Submission to ALRC Financial Services Inquiry, Interim Report A (Report No 137)

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Introduction

Thank you for the opportunity to provide feedback on the ALRC's Interim Report A. The report covers substantial ground, and in this submission, we have largely focused on issues relating to definitions and the role of the generic, economy-wide, consumer protection obligations, currently implemented through sch 2 *Competition and Consumer Act 2010* (Cth) ('*Australian Consumer Law*') and Part 2, div 2 of the *Australian Securities and Commission Act 2001* (Cth) ('*ASIC Act*'). As a general principle, these economy-wide obligations should apply equally to all sectors of the economy. While the focus of this Inquiry is necessarily on the financial services sector, regard should also be had to any implications for maintaining (or even improving) the implementation of genuine economy-wide consumer protection standards.

We also make some brief comments on issues specific to insolvency and pre-insolvency advice services, but plan to make some more detailed comments on this topic as the Inquiry proceeds.

Chapter 6: Design of definitions

We support the need for increased navigability in relation to defined terms and agree in principle with Recommendations 7-10 and the concept of including a single glossary of defined terms. However, it is noted that the ALRC suggests (at [6.68]) the task of preparing and maintaining such a glossary would be assisted by excluding Schedule 2 (Insolvency Practice Schedule (Corporations)) from its ambit. In its current form, Schedule 2 (Insolvency Practice Schedule (Corporations)) ("IPSC") contains its own definitional and navigability issues which are beyond the scope of this review. However, in the context of this review, there is a risk that simple exclusion of the IPSC may result in

unintended definition inconsistencies if it is not included as part of the preparation and maintenance of the glossary.

Chapter 7: Definitions of 'Financial Product' and 'Financial Service'

Proposal A3

In **Proposal A3**, the ALRC suggests that there should be a uniform definition of financial product and financial service in the relevant corporations and financial services legislation. We agree that this proposal would reduce the complexity that currently exists. However, in the absence of any consolidation of the financial services and credit legislation, this proposal would result in some providers (including credit providers) having to be across the obligations in both the *National Consumer Credit Protection Act 2009* (Cth))('*NCCPA*') and the *Corporations Act 2001* (Cth) ('*Corporations Act*') (in addition to the *ASIC Act*). Until very recently, the clear exclusion of credit from the *Corporations Act* meant that businesses working in the credit sector have been able to be confident that they will not need to consider whether any of the obligations in Chapter 7 are applicable to their business. This changed with the implementation of the Design and Distribution obligations through the *Corporations Act* for credit and non-credit products, instead of through both the *Corporations Act* and *NCCPA* (as is the case for the Product Intervention Powers). This recent example of inserting credit obligations into the otherwise credit-free chapter 7 is, in our view, an awkward way to achieve the relevant policy objective. The implications of this approach more broadly are discussed in response to **Proposal A4** below.

In addition, **Proposal A3** would not resolve the problematic carve-out of financial services from the *Australian Consumer Law* as a Commonwealth law, which we suggest is worth addressing in the context of this Inquiry. We are of the view that there is an alternative to **Proposal A3** which will address the differing *ASIC Act* and *Corporations Act* definitions, whilst also addressing the problems caused by the financial services carve-out.

An alternative to Proposal A3

As discussed in the ALRC's Background Paper 4, the carve-out of financial services from the economy-wide consumer protection laws was introduced following the Wallis Financial System Inquiry, and is presently implemented through s 131A *Competition and Consumer Act 2010* (Cth), Part 2, div 2 of the *ASIC Act*, and the cross-referencing of the definitions of 'financial product' and 'financial service' in the *Australian Consumer Law* ('ACL') and *ASIC Act*. This ensured that, although the *ACL* as a Commonwealth law does not apply to the financial services sector, equivalent protections are provided through the *ASIC Act*. The cross-referencing of definitions between the *ASIC Act* and the *ACL* also means that there are no regulatory gaps between the *ASIC Act* and the *ACL* as a Commonwealth law.

However, the current arrangements add to the complexities in this area of regulation and reduce consistency in the economy-wide consumer protections.

