lead to unnecessary intrusions into the operation of the CS facility licensee and the broader corporate group, including other licensed entities. An appropriate balance between the powers and available protections will also ensure continued trust in the institutions managing the crisis.

ASX notes that the full suite of resolution powers become available to the RBA once a crisis condition is met. While it is appropriate that the resolution authority has access to its resolution tools once a condition of resolution is satisfied, ASX submits that these should be deployed in a proportionate manner corresponding to the severity of a threat, and only to the extent necessary in the circumstances. The explanatory materials recognise the importance of proportionate use of resolution powers. For example, at paragraph 1.57:

> *"Given the high level of intervention which it involves, statutory management would generally be used as a measure of last resort, however this is ultimately at the discretion of the RBA."*

Ultimately, ASX considers that it would be useful for the RBA to develop and publish guidance on the resolution toolkit and how these tools might be deployed during a crisis, including the use of recapitalisation tools and funding arrangements. The UK's Central Counterparties Special Resolution Regime Code of Practice provides an example of such guidance, which provides guidance guide for central counterparties (**CCPs**), clearing members, and the financial markets as to how the Bank of England will seek to achieve the objectives of the resolution regime, and how its powers may be used in practice. ASX also notes that the Bank of England is legally obligated to have regard to the Code when using its resolution powers.

With these principles in mind, ASX has considered the draft legislation and has provided commentary and suggestions along the following themes to ensure the effective operation of the resolution regime:

1. The exercise of the resolution powers should not create unnecessary impediments to the ongoing day-to-day operation of the CS facility.
2. The legislation should include protections for asset holders, including access to an expert report regarding the fair value of assets and access to compensation in certain circumstances.
3. Given the seriousness of the transfer powers, Ministerial consent should be required before any exercise of the transfer power as a check and balance.
4. During statutory management, when a director is acting with the consent of the statutory manager, directors should not be liable for breaches of directors duties.

5. Consideration should be given to a number of amendments to the secrecy provisions to ensure the provisions interact appropriately with existing continuous disclosure obligations and that the obligations and duties imposed on entities, officers and employees apply in a coherent manner.
6. There should be limits on the powers of the statutory manager, in particular with regard to changing a body corporate's constitution and information gathering directions.

1.1. Objectives of the regime

Proposed section 830B sets out the objectives of the crisis management regime, being to provide for the effective management and resolution of threats posed to:

(a) the stability of the financial system in Australia; or

(b) the continuity of clearing and settlement facility services that are critical to the functioning of the financial system in Australia

that arise from, or in relation to CS facility licensees. In determining whether to exercise the powers contemplated in the exposure draft legislation, the RBA will have consideration to these two primary objectives underpinning any resolution action.

ASX considers these are appropriate primary objectives, consistent with the policy intent articulated by CFR. ASX notes that these objectives are articulated at a high level, and understands that the RBA will publish guidance material following passage of the legislation regarding the use of the powers in practice.

Additional articulation of the broader objectives of the regime may be beneficial, particularly given that the resolution regime provides a spectrum of resolution options that will need to be deployed with regard to the specific crisis situation at hand. Articulating secondary objectives in the primary legislation would provide appropriate guardrails for the RBA when both developing guidance material and in any potential uses of the powers. This would also provide further certainty to stakeholders about the operation of the regime.

1.1.1 The RBA should have regard to the impact on participants and shareholder value as secondary objectives

Given the use of the resolution powers would constitute a significant government intervention, it is important that these primary objectives are balanced by secondary objectives that operate to guide the exercise of resolution powers where the resolution authority can choose between different resolution powers. These would operate as a check on the use of powers which might otherwise impact participants and shareholders in the CS facility, but would not operate to defeat the exercise of powers needed to meet the primary objectives. This would provide further clarity to industry about the likely exercise of powers in a period of stress and considerable uncertainty.

In particular, ASX proposes that the RBA should be required to have regard to:

(a) the impact on participants in the CS facility, and any impact on end users (investors/beneficial owners) from the use of powers under Part 7.3B; and

(b) shareholder value in an entity subject to the use of powers under Part 7.3B.

These objectives are consistent with the FSB's *Key Attributes for Effective Resolution Regimes*, which state that:

> *"As part of its statutory objectives and functions, and where appropriate in coordination with other authorities, the resolution authority should:*
> *(i) pursue financial stability and ensure continuity of systemically important financial services, and payment, clearing and settlement functions;*
> *(ii)* ***protect, where applicable and in coordination with the relevant insurance schemes and arrangements****, such depositors, insurance policy holders* ***and investors as are covered by such schemes and arrangements;***

(iii) ***avoid unnecessary destruction of value*** *and seek to minimise the overall costs of resolution in home and host jurisdictions and losses to creditors, where that is consistent with the other statutory objectives; and*

(iv) *duly consider the potential impact of its resolution actions on financial stability in other jurisdictions."*[2]

1.1.2 Comparable jurisdictions include broader objectives in the legislation

The United Kingdom's legislation setting out the special resolution regime for CCPs[3] includes five objectives. The legislation also provides that the order of the objectives is not significant, but rather they are to be balanced as appropriate in each case.

The UK's special resolution regime objectives are:

- to protect and enhance the stability of the UK financial system, including in particular by
  - preventing contagion (including contagion to market infrastructures), and
  - maintaining market discipline.
- protect and enhance public confidence in the stability of the UK financial system.
- maintain the continuity of central counterparty clearing services.
- protect public funds.
- to avoid interfering with property rights in contravention of a Convention right (within the meaning of the *Human Rights Act 1998*).

New Zealand's *Financial Market Infrastructures Act 2021* also contains detailed principles for the exercise of the regulators' powers for dealing with distressed FMIs:

> *"In deciding whether to exercise its powers under this Part, and in exercising them, the regulator must take into account the following principles that are relevant:*
>
> *(a) the importance of recognising that primary responsibility for ensuring that an FMI is sound and efficient rests with its operators, participants, and indirect participants and those who own or control its operators, participants, and indirect participants*
>
> *(b) the need for an FMI's rules to provide, to the extent possible, certainty and predictability about the rights and obligations of the FMI's participants and indirect participants, especially in the event of a participant default or an indirect participant default*
>
> *(c) the importance of minimising costs and uncertainty for an FMI's participants and indirect participants, and the creditors of an operator of the FMI, where this is consistent with the purposes set out in section 77*
>
> *(d) the need to protect the interests of an FMI's participants and indirect participants, and the creditors of an operator of the FMI, where this is consistent with the purposes set out in section 77*
>
> *(e) the importance of timely, accurate, and understandable information being available to an FMI's participants and indirect participants, and the creditors of the operator of the FMI, to keep them informed about progress in acting in relation to an FMI or operator under this Part and how they may be affected by the exercise of powers under this Part*
>
> *(f) in the case of a systemically important overseas FMI, the importance of co-operating with regulators or other authorities that are carrying out (or have carried out) a process or an action referred to in section 77(d)*

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[2] Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions*, October 2014, paragraph 2.3, page 6, emphasis added.

[3] *Financial Services and Markets Act 2023* (UK).

(g) the importance of avoiding financial risk to the Crown resulting from a distressed FMI, other than financial risk associated with the Crown being a participant or an indirect participant of the FMI."[4]

Further articulation of the objectives of the regime in the primary legislation would ensure Australia is aligned with other comparable jurisdictions, and is consistent with the FSB's guidance.

1.2. Conditions for the exercise of resolution powers

Section 831A provides that the RBA may utilise the crisis resolution regime if it reasonably believes a specified event is likely to pose a threat to either financial system stability or the continuity of one or more CS services critical to the functioning of the Australian financial system. This threshold applies to many of the crisis conditions which act as triggers for the resolution powers. It is important that the use of such significant powers is subject to appropriately high thresholds.

1.2.1 Trigger for exercise of resolution powers should be linked to the threat

ASX considers that a 'likely' threat to financial system stability or the continuity of critical CS services is too far removed from the circumstances in which resolution powers should be deployed. This is because a 'likely threat' could include risks which do not yet exist, so that threshold is one step further removed, and would allow the RBA to exercise crisis powers in circumstances where there may or may not be an actual risk to financial stability or continuity of critical CS services. ASX notes that on its face, the scope of section 831A may permit the use of the resolution powers in circumstances not contemplated by the objectives of the resolution regime, and which may be considered disproportionate to the nature and/or likelihood of the threat.

ASX appreciates that the RBA may need to exercise some resolution powers before a crisis has materialised. However, ASX submits that the crisis powers should be accessible only in circumstances where an identifiable threat is present, noting that this will include circumstances where such a threat has not yet crystallised.

The availability of pre-crisis powers – such as directions under sections 823DB, 823E, and 823F – reduces the need for resolution powers extending to circumstances where a threat or risk may or may not emerge. Amending section 831A, such that the resolution powers are available only where a threat has emerged, while allowing the use of pre-crisis powers in broader circumstances, would more clearly distinguish between the resolution and other powers, and ensure that the resolution powers are reserved only for the extreme scenarios for which they have been designed.

1.2.2 Threshold for exercising powers in respect of a related body corporate should be higher and more targeted

ASX understands that it may be necessary to exercise some resolution powers against a related body corporate during a resolution, particularly in light of ASX's group structure. However, the risks that might pose a threat to financial stability are concentrated in the CS facility rather than related bodies corporate which are not also CS facility licensees. This is why regulatory obligations designed to support financial stability apply to CS facilities and not to other entities which are commonly related to CS facility licensees, such as market licensees.

