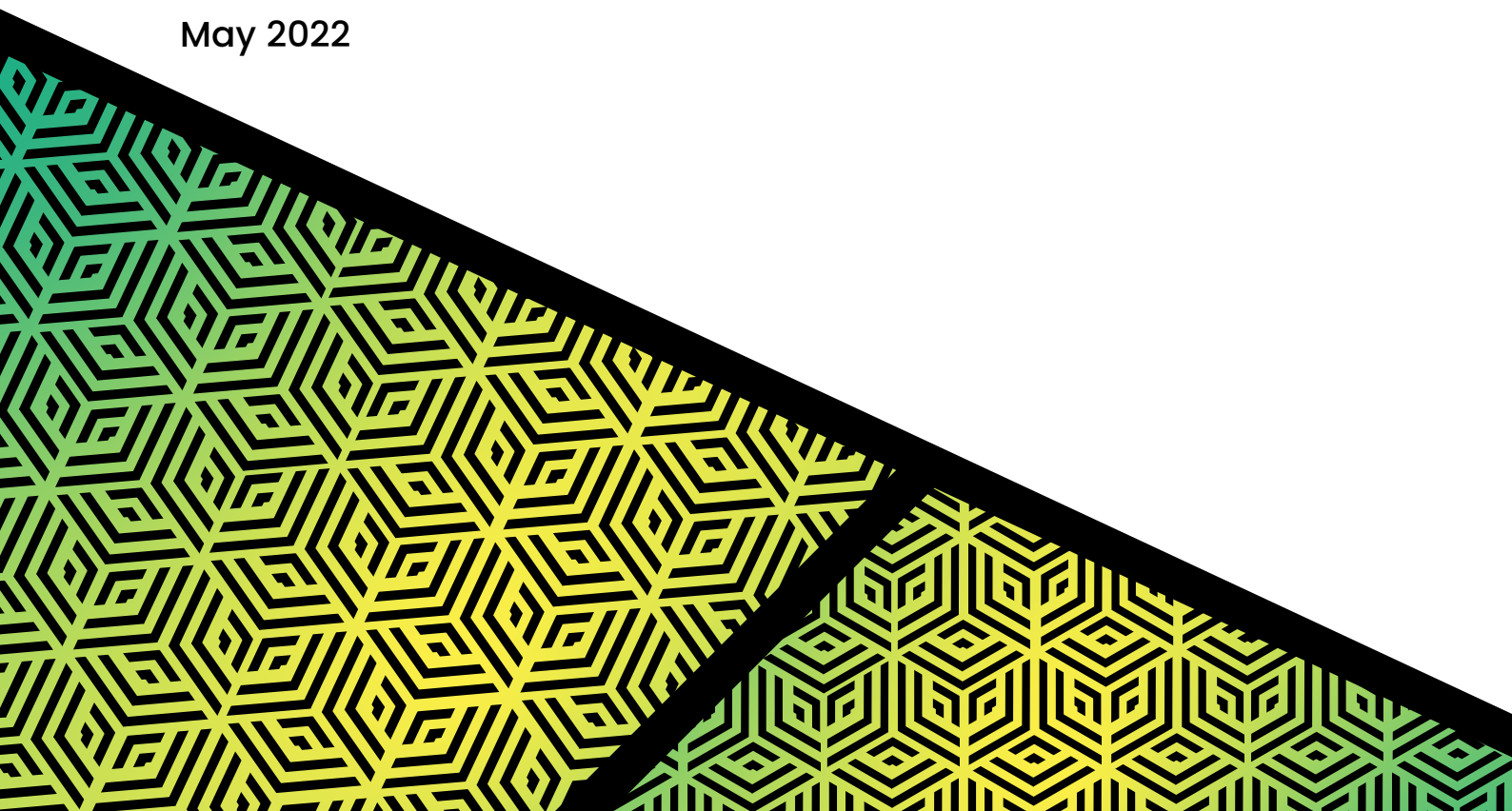
Australian Government
Australian Law Reform Commission

BACKGROUND PAPER FSL6

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Reflecting on Reforms – Submissions to Interim Report A

May 2022



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

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

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

View the Financial Services Legislation Background Paper Series.