For example, for some products and services, under the current arrangements, it may not be immediately obvious whether the product or service is a financial product or financial service (as defined in the *ASIC Act*) or not. This is particularly the case for novel products and services, such as

cryptocurrencies.[1] If the application of the definition in a particular instance is not immediately obvious, the provider (or a regulator or consumer) may face uncertainty as to whether:

- The consumer protection provisions in the *ASIC Act* or the consumer protection provisions in the *ACL* (Cth) apply; and
- The obligations in Chapter 7 *Corporations Act* apply or do not apply.

In relation to the first issue, outside the enforcement or litigation context, it may be assumed that this has only theoretical relevance for providers, as it was intended that the general consumer protection standards were to be equivalent in the *ASIC Act* and the *ACL*. However, in practice, there are some differences between the *ASIC Act* and *ACL.* For example, in the *ASIC Act*, quality standards are imposed through an implied terms regime,[2] and in the *ACL*, quality standards are implied through a consumer guarantees regime.[3] This means that the general consumer protection obligations imposed in relation to suppliers of financial products and financial services are different from those imposed in relation to other products and services, and a provider will need to know which set of standards apply in order to ensure that they can comply with the relevant obligations.

Even if the general consumer protection provisions in the *ASIC Act* and the *ACL* were identical (other than the reference to financial products and financial services), difficulties may still remain in a litigation context. In the absence of certainty as to the application of the definition of financial products and financial services, there may be additional time and costs for parties relying on general consumer protection standards in having to plead and respond to both *ASIC Act* and *ACL* provisions. In addition, there may be additional costs and complications if the litigation involves the regulator, as a referral of powers from the ACCC to ASIC, or vice versa, may be necessary, or the ACCC and ASIC may both need to be a party to the proceedings.

In addition, there is the potential for additional costs and complexities where a matter involves both financial products or services and non-financial products or services, as again, both *ASIC Act* and *ACL* provisions may need to be pleaded and the regulators may to invoke a referral of powers or both be parties to the proceedings.

Further complexities are introduced by the fact that there is not an equivalent to s 131A *Competition and Consumer Act* in the legislation of the States and Territories that applies the *ACL* as a law of the relevant State or Territory.

These complexities may also affect consumers seeking to understand and enforce their rights.

One solution to this issue is to remove the carve-out of financial products and financial services from the *ACL* as a Commonwealth law. This could be achieved by repealing *ASIC Act* Part 2, div 2 and *Competition and Consumer Act* s 131A. The definitions of 'financial product' and 'financial service' in the *ASIC Act* and *ACL* would no longer be needed and could also be repealed. In addition, to ensure that ASIC continues to have primary responsibility for financial services regulation, the definition of 'regulator' in *ACL* s 2(1) could be amended to include ASIC, and the practical division of responsibilities between ASIC and the ACCC could be managed through any necessary amendments

[1] For a discussion of whether digital currency falls within the *Corporations Act* definition of financial product, see P Latimer and M Duffy (2019) 'Deconstructing digital currency and its risks: Why ASIC must rise to the regulatory challenge' 47(1) *Federal Law Review* 121.
[2] *ASIC Act*, Part 2, div 2, subdiv E.
[3] *ACL* Part 3-2, div 1.

to the existing memorandum of understanding between ASIC and the ACCC (and the other *ACL* Regulators).[4]

This proposal would mean that, even in the absence of other reform to the financial product / financial service definition, the *Corporations Act* definitions of financial product and financial service could stand alone, and there would not be inconsistent definitions of the same terms in the *ASIC Act* to cause confusion.

Industry specific consumer protections in the financial services sector could continue to operate through Chapter 7 of the *Corporations Act* and the *NCCPA*, with the application and definition provisions of these Acts not needing to be amended.

Of course, this proposal would not preclude other changes to the scope and structure of the *Corporations Act* definitions of financial product and financial service being made to reduce complexity and improve clarity, as discussed in the ALRC's Interim Report.

A more detailed explanation of this proposal is provided in the attached paper (unpublished): "Addressing the lack of uniformity in the definitions of financial product and financial service in Australian financial services and consumer law".