In light of the above, ASX considers it is appropriate to limit the type of related bodies corporate the resolution powers may be exercised in respect of. Specifically, one of the conditions for the appointment of a statutory manager to a related body corporate of a CS facility should be that the RBA considers that the related body corporate provides services that are, or conducts business that is, essential to the capacity of the CS facility to maintain its operations. This proposed amendment is consistent with the operation of the *Banking Act 1959*.[5]

In addition, ASX considers that changes should be made to raise the threshold for the use of resolution powers against a related body corporate of a CS facility licensee. In particular, section 831A(1)(j), (k), (l) and (m) should be amended so that the appointment or possible appointment of an external administrator to a related body corporate of a CS facility

[4] *Financial Market Infrastructures Act 2021* (NZ), s 78.
[5] *Banking Act 1959*, section 13A(1D)

licensee, or 'any other act or thing' done by a related body corporate of a CS facility licensee (for subsection (m)), must pose a threat to

> *"the ability of the CS facility licensee to provide one or more clearing or settlement services in a way that causes or promotes stability in the Australian financial system"*

before it will allow the exercise of resolution powers under Part 7.3B. ASX's view is that this should be reflected in the legislation, the explanatory materials, and any guidance applicable to resolution powers.

1.2.3 Effect of exercise of resolution powers on related bodies corporate should be considered

Given the material impact the resolution powers could have not only on CS facilities, but also related bodies corporate, ASX submits that the RBA should minimise the use of the resolution powers on related bodies corporate.

ASX notes a similar requirement exists within the UK's *Financial Services and Markets Act* (**FSMA**) and considers this requirement would be appropriate and proportionate on the basis it would help preserve related bodies corporate (who in the absence of the exercise of the resolution powers may continue to operate as a going concern), and would provide appropriate protections to asset holders.

ASX considers that an obligation should be included in the primary legislation that requires the RBA, in deciding to exercise any powers under this Part 7.3B, to have regard to minimising the effect of the resolution powers on related bodies corporate of the licensee. Relevant considerations for the RBA to have regard to when contemplating any potential impact of any resolution actions on related bodies corporate should also be detailed in guidance developed by the RBA to support the implementation of the regime.

1.3. Continuity of CS services during a crisis

In light of the primary objective of ensuring continuity of critical CS services, it is essential that the resolution regime does not create unnecessary or unintended impediments to a CS facility's ability to operate. ASX has identified two such possible impediments in the exposure draft legislation. The first is the prohibition on officers carrying out their functions and powers upon the appointment of a statutory manager under section 834A. The second is the prohibition on the facility's ability to enforce rights to an advance of money under its risk management, default management and recovery arrangements while a stay applies under section 841A. ASX also seeks clarity on the application of the restriction on dealing with property to the operation of a central securities depository.

1.3.1 The prohibition on officers performing their functions and carrying out their duties should not apply to key operational staff

In the period leading up to or during a crisis, staff at a CS facility facing a crisis must have confidence that they can carry out their duties and functions to ensure the facility continues to function. The nature of operating critical CS facilities requires a number of functions to be performed each day to ensure continuity of service availability, for example collecting margin on a daily basis.

Proposed section 834A(1) prohibits 'officers' from performing or exercising a function or power of their office, save with the written consent of the statutory manager or the RBA, or where the Act permits them to do so despite the fact that the body corporate is under statutory management.

ASX considers this prohibition is appropriate for directors and senior executive staff in circumstances when a statutory manager has been appointed in a crisis situation. However, because the term 'officer' is a broad category of persons,[6] this prohibition risks preventing key operational and risk management staff from carrying out functions and duties necessary for the facility's continued operation, and represents a risk to the safe and efficient provision of CS services.

[6] 'Officer' captures persons who make, or participate in making, decisions that affect the whole, or a substantial part, of the business of a corporate, among others. See Corporations Act section 9AD(1)(b).

Upon appointment, the statutory manager would need to give written leave to those staff to continue to carry out their functions and duties. While the statutory manager could be expected to ultimately provide leave to the relevant staff for these critical functions and duties, in light of the very short timeframes required for many of the facility's functions (such as times by which margin must be called) even very short periods of time where such staff did not have leave to carry out these functions and duties may cause disruption to the safe and efficient operation of the facility. This would almost certainly increase financial system stability risks.

ASX submits that the exemption in subsection 834A(3) should be expanded to capture the exercise of functions, duties or powers by operational and risk management staff in good faith and the ordinary course of business (noting that this would need to include rare periods of significant stress). This would ensure the statutory manager has appropriate control of the business of the licensee while allowing operational staff to continue to perform their functions ensuring continuity of critical CS services.

1.3.2 CS facilities enjoying the protection of a stay under section 841A must be able to access risk management, resolution and recovery tools

Proposed section 841A(11) prohibits a body corporate subject to a stay from enforcing a right to an advance of money. This provision is similar to others that appear in Chapter 5 of the Corporations Act in relation to external administration.[7] While subsection (12), which ASX understands is designed to ensure that intragroup funding arrangements can continue in the event of statutory management, provides an exception to the prohibition, as currently drafted this would only allow a CS facility under statutory management to exercise rights to an advance of money under default management and recovery arrangements against related bodies corporate.

In order to ensure that there is no adverse impact on ASX's risk management, default management and recovery arrangements which are designed to be enforced against participants (which are not related bodies corporate) in the CS facility in accordance with the operating rules, ASX submits that market netting contracts (which include the operating rules under (aa) of the definition of 'market netting contract' in the *Payments Systems and Netting Act 1998*) be expressly excluded from the scope of the stay provisions (refer to section 1.3.5 below).

1.3.3 Continuation of the provision of essential services

Given the importance of ensuring the continuity of the CS facility's capacity to operate after the appointment of a statutory manager, ASX recommends that an equivalent stay to that included in section 15BD of the *Banking Act 1959* be included in relation to a CS facility licensee.

The stay included in section 15BD supports the continuation of essential services to a bank in circumstances where a statutory manager has been appointed and the bank owes an amount to the supplier of the essential service before the day the statutory manager took control of the bank's business. Under section 15BD a supplier of essential services cannot: (i) refuse to comply with a request for essential services for the reason only that an amount is owing; or (ii) make it a condition of the supply of the essential service that the amount be paid.

1.3.4 Clarity on the extent of dealing with a body corporate's property

Under proposed section 834B, only a statutory manager can deal with a body corporate's property. Dealings in property in contravention of this requirement are void and may result in significant penalties for an officer or employee of the body corporate involved in the void transaction (s834B(2) and (5) and s834C). ASX considers that section 834B will adversely impact the continuity of critical services provided by CCPs, including ASX Clear and ASX Clear (Futures), which in their day to day business deal in their own property. Dealings include the settlement of novated contracts (comprising rights and obligations of the CCPs and their clearing participants), the acceptance and return of cash and non-cash collateral absolutely transferred to the CCPs by clearing participants to meet margin requirements, and the investment of that cash collateral in liquid investments. Given the significant implications for both the transactions

[7] See Corporations Act ss 415D(9), 434J(8) and 451E(8).

themselves and the officers and employees involved in these activities, ASX submits that consideration be given to providing an exception for dealings in property of the CS facilities that occur in the ordinary course of business.

A central securities depository (**CSD**), such as Austraclear, holds the legal title to financial products and allows participants to transfer beneficial interests in those products. ASX assumes the legislation is not intended to apply to the transfer of beneficial interests by participants in this situation, as this would not be the body corporate (the CSD), or a person acting on its behalf, purporting to enter into a transaction. However, given the activity is central to the operation of a CSD it would be useful if this could be confirmed in the explanatory materials.

1.3.5 ASX supports the *Payments Systems and Netting Act 1998* prevailing over proposed Part 7.3B

The *Payments Systems and Netting Act 1998* (PSNA) protects the rights of parties to transactions made using certain payment systems and netting arrangements following the insolvency of one of the parties to those transactions. In particular, the protection extends to parties to transactions made using real-time gross settlement (RTGS) systems, approved multilateral netting arrangements, close-out netting arrangements and market netting contracts. The PSNA also protects certain margining and security arrangements over financial property and certain close-out rights.

Without these protections, doubt may arise about the integrity of transactions already executed in Australia in a period of stress or a crisis. This would risk a withdrawal of liquidity during a period of significant uncertainty, risking a feedback effect that could exacerbate financial system stability risks. As such, ASX strongly supports the PSNA prevailing over other Acts and provisions, including the provisions in Part 7.3B.

However, only some of the proposed stays include an express provision acknowledging primacy of the PSNA. Other proposed stays, including those most relevant to staying close-out netting and enforcing security (particularly sections 823V, 849E and 842B), do not have the benefit of express sections which acknowledge the primacy of the protections afforded to close-out netting and the enforcement of security under the PSNA. This introduces a risk that those stays could result in an implied repeal of, or at least create an inconsistency with, the PSNA to the extent of those stays. It would be preferable that the interaction between the stays and the protections under the PSNA is clear.

This could be achieved in a number of ways, including by the amending the Corporations Act to state that, to the extent of any inconsistency between any section in Parts 7.3 or 7.3B (or Chapter 7 or the Corporations Act more generally), the PSNA prevails to the extent of any inconsistency and identifying in the PSNA all the provisions listed above as "specified provisions" (*not* "specified stay provisions").

In addition, ASX suggests that in respect of the stays in sections 841A and 847B, the legislation should expressly exclude the following contracts, agreements and arrangements to ensure that parties have legal certainty as to their ability to exercise rights under them:

(i) contracts, agreements and arrangements that are the operating rules (other than the listing rules) of financial markets or of a clearing and settlement facility;
(ii) approved netting arrangements;
(iii) netting markets and market netting contracts and related security agreements; and
(iv) contracts used in connection with approved RTGS systems, approved netting arrangements and market netting contracts.

The exclusion of these contracts would be consistent with the policy position that the Australian government adopted in relation to existing "ipso facto" stays.

1.4. Protections for asset holders in the event of a compulsory transfer

Compulsory transfer of some or all of the business to another entity represents a high degree of intervention by the RBA, and has significant impacts on third party rights. As such, it is appropriate for the transfer provisions in sections 837A and 837B to be supported by adequate safeguards to protect asset holders from an unjust disposal of their assets.