Proposal A4

Paragraph (g) of **Proposal A4** proposes that application provisions be used to determine the scope of Chapter 7 of the *Corporations Act* and its constituent provisions.

This part of **Proposal A4** is obviously necessary if **Proposal A3** is implemented. The proposal also makes sense as regards products, services or circumstances for which many parts of Chapter 7 would be relevant, as in these cases, the relevant providers would need to be familiar with, and engage with, Chapter 7 in any case.

However, the effect of **Proposal A3** and **Proposal A4** would be that those providing consumer credit products and services would need to look to another piece of legislation (the *Corporations Act*) to determine the full scope of their consumer protection obligations. They would then discover that credit is excluded from all parts of Chapter 7, with the exception of only one small part, relevant to the Design and Distribution Obligations. It seems heavy handed to bring in credit products and services to the coverage of Chapter 7, when they are going to then be exempted from all but one set of the obligations in Chapter 7. We acknowledge that **Proposal A4** does facilitate a future consolidation of the consumer protection provisions in the *ASIC Act* with those in Chapter 7 *Corporations Act*, and perhaps also the *NCCPA*. However, a consolidation of consumer protection

[4] *Australian Consumer Law Memorandum of Understanding between Australian Competition and Consumer Commission, Australian Securities and Investments Commission, the State and Territory Offices of Fair Trading, New Zealand Commerce Commission and New Zealand Ministry of Business, Innovation and Employment,* signed 14 April 2020. Here, it is noted that in New Zealand, financial services have not generally been carved out of the economy-wide legislation (Fair Trading Act 1986 NZ), despite the existence of similar consumer protections in the Financial Markets Conduct Act 2013 NZ. The MOU between the Commerce Commission and the Financial Markets Authority clarifies that the Authority 'will have primary regulatory and enforcement responsibility for fair trading in relation to financial products and services', but that the Commerce Commission also retains investigation and enforcement ability in this space where the FMA consents: see *Memorandum of Understanding between Financial Markets Authority and Commerce Commission*, signed 31 March 2014 (para 3, 4) (at https://www.fma.govt.nz/assets/MOU/140331-mou-commerce-commission.pdf).

regulation of credit and other financial services can also be facilitated with the alternative proposal suggested above.

Proposal A6

Paragraph (b) of **Proposal A6** suggests that a new paragraph 'obtains credit' be inserted into the definitions of financial product in the *ASIC Act* and *Corporations Act*. Again, this proposal is necessary to implement **Proposal A3**, and if this is the approach ultimately recommended by the ALRC, we would support **Proposal A6**, para (b). However, adding credit to the definition of financial product in the *Corporations Act* would not be needed if the alternative proposal above were to be introduced.

Paragraph (c) suggests that the definition of 'credit' for the purposes of the concept 'obtains credit' should be consistent with the definition of credit in the *NCCPA*. If the definition of financial product is to include 'obtains credit', as suggested by **paragraph (b)**, the definition of credit in the *NCCPA* (which itself refers back to s 3(1), *National Credit Code* ('*NCC*') in the schedule to the *NCCPA*[5]) may be a useful place to start to facilitate consistency. However, as noted in the Interim Report, this definition of credit does not include several products / facilities that have, to date, been included in the definition of credit facility for the purposes of the *ASIC Act* and the *Corporations Act*.

There are also some other difficulties with the definition in the *NCCPA/NCC*. The first edition of Duggan and Lanyon's *Consumer Credit Law* referred to the similar definition in the Uniform Consumer Credit Code as a 'substantially meaningless provision', and recommended that reference be made to other materials to resolve the deficiencies in the definition.[6] For example, problems can arise in relation to contracts involving future payments, such as a sale of land under a 'terms contract' and sale of goods under a conditional sale contract. In these cases, it can sometimes be difficult to ascertain whether a future payment is a deferred debt (and therefore credit) or not, and there has been conflicting legal and judicial approaches.[7] In practice, these issues have been resolved through provisions in the *NCC* that deem these types of arrangements to be credit, regardless of whether the definition of credit is satisfied.[8] Adopting the NCC definition of credit without similar specific inclusions leaves open the possibility of uncertainty in application to these types of contracts.

It may also be arguable that an overdraft does not fall within the definition of credit because overdraft facilities are generally payable on demand. An overdraft facility was treated as regulated under the former *Uniform Consumer Credit Code* in *Police Department Employees Credit Union v Flood* (1999) ASC 155-034, but with little analysis of this issue. The NCC specifically exempts credit where there is no express agreement to provide it,[9] and so it would appear that overdrafts were contemplated to fall within the *NCC* without such an exemption.[10] More consideration may be needed as to whether creating a definition of credit based on the s 3 *NCC* definition of credit, without also identifying the exception, would lead to the same result.

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[5] See *NCCPA* s5(1) (definition of 'credit').
[6] Cited in H Bolitho, N Howell and JM Paterson (2020) *Duggan and Lanyon's Consumer Credit Law* (2nd ed, Lexis Nexis Butterworths), 39-40.
[7] See discussion in Bolitho et al, 43 – 46.
[8] For example, *NCC* ss 9 (hire-purchase agreements), 10 (contracts for sale of land by instalments), 11, 12 (sale of goods by instalments).
[9] *NCC* s 6(4).
[10] See discussion in Bolitho et al, 42.

Finally, there are various products that perform functions similar to credit, but that are not regulated by the NCCPA (including the NCC) because of the application provisions in s 5 NCC, and specific exclusions in s 6 NCC. For example, some buy-now-pay-later products are not regulated under the NCCPA because there is no charge for providing credit,[11] or because they are continuing credit contracts with only a fixed fee payable.[12] These may fall within a functional definition of credit (as thus regulated under the *ASIC Act* and *Corporations Act*), but reliance on these types of exclusions in the NCCPA application is problematic for developing consistent and appropriate regulation of consumer credit products.

Also, as noted in the Interim Report, other arrangements, such as consumer leases and guarantees, do not fall within the definition of credit, but they are specifically included in the *NCCPA* regime.

The Interim Report suggests that the issue of these type of products not falling within a functional definition of credit for the purposes of the *ASIC Act* definition of financial product could be addressed by application provisions in the *ASIC Act*. This would mean that the *ASIC Act* could be amended so that the Part 2, div 2 provisions apply to, for example:

- Financial products (including credit, using a functional definition based on *NCC* s 3)
- Financial services
- Guarantees
- Consumer Leases
- Contracts for sale of goods by instalment; and
- Other 'credit-adjacent' products that are not covered (or not clearly covered) by the functional definition of credit.

This seems to add to the complexity, and any such approach would need to be alert to the potential for regulatory gaps and arbitrage. If the financial services carve-out from the *ACL* were to continue, this approach will also seem to require an amendment to s 131A *Competition and Consumer Act* to exclude these additional products from the *ACL*, at least to the extent that it operates as a Commonwealth law.

Pre-insolvency and debt management advisors

We also wish to note a specific issue around the definitions of financial product and financial service that is relevant to debt and insolvency services. The problems associated with non-regulation of pre-insolvency advisors and other services that seek to assist over-indebted individuals or businesses is well documented.[13] This is, in part, due the fact that there exists a regulatory gap in relation to persons providing advice to debtors experiencing financial hardship in the legislation as currently drafted. Currently, such a person may be required by the *Corporations Act* or the *Bankruptcy Act 1966* (Cth) to be a registered liquidator or registered trustee, however this will depend on the nature of the advice being provided and whether the person has been appointed to carry out a particular insolvency arrangement.

[11] *NCC* s 5(1)(c).
[12] *NCC* s 6(5).
[13] See, for example, Attorney-General's Department (2022) *Bankruptcy System – Options Paper* 7-8; Chen, V. & Lemaitre, C.,'Regulating a quick fix for debt problems (2021) 49(3) *Australian Business Law Review 154; Senate Economics References Committee (2019) Credit and financial services targeted at Australians at risk of financial hardship* (Final Report), Ch 4 (Debt management services).