ASX considers that there are three changes required to implement these safeguards:

- The Minister's power to determine that consent is not required prior to a compulsory transfer should be removed.
- The exceptions to the need to obtain an expert report on the fair value of assets subject to a transfer determination should be removed, but with provisions to ensure that the need to obtain an expert report does not delay a transfer.
- Section 849G should be expanded to cover situations where a transfer determination is effected for less than the fair value of the assets subject to the transfer determination.

ASX considers that the above safeguards would not impede the timely transfer of the shares or business of the facility and would ensure that:

1. The decision to transfer is taken only as a last resort and is subject to appropriate oversight.
2. There is transparency about the fair value of the assets subject to a transfer determination at the time they are transferred, even if this is only assessed after a transfer is effected (and should not delay a transfer).
3. Shareholders are able to access compensation for the difference between the value realised under a transfer determination and the fair value of the assets at the time of the transfer.

1.4.1 Minister's power to determine consent to a compulsory transfer is not required should be removed

ASX acknowledges that the success of a transfer under section 837A or 837B may depend on its timely implementation. However, given the significant impact on asset holders it is essential that the exercise of these powers be subject to appropriate government oversight, and only be used in proportionate and necessary circumstances.

The draft legislation requires Ministerial consent prior to a compulsory transfer of business and/or shares, unless the Minister determines that consent is not required, pursuant to proposed section 837D. ASX notes that a decision by the Minister that consent is not required requires the Minister to make a legislative instrument, having regard to criteria prescribed in the regulations. These requirements, while appropriate given the level of intervention proposed by a compulsory transfer, would appear to defeat any expediency of waiving consent. There is likely to be no practical difference with respect to timeliness between the Minister providing consent under section 837B or making a determination that consent is not required under 837D.

Accordingly, ASX submits that provisions in 837A allowing the Minister to determine that consent is not required to a transfer should be removed. Government oversight is an appropriate protection even in times of significant financial stress in light of the strength of these powers. Such oversight is also not inconsistent with the underlying goals of the regime, and neither would prevent an expeditious transfer or recapitalisation.

1.4.2 Exceptions to the need to obtain an expert report on fair value of assets prior to recapitalisation or transfer of assets should be removed

Currently, section 849D requires that a statutory manager or the RBA must obtain an expert report from an independent expert before carrying out a transfer or recapitalisation under sections 833D, 837A, or 837B. However, subsection 849D(5) provides that an expert report need not be obtained if the RBA is satisfied that doing so is likely to pose a threat to the stability of the financial system in Australia, or the continuity of one or more clearing and settlement facility services critical to the functioning of the financial system in Australia.

ASX considers that the exception to the need to obtain an expert report in subsection 849D(5) is currently too wide. During a crisis, it is likely that the timeliness of a transfer will be critical to a successful resolution, and the delay associated with obtaining an expert report is likely to meet the criteria for the exception in subsection (5)(a) and (b). Accordingly, there is a high likelihood that this exception will, in many cases, operate to defeat the requirement to obtain an expert report.

While the need for an expert report on the fair value of assets subject to these powers should not delay an action required to ensure the continuity of any critical CS services, ASX submits that the need to obtain an expert report is an important protection for asset holders, who should not lose the right to realise the fair value of their assets in a crisis.

As such, ASX submits that two amendments should be made to section 849D. First, the exception to the need to obtain an expert report should be removed, and replaced with a provision clarifying that a transfer may be effected before an expert report is obtained, but that the expert report must be obtained within a reasonable period of time after the transfer or recapitalisation is effected. Second, a provision should be inserted clarifying that an expert report obtained after a transfer has been effected must be based on the financial information of an entity subject to a transfer immediately before the transfer took effect. These protections would better balance the need for fairness and transparency about the exercise of such a significant power with the need to ensure a timely response to a crisis.

1.4.3 Asset holders should be able to access compensation for the difference between the realised value of assets subject to a compulsory transfer and fair value

Part 7.3B provides for a number of powers which may require asset holders to dispose of their assets, such as the transfer powers under sections 837A and 837B and the recapitalisation powers under section 833D. ASX acknowledges that the use of such powers may be necessary to ensure a successful resolution and the continuity of critical CS services.

ASX submits that the regime should ensure that if there is a disposal of property for less than fair value, asset holders are able to access compensation for the difference between the price realised for their assets and fair value, (determined as at the time of an exercise of a power under Part 7.3B).

This could be achieved by ensuring access to compensation under section 849G includes any disposal of property on other than just terms, where that disposal has been required by the Commonwealth. Fair value, should be assessed by reference to the expert report obtained under section 849D.

This approach would balance the need for the resolution regime to be able to flexibly and quickly respond to crises, without conflicting with the need to ensure appropriate protections for asset holders.

1.5. Protections for persons complying with the exercise of powers under Part 7.3B

ASX supports the protections in section 849F for persons complying with the exercise of powers under Part 7.3B. These protections will be essential to ensure that a CS facility can continue operating and readily comply with its obligations during periods of significant stress and competing priorities. Most importantly, ASX agrees that personnel should not be criminally or civilly liable for any acts done or omissions made in compliance with directions or determinations designed to maintain financial system stability and ensure the continuation of critical CS services.

Unlike resolutions under the Banking Act (where the board ceases to hold office upon the appointment of a statutory manager), directors of CS facilities are not automatically removed or relieved of duties.[8] ASX understands that the different approach reflects the primary goal of the FMI resolution regime to ensure continuity of critical CS services in a crisis. This means that additional consideration is required regarding the appropriate application of directors duties and other obligations during a resolution. As such, ASX considers that some of the protections contained in the draft legislation should be amended as set out below.

1.5.1 Section 849F should protect officers from liability when subject to statutory management

ASX understands that during the period of appointment of a statutory manager, directors will remain liable for breaches of duties and obligations in connection with decisions, actions or inaction occurring prior to the appointment of a

[8] *Banking Act 1959*, s 15(1).

statutory manager. Directors will not be liable for the action or inaction of the statutory manager, nor for their own inaction where they are prohibited from exercising the relevant functions or powers during that period.

However, when acting (a) with the written approval of the statutory manager of the body corporate or the RBA; or (b) in circumstances in which, despite the fact that the body corporate is under statutory management, the director is permitted by the Corporations Act to act, all decisions and actions of the directors will be subject to their statutory and fiduciary duties and obligations. Further, where the directors are permitted by the Corporations Act to act, they will be liable for any inaction in breach of their duties and obligations.

ASX considers directors should not be liable for breaches of their duties while the entity is subject to statutory management on the basis that a director may held liable for taking an action approved by a statutory manager (but which they might not otherwise take, or may take in connection with a series of related actions) which is subsequently held to be in breach of their duties and obligations.

Given this tension, ASX considers there is a real risk that upon the appointment of a statutory manager, a director may see no choice but to resign rather than risk being held liable for breaching their duties. ASX notes that a director's resignation may result in a CS facility being deprived of important expertise that would support its continued operation.

In light of the above, ASX submits that section 849F be amended to clearly protect officers' from liability when subject to statutory management.

1.5.2 The 'reasonable' qualifier in section 849F should be removed

Currently, the protection in section 849F extends only to actions done or omissions made in compliance with the exercise of a power under Part 7.3B that were done in good faith and were reasonable. ASX submits that the inclusion of the 'reasonable' qualifier creates doubt as to the scope of the protection, and that only the 'good faith' qualifier is necessary to provide relevant persons an appropriate safeguard.

In addition, if the 'reasonableness' test was to remain in section 849F, this is likely to delay persons in deciding to act pursuant to section 849F(1)(a) as they determine whether an act is, or is not, reasonable in the circumstances. Such a delay in a person taking action is likely to delay the implementation of any resolution measures.

ASX considers that section 849F(1)(b) and section 849F(2) should be removed. The requirement that an act or omission be made in good faith is a sufficient safeguard against any improper reliance on the protection in section 849F. It would be inappropriate for a person not to receive protection under this provision where they have acted in good faith in complying with a direction or determination.

1.5.3 The burden of proof that a person failed to act in good faith should lie with the plaintiff

Section 849F(1) is unclear as to who bears the burden of proving that a person has acted in good faith. Similar legislative provisions have been interpreted by courts as imposing the burden of proof on the defendant.[9] ASX considers that the burden should lie with the plaintiff. The person seeking protection should not have the burden of proving that they acted in good faith, which is a much more difficult burden to discharge. ASX considers this change is necessary to ensure appropriate protection is provided to persons acting in response to a direction or determination, given the significant criminal and civil penalties this section provides protections from, and the scope of 'persons' who might seek to avail themselves of these protections, including particularly employees.

1.6. Secrecy determinations and continuous disclosure

Section 845A allows the RBA to issue secrecy determinations over certain information or documents. While ASX acknowledges the exercise of this power may be necessary in a crisis, there are aspects of the current drafting that present significant risks for persons that must comply with a secrecy determination. ASX considers that, when

[9] For instance, courts have concluded that, for the purposes of the business judgment rule in s 180(2) of the *Corporations Act*, the burden lies with directors to prove that they made a business judgment in good faith for a proper purpose. The sections themselves give no indication as to where the burden lies.

considering whether to make a secrecy determination and the appropriate scope of that determination, section 845A should require the RBA to have regard to the continuous disclosure obligations of listed entities, and consult ASIC. Second, the legislation should specify the time from which the secrecy obligations will apply, and cease to apply, to persons that are subject to the determination (including that the determination applies from when it is given in writing, rather than from the time it is made). Third, the operation of some exceptions to a secrecy determination should be clarified. Fourth, the protections in section 849F should be expanded to ensure they operate to provide effective protection with respect to secrecy provisions.

1.6.1 The legislation should explicitly require the RBA to have regard to continuous disclosure obligations and consult ASIC before making a secrecy determination

Once a condition in section 831A has been met, ASX acknowledges that there will be circumstances where it is important that certain information revealing, or provided in, the exercise of powers under Part 7.3B not be disclosed. However, a secrecy determination may conflict with continuous disclosure requirements under both the Corporations Act and the ASX Listing Rules (collectively the continuous disclosure regime). It is important that the interactions between secrecy determinations and the continuous disclosure regime are as clear as possible, and that those interactions can be clearly derived from a robust policy rationale.