Where the advice provided does not fall within the specific types of insolvency appointments covered by the *Corporations Act* and/or the *Bankruptcy Act 1966* (Cth), it is not always clear whether that advice or related activities will be covered by the current definition of a "Financial Product" or "Financial Service" in the *ASIC Act*. Further, while some pre-insolvency advisors may also engage in activities ('debt management activities') that are deemed to be credit activities for the purposes of the NCCPA, and therefore required to hold an Australian Credit Licence,[14] this will not always be the case. By not clearly determining which regulatory framework is appropriate to the management of financial hardship advice, both debtors and the creditors will continue to bear the risks associated with non-regulated pre-insolvency advisors. Even where debt and insolvency advice is subject to some regulation, there are currently inconsistencies in the regulatory framework as between those providing financial advice (regulated by the *Corporations Act* and *ASIC Act*), insolvency advice (regulated by the *Corporations Act* and *Bankruptcy Act*), and advice that amounts to a credit activity (regulated by the *NCCPA*). These inconsistencies should be addressed in order to ensure that consumers (and small businesses) have access to quality advice about their debts (including debts that are not related to credit products).

Chapter 12: Definitions of 'retail client' and 'wholesale client'

The Interim Report suggests that the definition of retail client in the *Corporations Act* could be simplified by excluding the reference to particular products and to the value / price distinction. In principle, this approach is supported, and would be effective in reducing complexity.

The Interim Report also notes that there is not currently consistency across the relevant definitions of the person to whom protections should be provided in the key consumer / investor protection statutes in financial services:

- the *Corporations Act* provisions protect the 'retail client';
- the *ASIC Act* provisions protect the 'consumer' (relevant for the implied terms regime and the provisions on referral selling and harassment and coercion only) and also parties to consumer contracts and small business contracts (relevant for the unfair contract terms provisions); and
- the *NCCPA* protects the 'consumer'.

In each case, the way in which the protected person is defined differs, even where the terminology is the same or similar.

In addition to the different definitions of small business across the relevant legislation and other regulatory instruments (including industry codes and the terms of reference for the Australian Financial Complaints Authority), some anomalies under the current arrangements include the following:

- Regardless of their level of sophistication about financial matters, a natural person who is purchasing financial or credit products or services for personal use will be a consumer under both *ASIC Act* definitions, and under the *NCCPA*, but will not be a retail client (and thus

[14] See *NCCPA* s 6(1) (meaning of credit activity), s 29 (licensing obligation); National Consumer Credit Regulation 2010 (Cth), reg 4A (providing that a debt management service is a prescribed activity for s 6(1) *NCCPA*).

entitled to the consumer protections in chapter 7 of *the Corporations Act)* if he or she is a sophisticated investor.

- A small business will be entitled to protections under the *ASIC Act* and chapter 7 *Corporations Act* in some circumstances, but will not be entitled to protections under the *NCCPA* in any circumstances.
- A medium or large business making transactions below the prescribed threshold (currently $100,000) will be entitled to protections in part 2, div 2, subdivs C, D, and E of the *ASIC Act*, but will not be entitled to the *ASIC Act* unfair terms protections (subdiv BA). Nor will it be entitled to protections in chapter 7 *Corporations Act* (because the retail client definition only covers small businesses) or the *NCCPA*.

This comparison highlights the fact that achieving consistent definitions as between even the *ASIC Act* and Chapter 7 provisions is likely to be challenging, and could benefit from a broader consideration of how to identify who is the person who is appropriately entitled to consumer or investor protections. A reference to a purpose test (eg, predominantly for personal, domestic or household purposes) may be appropriate as a starting point. However, it would be important to clarify that an investment purpose is a personal, domestic or household purpose, as (with the exception of residential investment purposes) a different approach has been taken in the NCCPA.[15] A purpose test along these lines is also complicated in the context of the current Chapter 7 protections, because, as noted above, these currently apply to some small business customers, engaging in transactions for business purposes.