ASX proposes that the legislation should clarify that, prior to making a secrecy determination, the RBA must have regard to the public interest in a transparent and informed market in the securities of an entity subject to a secrecy determination. In addition, the RBA should be required to consult ASIC prior to making a secrecy determination.

ASX considers that if the RBA has regard to an entity's continuous disclosure obligations and consults ASIC prior to making a secrecy determination, this will help to ensure that the scope of the determination is appropriately specific so that it extends only to what is necessary to protect financial system stability, while minimising any impact on market integrity. Placing an obligation on the RBA to consult ASIC is consistent with the compulsory transfer powers in sections 837A and 837B, which require the RBA to consult ASIC prior to making a transfer determination.

1.6.2 Secrecy determinations should apply from the time they are given to the body corporate to which they relate (and continue to apply until a relevant variation or revocation has been given)

Section 845A(3) requires that the RBA must give the body corporate to which a secrecy determination relates a copy of the determination as soon as practicable after making it. Given the penalties for a breach of a secrecy determination under section 845C, ASX submits that a secrecy determination should not be binding on a person until after it has been given to the body corporate to which it relates. If this change is not made to the legislation, individuals and entities may be exposed to significant legal liability if they disclose information which is the subject of such a determination before the determination has been provided to the body corporate to which it relates.

This risk also applies to revocations and variations, in which case there is a risk that, if a person or entity subject to a secrecy determination is also under a conflicting duty to disclose the information that is the subject of a secrecy determination, then they may be in breach of that other duty of disclosure from the time a secrecy determination is varied or revoked. Further, it appears unlikely that a person could rely on section 849F for acts done or omitted to be done where a direction or determination is no longer in effect. To avoid this risk, secrecy determinations should continue to bind a person until the determination to vary or revoke is provided to the body corporate to which is relates.

To address this, subsection 845C(1) should specify that the prohibition on disclosing information subject to a secrecy determination will only apply if:

(1) The determination has been given to the body corporate to which it relates in accordance with subsection 845A(3);

(2) The RBA has not given a variation of the determination in accordance with subsection 845B(2), which varies the determination such that the information is no longer specified in the determination; and

(3) The RBA has not given a revocation of the determination in accordance with subsection 845B(2).

Subsection 845B(3) should also specify that the determination continues to have effect until a variation or revocation is made under subsection 845B(1) and the variation or revocation has been given to the person in writing, under subsection 845B(2).

In addition, subsections 845B(2) and 844D(2) should include the timing for when a variation or revocation decision is given, in similar terms as subsection 845A(3), which requires the RBA to give a body corporate a copy of its determination *"as soon as practicable after making"* the determination. This appears to be the intention of the legislation, as indicated in paragraph 1.292 of the explanatory materials which states *"As soon as practical after making, varying or revoking the determination, the RBA must give the body corporate a copy of the determination."*

1.6.3 Exceptions to secrecy determinations should be clarified

ASX supports the exception to secrecy determinations in section 845D (Disclosure of publicly available information). However, ASX considers that this exception should be amended so that it is capable of being relied on in appropriate circumstances.

If information the subject of a secrecy determination has become publically available (other than as a result of a breach of a secrecy determination) it would be unduly burdensome for the entity subject to the determination to establish that the information was *lawfully* made public. Further, where an entity cannot verify that information was lawfully made public, it cannot readily rely on this exception (even if the exception in fact applies). This may result in an entity operating under the mistaken belief that a secrecy determination is still in force, and therefore withholding disclosures and unknowingly breaching its continuous disclosure obligations.

To remedy this, ASX submits that the exception in section 845D be revised so that information subject to a secrecy determination is discloseable, so far as it becomes public other than as a result of a breach by the body corporate or its officers and employees to which the determination applies.

Secondly, ASX considers that regulators who are in possession of information subject to a secrecy determination should be bound by specific confidentiality arrangements in relation to these matters, noting that listed entities subject to a secrecy determination will likely need to rely on an exception to disclosure under Listing Rule 3.1A. For Listing Rule 3.1A to apply, three limbs must be satisfied: (1) at least one of five situations must apply, which includes that it would be a breach of a law to disclose the information; (2) the information must be confidential and remain confidential; and (3) a reasonable person would not expect the information to be disclosed.

Where a secrecy determination has been made, ASX anticipates that regulators would maintain confidentiality over the specified information unless they determined it was appropriate in performing their functions to disclose it. However, in the event a regulator determines not to maintain confidentiality in exercising its powers or functions,[10] there should be a requirement in subsections 845G and 845H for the regulator to inform the body corporate to which the secrecy determination relates in writing, as soon as is practicable (as the exception in Listing Rule 3.1A.2 would cease to apply once the information was no longer confidential).

Where information has been disclosed by a regulator in manner that cedes confidentiality (even if it is not "publicly available" as contemplated under section 845D), the RBA should determine whether the secrecy determination should continue to apply. In making this subsequent determination, the RBA should continue to have regard to continuous disclosure obligations and consult ASIC.

Finally, ASX considers that the operation of subsections 845E (2),(4) and (5) should be strengthened by requiring the RBA to have regard to continuous disclosure obligations and consult ASIC before allowing specified persons to disclose specified information and when determining what conditions to impose on such disclosures.

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[10] Provisions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and *Reserve Bank Act 1959* (Reserve Bank Act) (respectively) permit ASIC personnel to disclose information to performing their functions, and permit the RBA to disclose information to a financial sector supervisory agency, foreign central bank, or other person prescribed by the regulations to assist them to perform their functions or exercise powers, or where approved in writing by the Governor (or their delegate). For example, see subsection 127(3) of the ASIC Act and subsections 79A(4),(5) and (6B) of the Reserve Bank Act.

1.6.4 The interaction of section 849F with the continuous disclosure regime and misleading and deceptive conduct laws should be clarified

ASX understands that section 849F provides protection from liability for not disclosing information in compliance with a secrecy determination. However, in a period of stress there will likely be a number of announcements and statements being made about ASX's condition. ASX considers there may be a risk that a claimant alleges a breach of continuous disclosure obligations, or misleading and deceptive conduct provisions, by reference to what *was* disclosed rather than what *was omitted*. In other words, a claimant may allege that certain announcements or statements breached continuous disclosure obligations or were misleading or deceptive, in circumstances where the information the subject of the claim is directly related to the information specified in the secrecy determination.

ASX considers that a provision should be inserted into section 849F clarifying that, for the avoidance of doubt, in such circumstances the protection applies.

Further, the protection from liability in section 849F should extend to all persons that fall within subsection 849F(1)(c), irrespective of their knowledge of a secrecy determination. This will ensure effective protection is provided in a situation where an officer or employee is alleged to have breached their continuous disclosure obligations or other legal obligations (because of material disclosed or not disclosed), in circumstances where that officer or employee is unaware of the existence of a secrecy determination.

Finally, in circumstances requiring resolution, there may be a leak of the subject matter to which a secrecy determination relates. If a person subject to a secrecy determination is asked whether certain circumstances exist and cannot give a truthful answer because of the secrecy determination, the response is likely to be misleading. In those circumstances, section 849F is unlikely to provide protection, because it would be difficult to prove (and easy to disprove) that the person is acting in good faith when being untruthful. We suggest that the explanatory materials clarify that the protection in section 849F would apply to any misleading statement made to the extent necessary to comply with a secrecy determination, and that in those circumstances good faith would be presumed.

1.7. Powers of the statutory manager

As articulated in the explanatory materials, statutory management involves a high level of intervention. The corollary to such high level of intervention is appropriate protections and limits on the use of powers as a result of the intervention. While the draft legislation contains a number of protections already, ASX considers there are additional limits that could be imposed on the powers of the statutory manager to ensure the most efficient operation of the resolution regime.

1.7.1 The power to alter body corporate's constitution under section 833C should only be available where 'necessary' to manage or respond to a condition in section 831A, not where it is merely 'convenient'

Section 833C allows the statutory manager to amend a body corporate's constitution, rules, or other arrangements for governance if it is necessary or convenient for enabling or facilitating the performance of their functions and duties or the performance of their powers under Part 7.3B, and it is reasonably appropriate to manage or respond to a condition in section 831A being satisfied in relation to the licensee.

ASX accepts that a statutory manager may need to alter a body corporate's constitution to effectively manage or respond to a condition in section 831A in relation to the licensee. However, given the broad range of powers available to a statutory manager and the impact on shareholders from the use of this power, a statutory manager should seek to rely on other powers to achieve their objectives where possible. This power should be reserved for serious issues that can only be resolved by amending the body corporate's constitution.

Section 833C should be amended such that the statutory manager can only exercise this power if it is 'necessary' – not merely 'convenient' – for enabling or facilitating the performance of their functions, duties, and powers under Part 7.3B. Similarly, it should be 'necessary' – not merely 'reasonably appropriate' – to manage or respond to a condition in section 831A being satisfied in relation to the licensee. ASX considers that, given the impact of this on the body corporate, these higher thresholds are appropriate for the use of such a significant power.

1.7.2 Requirements that the RBA 'reasonably believe' a person subject to an information gathering power has the relevant information or documents should be replaced with an obligation to comply to the extent 'reasonably practicable'

The draft legislation provides for certain information gathering powers which come with criminal penalties for non-compliance under proposed sections 833E and 844B. As drafted, the provisions risk subjecting persons to criminal liability for failure to comply with a direction to provide information even where they do not have access to it. This is because the RBA's belief that the person has information may be reasonable, but incorrect. In such circumstances, a person may be liable for non-compliance even where they are not legally able to comply.