Achieving some consolidation of credit and financial services legislation – as flagged as a matter for consideration in this Inquiry - would also require explicit consideration to the issue of small business protections, as currently there is no credit legislation offering protection for business credit customers, even where those businesses are small businesses customers.[16]

Extending legislative 'consumer' protection to small business borrowers has been flagged in previous consultations and was the subject of a regulation impact statement.[17] This consultation did not result in any changes to the NCCPA to accommodate protections for small businesses, however, additional protections for small business borrowers are included in the Banking Code of Practice and Customer-Owned Banks Code of Practice, and small businesses can access AFCA for dispute resolution. The Financial Services Royal Commission also highlighted concerns around the treatment of small business borrowers.[18] The extension of 'consumer' protections to small businesses is well established in the general consumer protection law,[19] in the investor protection provisions of chapter 7 (through the retail client definition), and in other sectors, and consideration of the merits of consolidating some of the financial services and consumer credit protections will be an opportune time to revisit this question.

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[15] *NCC* s 5(3). See also the discussion in Bolitho et al, 52 – 54.

[16] See *NCC* s 5(1)(a), (b).

[17] Australian Government The Treasury (2010) *National Credit Reform Enhancing confidence and fairness in Australia's credit law* (Green Paper), chapter 1; *Regulation Impact Statement: Small business credit* (undated).

[18] See also a comprehensive discussion of the protections for small business borrowers in A Godwin, JM Paterson and N Howell (2018) *Credit for small businesses – An overview of Australian law regulating small business loans* (Financial Services Royal Commission Background Paper No 10).

[19] For example, ACL unfair terms protections apply to small business contracts – see ACL s 23(1). See also Griggs, L., Freilich, A., & Webb, E. (2011) 'Challenging the notion of a consumer : time for change' 19(1) *Competition & Consumer Law Journal* 52–77, which discussed the need for an expanded definition of consumer.

Chapter 13: Conduct Obligations

Question A18

In principle, we support the inclusion of relevant norms as statutory objectives. However, this exercise will also need to consider the existence and role of the *ACL* in drafting and implementing this proposal.

We are also of the view that there is merit in considering the introduction of fundamental norms that are directly enforceable, and that this option should not be dismissed in the ALRC's Inquiry. One of us is part of a team currently researching the applicability and relevance of a 'Treating Customers Fairly' approach in the financial services sector;[20] an approach which has been wholly or partly introduced in several jurisdictions, including South Africa and the United Kingdom. Later in 2022, this team will be providing more detail to the ALRC on our findings and recommendations in this regard.

Unconscionable conduct and misleading or deceptive conduct

The ALRC's proposals in relation to unconscionable conduct and misleading or deceptive conduct aim to reduce complexity by minimising or eliminating overlaps between substantially similar provisions. In general, the aim of reducing these types of overlapping provisions is welcome, however, there are some potential pitfalls or other consequences in the proposals suggested by the ALRC.

Proposal A22

In **Proposal A22**, the ALRC suggests that s 12CA *ASIC Act* and s 991A *Corporations Act* could be repealed, leaving unconscionable conduct matters to be addressed only with s 12CB *ASIC Act*. As discussed in the Interim Report, s 12CA *ASIC Act* covers similar ground to s 12CB *ASIC Act*. In addition, s 12CA does not apply to conduct that is prohibited by s 12CB,[21] indicating that s12CB has the widest applicability. In practice, since s 12CB was extended to cover conduct affecting businesses (large and small), it seems that s 12CA adds little, if anything, to the legislation.

However, s 12CB includes a qualification (that the offending conduct must be in trade or commerce) that is not replicated in unconscionable conduct prohibition in s 991A *Corporations Act*. As discussed below, the ALRC would therefore need to give consideration as to the extent that repealing s 991A *Corporations Act* will reduce protections in practice.

In addition, repealing s 12CA in the *ASIC Act* would add to the divergence between the general consumer protections in the *ASIC Act* and the general consumer protections in the *ACL*, which, as noted above, should be avoided. If **Proposal A22** were implemented, s 20 *ACL* would also need to be repealed to maintain consistency between the consumer protection provisions in the *ACL* and *ASIC Act*.

[20] This collaboration is mentioned in the ALRC's *Financial Services Legislation eNews*, October 2021.
[21] *ASIC Act* s 12CA(2).