To remedy this, the requirement that the RBA 'reasonably believe' a person have the specified information or documents should be removed, and replaced with an obligation for the person subject to such a direction to comply only to the extent that it is 'reasonably practicable' to do so. This would allow a person who does not have access to the documents to be protected from liability without constraining the RBA's ability to gather relevant information.

ASX would support an articulation of the 'reasonably practicable' qualifier that clarifies that it would be reasonable for a person to comply with the direction if the person legally has access to the information or documents. ASX's primary consideration is removing the legal risk that a person is liable for non-compliance where they are genuinely unable to comply with an information gathering direction.

1.7.3 The power to request information or documents in section 833E should be time limited

Section 833E allows the statutory manager to request information or documents from any person who has at any time been an officer of the licensee or related body corporate under statutory management, and a failure to comply is an offence.

A person who is not currently an officer would not legally have access to any of the entity's systems or documents, and will become more limited in their ability to provide accurate information as time passes. As such, ASX considers that the power to request information from a person who has at any time been an officer of the entity is disproportionate, and submits that the power to request such information should be limited to persons who had been an officer within the previous three years.

1.8. Recapitalisation

1.8.1 Debt facilities should be specified in the regulations to allow debt capital to be raised in periods of stress instead of being forced to raise equity capital only

ASX considers that it will be essential for both the crisis prevention and resolution powers to allow for the broadest possible range of recapitalisation actions. Currently, sections 823F and 833D provide for recapitalisation – under a pre-crisis direction and statutory management, respectively – via the issuance of shares or rights to acquire shares. ASX submits that recapitalisation should not be limited to equity instruments, but that debt instruments should also be available both before and after a condition in section 831A has been met.

In either case, the facility should have access to the broadest possible range of funding options to ensure that funding can be obtained on the most favourable terms possible in the circumstances. This would provide the most flexibility in periods of stress, when optionality will be particularly useful to ensure the CS facility's continued operation.

ASX submits that two changes to the exposure draft legislation should be made to implement these suggestions. First, section 833D should be amended to allow a statutory manager to issue a broader range of capital instruments than those currently listed – specifically, including debt instruments. This could be done either by listing such capital instruments in section 833D(1), or introducing a regulation-making power like that provided for in section 823F(1)(c)(iii) and then prescribing debt instruments for the purposes of 833D(1).

Second, section 823F should be amended to allow the RBA to direct a licensee to raise capital while allowing the licensee to choose the optimal funding source in the circumstances, whether debt or equity. This is because the licensee is better placed to assess the benefits of different funding options than the RBA. This change would ensure that

the licensee has access to the broadest and most flexible range of funding options to comply with a direction, improving the chances that a crisis can be averted.

Guidance could also outline other types of instruments – such as repurchase agreements with the RBA over Australian Government Securities – which may be available but which are not prescribed (for example, in a broader financial crisis that satisfies a condition in section 831A but which also requires the RBA to act as a lender of last resort).

2. Crisis prevention – RBA powers

Schedules 1 and 2 provide the RBA with enforcement powers with respect to its role in supervising CS facilities to mitigate the risk of a crisis occurring. In light of the purpose of the resolution regime to ensure stability of the financial system in Australia and continuity of critical services, the proposed new powers for the RBA to prevent a crisis from crystallising are a logical part of the toolkit for the RBA.

ASX has provided comment below on certain elements of the crisis prevention measures, which are designed to ensure that the law operates effectively in line with the policy intent, with clarity and without duplication.

2.1. Pre-crisis directions powers

2.1.1 The directions power in section 823FA should be limited to comply with standards made under 827DB only

Section 823FA(1) allows the RBA to give directions to a CS facility licensee or a related body corporate to take specified measures to:

a) comply with all or part of one or more standards in force under section 827DA (resolvability standards) if the RBA believes the entity is not complying with those standards; or
b) manage or resolve an impediment to the effective management of or response to a crisis condition in section 831A being satisfied in relation to the licensee, if the RBA believes the entity has not or is unlikely to do all things practicable to manage or resolve the impediment.

Section 827DA in turn allows the RBA to make standards for the purposes of ensuring that CS facility licensees and their related bodies corporate conduct their affairs in a way that would assist the RBA to manage or respond to a condition in section 831A being satisfied in relation to a CS facility licensee.

The directions power in 823FA(1)(b) effectively allows the RBA to impose obligations of a kind contemplated under section 827DA (resolvability standards). ASX considers that the directions power should not overlap with the scope of the resolvability standards. The power to determine resolvability standards incorporates certain consultation and other administrative law obligations that apply to legislative instruments, which would be bypassed under a direction.

Moreover, a number of crisis powers provide regulatory tools to deal with impediments to the management or response to a condition in section 831A being satisfied. These include powers to give directions (section 844A) or appoint a statutory manager (given their wide range of powers, particularly under sections 833A and 833C). As such, there is no clear case for the RBA to bypass the process for making resolvability standards by issuing a direction under 823FA(1)(b).

ASX submits that the scope of section 823FA should be limited to directions to comply with the resolvability standards only. This would be consistent with other RBA directions powers, such as under section 823DB, which are limited to directions to comply with licence obligations or the FSS.

2.2. Notification requirements

Proposed Subdivision AA introduces a number of new notification obligations on licensee and related bodies. ASX understands that these will be important to give regulators visibility of risks before they crystallise. ASX has identified the following potential issues with the operation of the notification requirements.

2.2.1 The notification requirement for the sale of shares appears to be limited to where a statutory manager has issued a recapitalisation direction

Proposed section 821H(1)(c) as drafted would seem to limit the notification obligation to circumstances where a statutory manager has been appointed. The drafting provides that a body corporate must notify the RBA immediately after the body corporate forms an intention to enter into a transaction to do any act referred to in section 833D(1) (powers of the statutory manager to facilitate recapitalisation).

Given subsection 833D(1) specifically refers to actions carried out by a statutory manager, and not a CS facility licensee operating normally, ASX considers this section may only operate to require a statutory manager to notify the RBA when it carries out a recapitalisation action under that section. This appears contrary to the intention of this section to operate as a mechanism to give the RBA visibility of changes to the financial position of a CS facility licensee before a statutory manager is appointed.

If the intention is to impose a notification obligation on CS facilities recapitalising before the appointment of a statutory manager, then the provision should be redrafted to clarify this by removing the reference to section 833D(1).

2.2.2 The notification requirement for sale of shares should be subject to a materiality threshold

ASX submits that recapitalisation actions should only enliven a notification obligation where the recapitalisation is material to a licensee's financial position. This is because there are various types of such transactions that would not be expected to materially change a licensee's financial position, such as dividend reinvestment plans. ASX considers that these types of share issues should not be captured by the notification obligation.

2.2.3 The notification requirement for developing a plan for restructuring should be subject to a materiality threshold

Proposed subsection 821H(1)(e) requires a CS facility licensee or a related body corporate to notify the RBA if it *forms an intention to develop* a plan to restructure. This would require notification at a very early stage, before any formal decision has been taken by the entity to consider restructuring.

ASX submits that this is unnecessarily early in the process for considering a restructure, particularly in light of subsection 821H(1)(d), which captures the moment a body corporate forms an intention to propose a scheme for the reconstruction of the body corporate.

ASX suggests that the notification requirement only applies when one or more defined options to restructure the body corporate are being considered. This would avoid an entity needing to notify the RBA where it is contemplating exploring options for a restructure which may or may not eventuate.

2.3. Financial Stability Standards (FSS)

The draft legislation includes amendments to implement CFR's recommendation to remove the qualification on the obligation to comply with the FSS to the extent that it is 'reasonably practicable'. CFR, in its July 2020 Advice to Government expressed concern that the meaning of this qualifier is open to interpretation, and it may prevent the effective exercise of the related directions power. CFR also suggested that the qualifier means that in some situations it may be difficult to establish whether an entity has breached its FSS compliance obligations and may limit the enforceability of the FSS, as an entity may argue that remediation actions are not 'reasonably practicable'.

The explanatory materials to the draft legislation focuses on the potential to prevent the effective exercise of the RBA issuing directions to comply with the FSS, as the direction could be challenged on the basis that the measures to achieve compliance exceed what is reasonably practicable for the CS facility licensee.

ASX notes that the qualifier will remain for the obligation to do all things to reduce systemic risk.

2.3.1 The 'reasonably practicable' qualifier should be retained

Compliance with an obligation to the extent that it is reasonably practical is an objective test applied to a number of obligations across various areas of law. It allows compliance with an obligation to work practically, without becoming an offence of absolute liability.

The qualifier is particularly important with respect to the obligation to comply with the FSS, as these standards are wide-ranging and designed to cover a broad range of FMIs. As a product of their drafting, it is possible to conceive of circumstances in which it would be practically impossible for a licensee to comply with a specific standard or part of a standard. This could include situations where a change in external circumstances requires modification to the

arrangements to comply with the FSS, which takes time to implement properly, or a different approach to compliance with the FSS is a required. In those circumstances, the ability for the RBA to issue a direction to the licensee would have no impact, as there is no ability for the licensee to comply. As such, it is appropriate for the obligation to comply with the FSS to be expressed as an obligation to comply to the extent that it is reasonably practicable.

ASX notes that the qualifier is not inconsistent with other obligations imposed on licensed entities in the Corporations Act, including:

- The obligation on a market licensee to the extent that it is reasonably practicable to do so, do all things necessary to ensure that the market is a fair, orderly and transparent market (section 792A)
- The obligation on a CS facility licensee to the extent that it is reasonably practicable to do so, do all things necessary to reduce systemic risk (821A(1)(aa))
- The obligation on a CS facility licensee to the extent that it is reasonably practicable to do so, do all things necessary to ensure that the facility's services are provided in a fair and effective way (821A(1)(a))

Guidance from regulators regarding the limits to the interpretation of 'reasonably practicable' would be beneficial to align expectations to situations where it is practically not possible to comply.

If the 'reasonably practicable' qualifier is removed, ASX submits that the RBA should provide guidance indicating its approach to circumstances where it is practically impossible for a licensee to comply strictly with the FSS, including where arrangements to comply with a Standard may take time to implement.

3. Enhancing and streamlining ASIC's licensing and supervisory powers

Schedule 2 of the exposure draft legislation provides for new and enhanced regulatory powers for ASIC in relation to FMI entities. Schedule 3 transfers certain existing Ministerial powers relating to the licensing and supervision of CS facilities and financial markets to ASIC and the RBA.

ASX broadly supports the changes proposed throughout Schedule 2 and 3 of the draft legislation. Comments are provided below on a limited number of elements of Schedules 2 and 3 where it is considered that improvements to the law or additional guidance could be provided to enhance the effectiveness of the reforms.

3.1. CS facility rules

3.1.1 The power to make CS facility rules should be consolidated with the power to make CS services rules

Proposed section 826H provides for ASIC to make CS facility rules. While ASX appreciates that this rule-making power is intended to operate differently to the CS services rulemaking power, there is nevertheless significant practical overlap between them. The CS services rules may cover the 'activities, conduct, and governance of CS facility licensees in relation to CS services',[11] while the CS facility rules may be made for the purpose of 'promoting the provision of fair and effective services by licensed CS facilities.'[12] The CS facility rules may bind participants,[13] whereas the CS services rules cannot (unless and until regulations prescribing participants are made).[14]

The distinction between these two rulemaking powers creates unnecessary complexity, and ASX considers that these rule-making powers should be consolidated into a single rulemaking power. While this may expand the scope of the rule-making power as it applies to participants, ASX submits that this can be addressed with guidance clarifying the rules which would be made for participants and those which would be made for CS facilities. Consultation requirements and Ministerial consent would also operate as a check on the use of such a rulemaking power being used beyond its intent. This would significantly reduce the complexity of the regulatory framework without undermining the purpose of these rulemaking powers or their ability to realise their underlying policy goals.

3.1.2 ASX supports the inclusion of appropriate checks and balances around making of the CS facility rules

Under proposed section 826M, ASIC must not make CS facility rules unless ASIC has consulted the public, the RBA, and any other person as required by regulations. ASX supports this requirement for consultation on the CS services rules, and notes that such a requirement ensures:

- **Evidence-based rule making.** Any CS facility rules that are made by ASIC will be made after public and stakeholder engagement, ensuring that ASIC will understand the likely effect of the proposed rules, including any potential impacts on stakeholders.
- **The objects of the CS facility rule-making framework are met.** Consultation will allow ASIC to determine whether a proposed CS facility rule will promote the provision of fair and effective services by licensed CS facilities.
- **Increased transparency**. Consultation allows stakeholders to understand ASIC's approach to the rules, and will ensure that rules have been made with sufficient and relevant evidence.
- **Appropriate scrutiny of delegated legislation.** As recognised by the recent Australian Law Reform Review report on the financial services and corporations law, meaningful consultation is an important process-oriented safeguard on the exercise of delegated legislative power.

ASX also supports the proposed additional safeguards in the rule-making framework, including that the CS facility rules must be consented to by the Minister under section 826N and that CS facility rules are subject to oversight by the Parliament due to their nature as legislative instruments. This ensures an appropriate level of scrutiny by Parliament.

[11] Corporations Act, section 828A(1)(a).
[12] Proposed section 826H.
[13] Proposed section 828J(1)(b).
[14] Corporations Act, section 828A(1)(b).

3.2. Ownership of widely held market bodies

3.2.1 ASX supports the changes to streamline the widely held market body provisions

The widely held market body provisions are an important check on a person's ability to gain a significant stake in Australian FMIs. Alongside the fit and proper provisions in Part 7.4 of the Act, these provisions ensure that Australian FMIs are not subject to inappropriate control or influence. Nevertheless, the process for approval to exceed the voting power limits specifically applicable to ASX under the current widely held market body provisions is onerous, requiring a regulation to be made granting approval.

ASX supports transitioning to a Ministerial approval process for persons seeking to take a significant stake in all widely held market bodies, including ASX Limited. Repealing the bespoke ASX Limited provision ensures regulatory consistency with the broader the process for widely held market bodies, is consistent with the *Financial Sector Shareholdings Act 1998* (FSSA), and will streamline the process for interested parties seeking to take a significant portion of voting power in ASX.

3.3. Fit, proper, competent and capable standard and FMI banning orders

ASX supports the proposed amendments to implement a fit, proper and competent standard for individuals performing certain roles or carrying out certain functions in licensed entities. Key individuals responsible for making decisions in FMIs should have the appropriate skills and be of good character given the critical role these entities play.

'Fit and proper' is a well-understood term, used throughout the financial services law and more broadly in Australian law. Section 913BA of the Corporations Act sets out a fit and proper person test, and ASIC has also issued guidance on what is meant by 'fit and proper' in a range of contexts. 'Fit, proper and competent' is the standard applied in the UK by the FCA for the Senior Managers Regime. However, the application of the proposed 'fit, proper, competent and capable' appears to be novel for Australia, and the explanatory materials for the FMI reforms provides little explanation of what is considered 'competent' and 'capable' for the purpose of complying with the new standard.

3.3.1 Clarity regarding whether 'capable' forms part of the standard

The draft legislation creates a new general licence obligation in 792A(1)(ha) which provides that the licensee must take all reasonable steps to ensure that each individual performing the role of core officer must be 'fit, proper, capable and competent' for that role. The explanatory materials refer largely to a new *fit, proper and competent* standard.

Proposed section 853H sets out ASIC's power to make FMI banning orders against an individual in a number of circumstances, including where ASIC has reason to believe that the individual is not adequately trained, or is not competent, to perform one or more functions as a core officer of an FMI licensee or control an FMI licensee. ASIC's power to ban individuals for inadequate training suggests there is an intention to include capability as a part of the new standard for core officers.

Clarity on the content of the standard is sought given the lack of reference to 'capable' in the explanatory materials. ASX is interested in particular to understand the criteria that would satisfy each of the 'capable' and 'competent' elements of the standard, and how they are differentiated. ASX considers that meeting a 'competent' standard would inherently satisfy a capability requirement.

3.3.2 Guidance from regulator on expectations around the standard

CFR's 2021 Response to Consultation noted that ASIC is able to issue guidance to provide clarity and assist industry in complying with fit and proper requirements. There are precedents in other regulatory contexts which provide examples of regulatory guidance on fit and proper criteria. This is particularly important as the standard in the draft legislation goes beyond the well-understood concept of 'fit and proper' and there is no guiding material in an Australian context on the expectations for meeting a 'capable and competent' standard.

ASX would find it useful for guidance material to published by ASIC ahead of the application of the new standard, setting out clear expectations for meeting the new standard, and in particular, the 'capable' and 'competent' limbs.

3.3.3 Clarity on application to core officers

The new standard and FMI banning powers apply to 'core officers' of a licensed entity, defined with reference to the existing definition of 'officer' in section 9AD of the Corporations Act. ASX notes explanatory materials at paragraph 3.94 provides that "a core officer is a person covered by paragraphs (a) and (b) of the definition of officer, that is a director or alternate director of a corporation or a person commonly known as a shadow director of a corporation."

ASX's understanding of paragraphs (a) and (b) of the definition of officer in section 9AD extends beyond a director, alternate director or shadow director, and also includes:

- A secretary
- A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- A person who has the capacity to affect significantly the corporation's financial standing

ASX understands that this definition extends to key senior executive staff, consistent with CFR's recommendation that the fit and proper standard should apply in respect of those 'involved in' a licensed entity.

Clarity is sought via the explanatory materials about the group of individuals to which the fit, proper and competent standard applies.

ATTACHMENT B: – ASX comments on specific provisions of the draft legislation

ASX submission reference	Draft legislation reference	ASX comment
1.1 The RBA should have regard to the impact on participants and shareholder value as secondary objectives	830B	The objects provision should be expanded to include two additional secondary objectives: (a) the impact on participants in the CS facility, and any impact on end users (investors/beneficial owners) from the use of powers under Part 7.3B; and (b) shareholder value in an entity subject to the use of powers under Part 7.3B. These should not operate to defeat the exercise of any power in line with the primary objectives, but should guide the resolution authority or statutory manager where they have a choice about which power to deploy to meet the primary objectives.
1.2.1 Trigger for exercise of resolution powers should be linked to the threat	831A	The events listed in section 831A should be linked to a 'threat' to financial stability or continuity of critical CS services, rather than a 'likely threat'. The word 'likely' should be removed.
1.2.2 Threshold for exercising powers in respect of a related body corporate should be higher and more targeted	831A	The type of related bodies corporate the resolution powers may be exercised in respect of should be limited to a related body corporate that provides services that are, or conducts business that is, essential to the capacity of the CS facility to maintain its operations, consistent with the *Banking Act 1959*. Subsections 831A(1)(j), (k), (l) and (m) should be amended so that the appointment or possible appointment of an external administrator to a related body corporate of a CS facility licensee, or 'any other act or thing' done by a related body corporate of a CS facility licensee (for subsection (m)), must pose a threat to "the ability of the CS facility licensee to provide one or more clearing or settlement services in a way that causes or promotes stability in the Australian financial system" before it will allow the exercise of resolution powers.
1.2.3 Effect of exercise of resolution powers on related bodies corporate should be considered	NA	ASX considers that an obligation should be included in the primary legislation that requires the RBA, in deciding to exercise any powers under this Part 7.3B, to have regard to minimising the effect of the resolution powers on related bodies corporate of the licensee. The impact of any resolution actions on related bodies corporate should also