We do not support the suggestion identified (but not proposed) in the report that unconscionable conduct would be replaced by the 'efficient, honest and fair' test. There is a separate argument about whether the concept of unconscionable conduct is too uncertain, and should be replaced by, for example, a prohibition on unfair commercial practices.[22] However, this is a separate question, and if such a change were made, it should be made for both financial services sector and all other sectors of the economy.

In contrast, removing the prohibition against unconscionable conduct from the financial services sector (because it is said to be subsumed by the 'efficient, honest and fair' concept) will dilute the universality of the economy-wide general consumer protections, and see the financial services sector (alone) on a separate track. This may also impede the development of the law on unconscionability in the *ACL*. The concept of unconscionable conduct is still contested, and key cases to date have involved financial services (as defined in the *ASIC Act*).[23] Given the relatively few matters litigated, removing the possibility of financial services cases from potential litigation will likely decrease further the number of matters litigated and the opportunities to clarify the concept for the benefit of all sectors of the economy. This proposal would also have the effect of creating a significant divergence between the financial services regulation and the *ACL*, which is unwarranted (as recognised in the Interim Report at [13.120]).

Proposal A23

Proposal A23 would involve consolidating the various misleading or deceptive conduct type provisions into a single provision. While the aim of reducing the number of overlapping provisions is generally supported, this proposal does not appear to take into account the fact that, although the relevant provisions have an element of overlap, there are some differences. For example, there are different consequences for non-compliance with the general prohibition against misleading or deceptive conduct in s 12DA *ASIC Act* and the more specific false or misleading representations in ss 12DB, 12DC, and 12DF *ASIC Act*. In particular, contravention of the prohibitions against specific false or misleading representations can result in criminal prosecution and the imposition of a criminal penalty. This is not an option in relation to a contravention of the general prohibition against misleading or deceptive conduct in s 12DA.[24] Similarly, a contravention of the prohibitions against specific false or misleading representations can result in the imposition of a pecuniary penalty, but again, this is not an option in relation to the prohibition in s 12DA.[25]

The relevant prohibitions in the *Corporations Act* also include prohibitions that can be subject to criminal *or* civil liability (ss 1041E, 1041F) and a prohibition where civil liability is the only option (s 1041H).

In the recent Federal Court decision of *ACCC v Google LLC (No 2)* [2021] FCA 367, Thawley J discussed ss 18 and 29 of the *ACL* (the equivalent provisions to ss 12DA and 12DB *ASIC Act*) and noted that '[a] comparison of the text of ss 18 and 29 suggest potentially significant differences in their respective operation'.[26] The differences highlighted by Thawley J, including the different consequences of non-

[22] For a discussion on the merits of an unfair conduct provision, see JM Paterson and E Bant (2020) 'Should Australia introduce a prohibition on unfair trading? Responding to exploitative business systems in person and online' 44(1) *Journal of Consumer Policy* 1.
[23] For example*, ASIC v Kobelt* [2019] HCA 18.
[24] *ASIC Act* s 12GB(1).
[25] *ASIC Act* s 12GBA(1)(a).
[26] *ACCC v Google LLC (No 2)* [2021] FCA 367 [102].

compliance, will need to be taken into account, and suggest that consolidation of the various false or misleading prohibitions in the *ASIC Act* and *Corporations Act* may not be a straightforward exercise.

Specifically, consolidation of the more specific prohibitions in ss 12DB, 12DC and 12DF into the more general prohibition in s 12DA would seem to require either that civil and criminal penalties will no longer be an option in relation to any misleading or deceptive conduct or false or misleading representations. This would appear to reduce the options available to the regulators for responding to the most serious breaches of the law, where the availability of criminal sanctions is said to be 'necessary to deter the most serious offenders'.[27]

Alternatively, it would appear to require a change in the policy settings, such that it would be possible to face criminal sanctions and civil penalties in circumstances where this option is not currently available (for example, where conduct is misleading or deceptive, but is not conduct that contravenes one of the more specific prohibitions).

There are also several defences in the *ASIC Act* that are applicable in relation to criminal prosecutions, and these are not available if a civil remedy is sought.[28] Consideration would need to be given to the continuation or otherwise of these defences in the event that the various prohibitions were consolidated into a single prohibition.

Other distinctions are identified in the *ACCC v Google (No 2)* judgment, including the use of 'likely' in s 18 ACL, but not s 29 *ACL*. In this regard, Thawley J accepted the submission of Google that:

> 'by reason of the lack of reference in s 29 to the concept of something being 'likely to mislead', the ACCC had to prove to the requisite standard that Google made representations that were actually false or misleading; it was not sufficient for the ACCC to prove that it was likely, or that there was a real or not remote chance or possibility, that relevant users would be misled. That would be sufficient for s 18, but not for s 29.'[29]

The Interim Report also notes a suggestion that the various prohibitions could be removed entirely, and instead, parties could rely on the 'efficiently, honestly and fairly' obligation. For the reasons discussed above in relation to the prohibition against unconscionable conduct, we do not support this option.

Maintaining uniform, economy-wide consumer protections

The proposals and discussion in this section focus on two key parts of the economy-wide consumer protections – the various prohibitions against unconscionable conduct and misleading or deceptive conduct. The relevant provisions in the *ASIC Act* are mirrored in the *ACL*, and, as the ALRC acknowledges in its discussion in para 13.120, removing the symmetry because the provisions should be avoided in the absent of strong countervailing benefits.

This reference in the ALRC's report is made in the context of a suggestion that the prohibition against unconscionability could be repealed. However, it is also applicable to the ALRC's **Proposal A22** and **Proposal A23** in relation to consolidating the various unconscionable conduct and misleading or deceptive conduct provisions. It is difficult to envisage a rationale for disrupting the

[27] JM Paterson (2019) *Corones' Australian Consumer Law* (4th ed, Thomson Reuters), 532.
[28] Eg, *ASIC Act* s 12GI.
[29] *ACCC v Google LLC (No 2)* [2021] FCA 367 [110].

symmetry between the equivalent provisions in the *ASIC Act* and *ACL*, and in principle, if changes to the relevant *ASIC Act* provisions were made, they should be mirrored in the *ACL*.

However, it should also be noted that the recent review of the *ACL* did not raise any concerns about the extent of overlap in the unconscionable conduct and/or misleading or deceptive conduct provisions, nor make any suggestions for reducing or consolidating the overlapping provisions. [30]

A more minimalist approach – subject to addressing the concerns about consequences and defences discussed above – might be to repeal the equivalent provisions in the *Corporations Act*, while leaving the *ASIC Act* provisions unchanged. This would ensure that the symmetry between the *ASIC Act* and the *ACL* was retained. However, such a step would also need to examine whether the absence of the 'trade or commerce' requirement from some of the *Corporations Act* provisions provides a benefit that would be lost if only the *ASIC Act* provisions were available,[31] or if there are any other differences in the wording that provide a practical relevance.

It is also noted here that the alternative proposal noted above, to remove the carve-out of financial services from the *ACL*, would ensure that there is a single and uniform set of general consumer protection obligations that apply equally to all sectors of the economy, including the financial services sector.

Further information

For any queries in relation to this submission, please contact Nicola Howell [redacted]

[30] Consumer Affairs Australia and New Zealand (2017) *Australian Consumer Law Review (Final Report)*.
[31] In *ASIC v National Exchange* [2005] FCAFC 226, the Full Federal Court found that the conduct of National Exchange was unconscionable, but that there was no contravention of s 12CC ASIC Act (as it then was), because the requirement that the acquisition of the unsolicited offer be "for the purposes of trade or commerce" was not satisfied: at [45] – [46]. However, the issue that arose in that case may be less relevant now as at the relevant time, s12CC(7) *ASIC Act* required that the acquisition or possible acquisition of financial services had to be 'for the purpose of trade or commerce', but this requirement is no longer included in the current provisions. Also, the prohibition against unconscionable conduct now applies equally to protect consumers and businesses. In contrast, the original s12CB *ASIC Act* applied to consumer unconscionability, and the original s 12CC *ASIC Act* (with the 'for the purpose of trade or commerce' requirement, applied to business unconscionability).