ASX submission reference	Draft legislation reference	ASX comment
		be detailed in guidance developed by the RBA to support the implementation of the regime.
1.3.1 The prohibition on officers performing their functions and carrying out their duties should not apply to key operational staff	834A	The exemption in 834A(3) should be expanded to capture the exercise of functions, duties or powers by operational and risk management staff in good faith and the ordinary course of business.
1.3.2 CS facilities enjoying the protection of a stay under section 841A must be able to access risk management, resolution and recovery tools	841A	Subsection 841A(12) should be expanded to cover rights to advances of money under risk management, default management or recovery arrangements against all parties rather than only against related bodies corporate.
1.3.3 Continuation of the provision of essential services	NA	There is no equivalent in the proposed stays to s15BD of the Banking Act that supports the continuation of essential services to a bank in circumstances where a statutory manager has been appointed and the bank owes an amount to the supplier of the essential service before the day the statutory manager took control of the bank's business. ASX recommends that an equivalent stay be included in relation to a CS facility licensee.
1.3.4 Clarity on the extent of dealing with a body corporate's property	834B	Given the significant implications for both the transactions themselves and the officers and employees involved in these activities, ASX submits that consideration be given to providing an exception for dealings in property of the CS facilities that occur in the ordinary course of business.
1.3.5 ASX supports the *Payments Systems and Netting Act 1998* prevailing over proposed Part 7.3B	841C 841A 847B	The interaction between the stays and the protections under the PSNA should be clarified by by the amending the Corporations Act to state that, to the extent of any inconsistency between any section in Parts 7.3 or 7.3B (or Chapter 7 or the Corporations Act more generally), the PSNA prevails to the extent of any inconsistency and identifying in the PSNA all the provisions listed above as "specified provisions" (*not* "specified stay provisions"). In addition, in respect of the stays in sections 841A and 847B, the legislation should expressly exclude the certain contracts, agreements and arrangements.
1.4.1 Minister's power to determine consent to a compulsory transfer is not required should be removed	837A 837B	Provisions allowing the Minister to determine that they need not consent to a transfer under either section 837A or 837B should be removed to ensure appropriate oversight.
1.4.2 Exceptions to need to obtain expert report on fair value of assets prior to recapitalisation or transfer of assets should be removed	849D	The exception to the need to obtain an expert report should be removed, and replaced with a provision clarifying that a transfer may be effected before an expert report is obtained, but that the expert report must be obtained

ASX submission reference	Draft legislation reference	ASX comment
		within a reasonable period of time after the transfer or recapitalisation is effected. A provision should be inserted clarifying that an expert report obtained after a transfer has been effected must be based on the financial information of an entity subject to a transfer immediately before the transfer took effect
1.4.3 Asset holders should be able to access compensation for the difference between the realised value of assets subject to a compulsory transfer and fair value	849G	This section should be expanded to allow for compensation for any disposal of property on other than just terms that is a result of the exercise of powers under Part 7.3B.
1.5.1 Section 849F should protect officers from liability when subject to statutory management	849F	Directors should not be liable for breaches of their duties while the entity is subject to statutory management on the basis that a director may held liable for taking an action approved by a statutory manager (but which they might not otherwise take, or may take in connection with a series of related actions) which is subsequently held to be in breach of their duties and obligations.
1.5.2 The 'reasonable' qualifier in section 849F should be removed	849F	The requirement that an act be 'reasonable' before it qualifies for protection under section 849F should be removed.
1.5.3 The burden of proof that a person failed to act in good faith should lie with the plaintiff	849F(1)	This section should be amended to clarify that the burden of proving a person failed to act in good faith should lie with the plaintiff.
1.6.1 The legislation should explicitly require the RBA to have regard to continuous disclosure obligations and consult ASIC before making secrecy determinations	845A	The legislation and explanatory materials should stipulate that, prior to making a secrecy determination, the RBA must have regard to continuous disclosure obligations. The RBA should also be required to consult ASIC prior to making a secrecy determination.
1.6.2 Secrecy determinations should apply from the time they are given to the body corporate to which they relate	845A 845B 844D	A secrecy determination made under section 845A should apply from the time it is given to a body corporate or person subject to it, rather than from the time it is made, and continue to apply until revoked or varied. Subsections 845B(2) and 844D(2) should include the timing for when a variation or revocation decision is given, in similar terms as subsection 845A(3), which requires the RBA to give a body corporate a copy of its determination *"as soon as practicable after making"* the determination.

ASX submission reference	Draft legislation reference	ASX comment
1.6.3 Exceptions to secrecy determinations should be clarified	845D 845E 845G 845H	Section 845D should be expanded so that information subject to a secrecy determination is discloseable, so far as it becomes public other than as a result of a breach by those subject to the determination. Subsections 854E (2),(4) and (5) should be revised so that the RBA must have regard to continuous disclosure obligations and consult ASIC before allowing specified persons to disclose specified information and when determining what conditions to impose on such disclosures. Sections 845H and 845G should be expanded so that: • a regulator who has disclosed information (in the exercise of its powers or functions) is required to inform the body corporate to which the secrecy determination relates in writing, as soon as is practicable (noting that the information would no longer be confidential and the exception to disclosure in Listing Rule 3.1A would cease to apply). • where information has been disclosed by a regulator in manner that cedes confidentiality, the RBA is required to determine whether the secrecy determination should continue to apply (and in doing so, should have regard to continuous disclosure obligations and consult ASIC).
1.6.4 The interaction of section 849F with the continuous disclosure regime and misleading and deceptive conduct laws should be clarified	849F	An 'avoidance of doubt' provision should be inserted clarifying that section 849F applies to information which may be alleged to be misleading or deceptive, in circumstances where the information the subject of the allegation is directly related to the information specified in the secrecy determination. The explanatory materials should also clarify that the protection in section 849F would apply to any misleading statement made to the extent necessary to comply with a secrecy determination, and that in those circumstances good faith would be presumed.
1.7.1 The power to alter body corporate's constitution under section 833C should only be available where 'necessary' to manage or respond to a condition in section 831A, not where it is merely 'convenient'	833C	Section 833C should be amended such that the statutory manager can only exercise this power if it is 'necessary', not merely 'convenient', for enabling or facilitating the performance of their functions, duties, and powers under Part 7.3B or to manage or respond to a condition in section 831A being satisfied in relation to the licensee. Similarly, it should be 'necessary', not merely 'reasonably appropriate' to manage or response to a condition.

ASX submission reference	Draft legislation reference	ASX comment
1.7.2 Requirements that the RBA 'reasonably believe' a person subject to an information gathering power has the relevant information or documents should be replaced with an obligation to comply to the extent 'reasonably practicable'	833E 844B	The requirement that the RBA 'reasonably believe' a person has specified information or documents before it can use an information gathering power under sections 833E or 844B should be removed and replaced with an obligation on a person subject to such a power to comply only to the extent that it is 'reasonably practicable' to do so.
1.7.3 The power to request information or documents in section 833E should be time limited	833E	The information gathering power in section 833E should be limited to persons who have been officers in the past three years.
1.8.1 Debt facilities should be specified in the regulations to allow the RBA or a statutory manager to raise debt capital in periods of stress instead of being forced to raise equity capital only	823F 833D	A regulation-making power should be included for the purposes of section 833D and debt instruments should be prescribed for the purposes of sections 823F and 833D.
2.1.1 The directions power in section 823FA should be limited to comply with standards made under 827DB only	823FA	The power to issue directions under section 823FA(1)(b) should be removed.
2.2.1 The notification requirement for the sale of shares appears to be limited to where a statutory manager has issued a recapitalisation direction	821H	The scope of section 821H(1)(c) should be clarified by amending or removing the reference to 'an action referred to in paragraph 833D(1).'
2.2.2 The notification requirement for sale of shares should be subject to a materiality threshold	821H	Recapitalisations should only trigger a notification obligation under section 821H where they are material.
2.2.3 The notification requirement for developing a plan for restructuring should be subject to a materiality threshold	821H	Restructuring plans should only trigger a notification obligation under section 821H where they are material.
2.3.1 The 'reasonably practicable' qualifier should be retained	821A	The 'reasonably practicable' qualifier on the obligation to comply with the Financial Stability Standards under section 821A should be retained.
3.1.1 The power to make CS facility rules should be consolidated with the power to make CS services rules	826H	The power to make CS facilities rules under section 826H should be consolidated with the power to make CS services rules under section 828A.
3.1.2 ASX supports the inclusion of appropriate checks and balances around making of the CS facility rules	826M	ASIC supports the inclusion of appropriate safeguards in the CS facility rule-making framework, including requirements for consultation and Ministerial consent.

ASX submission reference	Draft legislation reference	ASX comment
3.2.1 ASX supports the changes to streamline the widely held market body provisions	Div 1 Pt 7.4	ASX supports transitioning to a Ministerial approval process for persons seeking to take a significant stake in all widely held market bodies, including ASX Limited.
3.3.1 Clarity regarding whether 'capable' forms part of the standard	853H	ASX seeks clarity in the explanatory materials about whether 'capable' forms part of the standard.
3.3.2 Guidance from regulator on expectations around the standard	N/A	ASX would find it useful for guidance material to published by ASIC ahead of the application of the new standard, setting out clear expectations for meeting the new standard, and in particular, the 'capable and competent' limbs.
3.3.3 Clarity on application to core officers	Explanatory Materials	ASX seeks clarity in the explanatory materials about the individuals to which the fit, proper, competent and capable standard applies.

9 February 2024

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ASX SUBMISSION ON CLIMATE-RELATED FINANCIAL DISCLOSURE: EXPOSURE DRAFT LEGISLATION

ASX Limited (**ASX**) welcomes the opportunity to make a submission to Treasury's consultation on the exposure draft legislation to implement mandatory climate-related financial disclosure (**CRFD**) requirements (**Consultation 3**).

ASX supports the introduction of a mandatory CRFD regime in Australia that closely aligns with the global baseline of the International Sustainability Standards Board's (**ISSB**) *IFRS S2 Climate-related Disclosures* (**IFRS S2**). The successful implementation of a mandatory CRFD regime is important for companies, investors and the financial system. A reliable CRFD regime would support more transparent identification and management of climate-related financial risks and opportunities within companies and across the Australian economy, which would enable more accurate pricing of risks and opportunities and ultimately lead to improved efficiency of capital flows. It would also assist with monitoring the build-up of climate-related financial stability risks. With several international jurisdictions at more advanced stages of CRFD reporting, it is critical that Australia's CRFD regime produces consistent, comparable and high-quality disclosures. The strength of Australia's CRFD regime will have meaningful implications for Australia's position in the international financial landscape and the attractiveness of Australia as an investment destination for global capital.

As an important conduit between issuers and investors, ASX is uniquely positioned to provide insights on disclosure-related matters. High-quality disclosures are vital to promoting transparent, efficient and resilient capital markets that generate long-term value. The introduction of mandatory CRFD requirements represents a significant shift in financial reporting and disclosure standards in Australia. ASX is concerned that the proposed commencement date of 1 July 2024 for Group 1 entities will not provide those entities adequate time to prepare for and appropriately report against the proposed CRFD requirements. It is essential that the commencement of the CRFD regime is carefully calibrated to ensure that it achieves its important purpose.

Treasury's Policy Statement outlines that the Government welcomes stakeholder feedback on whether amending the proposed legislation to require a 1 January 2025 commencement date for Group 1 entities would improve the quality of reporting during the transition year. ASX submits that there should be a minimum of 12 months between the finalisation of the Australian Accounting Standards Board's (**AASB**) climate disclosure standards and the commencement of the first reporting period under the proposed CRFD regime. In the absence of at least a 12-month preparation window, a 1 January 2025 commencement date for Group 1 entities is better than a 1 July 2024 commencement date.

ASX provided submissions to Treasury's initial discovery consultation in March 2023 (**Consultation 1**) and second design consultation in July 2023 (**Consultation 2**). Given the short timeframe provided for responses to Consultation 3, ASX's submission to Consultation 3 is limited only to comments on the proposed commencement date for Group 1 entities.

Significant reporting uplift required

As described by ASIC Chair Joe Longo, the "shift to mandatory climate-related disclosure presents the biggest change to corporate reporting in a generation."[1]

Separate to existing mandatory disclosure requirements, ASIC and the ASX Corporate Governance Council have previously encouraged listed entities to voluntarily consider disclosing additional climate-related financial information in accordance with the TCFD framework. Although there has been a steady uptake of TCFD reporting in Australia across the ASX200, the capability of reporters varies and there is considerable disparity in how risks are disclosed.

KPMG's *Australian Sustainability Reporting Survey June 2023* indicates that even among those listed entities that report voluntarily, not all are reporting in accordance with the full TCFD requirements. For example, KPMG's report suggests, "Of the 94 ASX100 companies that report sustainability performance, 88% acknowledge climate change as a risk to the business. Most of those deliver a narrative description of the potential impacts (90%), and very few include modelling of the potential impacts using scenario analysis (8%) or provide financial quantification of the potential impacts (1%)."[2] In addition, only 53% of ASX100 companies obtained third-party assurance of their reported sustainability performance. Further research from the Australian Council of Superannuation Investors indicates that there is even greater uplift required when taking a wider view out to the ASX200, with analysis suggesting that only 75% of the index has committed to or is reporting against the TCFD framework in some form.[3]

Given the considerable variation in current reporting and shortcomings in the consistency and depth of disclosures, the proposed CRFD regime will be a significant step change for many reporting entities, including those listed entities that may already be voluntarily reporting in some form. As noted in Treasury's Policy Impact Analysis, it is likely that reporting entities will need to undertake extensive transitional activities in order to report against the CRFD regime for the first time, including:

- Familiarisation and gap analysis activities. Reporting entities will need to carefully consider and analyse the requirements of the CRFD regime, including the standards yet to be finalised by the AASB and any forthcoming regulatory guidance. Many reporting entities will need to undertake a detailed gap analysis to identify where uplift is required in both internal processes and external disclosures across governance, strategy, risk management and metrics and targets. Action plans will need to be developed and executed to address any gaps.
- Legal review. Given the introduction of new mandatory obligations, many reporting entities may need to obtain legal review and advice that considers how compliance will be achieved with regard to the circumstances of the specific entity.
- Systems changes, data collection, scenario analysis and scope 3 modelling build-out. It is expected that the implementation and upgrade of information and communications technology systems, data collection and related systems for collecting and processing of climate-related data to enable reporting that meets the requirements of the CRFD regime will be significant. Many reporting entities may also need to enhance data governance and ensure adequate frameworks for audit trails.
- Preparation of the report for the first time. It is expected that the CRFD requirements will result in lengthier and more complex reports. Many reporting entities may need to establish roles and responsibilities and build capabilities within sustainability and financial functions or engage external resources. There may also be additional time associated with preparing disclosures as reporting entities experience the learnings involved in developing a report that satisfies the requirements of the CRFD regime for the first time.
- Preparation for assurance of the report for the first time. Many reporting entities will obtain independent assurance of climate-related financial disclosures for the first time. This may necessitate the undertaking of assurance readiness activities and assessments of how internal audit functions can support improvements to controls and systems.

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[1] Foreword by ASIC Chair Joe Longo, *A director's guide to mandatory climate reporting* (October 2023), the Australian Chapter of the Climate Governance Initiative (CGI), the Australian Institute of Company Directors, MinterEllison and Deloitte, https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-resources/directors-guide-to-mandatory-climate-reporting-web.pdf.

[2] KPMG, *Status of Australian Sustainability Reporting Trends – June 2023 Update*, https://assets.kpmg.com/content/dam/kpmg/au/pdf/2023/australian-sustainability-reporting-trends-june-2023-update.pdf.

[3] Australian Council of Superannuation Investors, *Climate Reporting in ASX200 companies: August 2023*, https://acsi.org.au/wp-content/uploads/2023/08/Promises-Pathways-Performance-Climate-reporting-in-the-ASX200-August-2023.pdf.

Limited understanding and certainty of aspects of the proposed CRFD regime

The complexity and challenge of the extensive transitional activities that reporting entities will need to undertake is further heightened by the fact that there is limited understanding and certainty of particular aspects of the proposed CRFD regime, which will continue very closely up to the proposed commencement date.

Important detailed aspects of the proposed overarching legislative framework of the CRFD regime have only just recently become available with the publication of Consultation 3, including in relation to requirements concerning the applicability of liability for disclosures and the location of reporting. Finalised details of the overarching legislative framework will remain subject to change until the conclusion of Consultation 3 and the subsequent parliamentary and legislative processes. In addition, the AASB's climate disclosure standards will remain open for consultation until March 2024, with finalised standards not expected until just before the proposed commencement date of 1 July 2024.

Further, the final form of assurance requirements will not be known for a considerable period. ASX acknowledges that the Australian Auditing and Assurance Standards Board (**AUASB**) will set out a pathway for phasing in assurance requirements over time. However, reporting entities' visibility of the final form of assurance requirements will likely be dependent on the development of the international standard on sustainability assurance (which is not expected to be finalised until the end of 2024) and the completion of subsequent AUASB processes to align domestic requirements as far as possible with the international standard.

Risks of rushed implementation

ASX understands the significance of timely implementation of a mandatory CRFD regime and acknowledges the Government's commitment to the implementation as part of its climate agenda. However, ASX encourages the Government to consider the damaging risks that are increased if reporting entities are not afforded adequate time to prepare, including risks such as:

- Poor-quality disclosures that obscure or misrepresent important climate-related financial risks and opportunities.
- Greenwashing and greenhushing that leads to misallocation of capital.
- Inadvertent non-compliance with requirements that gives rise to legal and reputational consequences for impacted reporting entities.

Rushed implementation would not only negatively impact reporting entities, investors and efficient capital allocation, but it would also undermine the credibility of the CRFD regime and jeopardise Australia's attractiveness as an investment destination for global capital. Given the important purpose of the CRFD regime, the desire for immediate implementation must be appropriately balanced against placing reporting entities in a compromised position in which they are unable to achieve the necessary uplift activities that would support compliant and high-quality reporting.

Adequate preparation window of 12 months at a minimum

Treasury's Policy Statement details that the Government welcomes stakeholder feedback on whether amending the proposed legislation to require a 1 January 2025 commencement date for Group 1 entities would improve the quality of reporting during the transition year.

A 1 January 2025 commencement date for Group 1 entities is preferable to a 1 July 2024 commencement date. However, it should be noted that a 1 January 2025 commencement date would also involve operational risks and complexities for reporting entities. For example, this timing would only allow Group 1 reporting entities around 6 months to undertake extensive uplift activities following the finalisation of requirements, which would still give rise to the risks associated with rushed implementation (albeit to a potentially lesser extent). In addition, reporting entities may face challenges making certain disclosures on a half-year basis in an annual reporting context.

ASX considers that there should be a minimum of 12 months between the finalisation of the AASB's climate disclosure standards and the commencement of the first reporting period under the CRFD regime. This preparation window would support the success and credibility of the regime, including by:

- Allowing reporting entities adequate time to undertake necessary uplift activities based on finalised framework legislation, disclosure standards and regulatory guidance.

- Encouraging reporting entities to thoughtfully plan and invest in the necessary skills and systems to support CRFD reporting and the long-term internal capability of their businesses to meet sustainability reporting requirements.
- Reducing the risks of poor-quality disclosures, greenwashing, greenhushing and inadvertent non-compliance.
- Allowing the professional services market time to develop expertise and increase availability of resources.
- Providing reporting entities greater direction on the future of assurance requirements.

The recalibration of the commencement date for Group 1 reporting entities to provide a minimum preparation window of 12 months should have regard to a start date that aligns with the standard Australian financial reporting year and subsequent adjustments to the proposed commencement date for Group 2 and Group 3 entities to ensure that the proposed phased implementation structure remains.

We would welcome the opportunity to discuss the matters raised in this submission in more detail. If you have any questions, please do not hesitate to contact me.

Yours sincerely

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