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

The office of the ALRC is at Level 4, Harry Gibbs Commonwealth Law Courts Building, 119 North Quay, Brisbane QLD 4000.

Postal Address:

PO Box 12953,
George Street QLD 4003

Telephone: within Australia (07) 3248 1224

International: +61 7 3248 1224

Email: info@alrc.gov.au

Website: www.alrc.gov.au

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Introduction

1. Feedback from stakeholders is crucial in assisting the ALRC to develop its recommendations for simplification of corporations and financial services legislation. In this Background Paper, the ALRC provides an overview of the feedback it has received, by way of formal submissions, on questions and proposals outlined in Interim Report A. This feedback will inform the development of proposals in subsequent Interim Reports, as well as the recommendations for reform made in the ALRC's final report in 2023.

2. The purpose of this Background Paper is to provide a foundation for further discussions with stakeholders as the ALRC continues to develop its proposals for reform.

3. Interim Report A was published on 30 November 2021, and submissions were invited until 25 February 2022. In total, the ALRC received 56 submissions from a range of stakeholders, including legal practitioners, financial services providers, consumer representatives, and academics. Industry and professional bodies accounted for the most significant proportion of submissions. The types of financial services providers represented by these bodies included individuals such as financial planners, stockbrokers, mortgage brokers, and accountants, as well as institutions, such as banks, superannuation funds, and insurers. A list of submissions, including download links, is included at Appendix A.

4. The first section of this Background Paper details the feedback from submissions in response to specific proposals and questions. This is followed by a brief discussion of comments received in relation to the 13 recommendations included in Interim Report A. The Background Paper concludes with an outline of feedback received in relation to the scope of the ALRC's Inquiry.

5. The ALRC is grateful to all of those who have shared their views to date, and encourages stakeholders to continue to share their feedback with the ALRC throughout this Inquiry. There will be further calls for submissions following the publication of:

- Interim Report B, on legislative hierarchy and design (due by 30 September 2022); and
- Interim Report C, on the structure of Chapter 7 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') (due by 25 August 2023).

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

Feedback on proposals and questions

7. The degree of support expressed for specific proposals and questions in Interim Report A is illustrated by Figure 1. The majority of proposals were supported by stakeholders, although submissions highlighted a range of key issues for the ALRC to consider in further developing these proposals. The analysis below summarises the feedback received in response to each proposal and question, including:

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

Figure 1: Support for Interim Report A proposals and questions

Empirical data

8. The ALRC obtained and analysed a range of data for Interim Report A to illuminate the complexity and potential for simplification of the *Corporations Act* and related legislation, and to better understand the regulatory ecosystem (including Australian Securities Exchange ('ASX') market rules, Australian Securities and Investments Commission ('ASIC') guidance, industry codes, licensee business rules, and court judgments), and the changing nature and structure of financial markets and services.

9. This data also provided a foundation for proposals in other chapters of Interim Report A.

10. Question A1 was designed to obtain stakeholder suggestions on data that will further assist the ALRC, the Australian Government, and the general public to better understand the ecosystem and its various sources of complexity, and for use in future reports for this Inquiry.

Question A1: Data and the Inquiry

Question A1 What additional data should the Australian Law Reform Commission generate, obtain, and analyse to understand:

a. legislative complexity and potential legislative simplification;

b. the regulation of corporations and financial services in Australia; and

c. the structure and operation of financial markets and services in Australia?

11. Several of the submissions by financial advice industry bodies suggested that the ALRC should have regard to:

- industry codes, such as the Financial Planners and Advisers Code of Ethics and the Financial Planning Association Code of Professional Practice;[1] and
- ASIC-issued guidance, including Regulatory Guides, Information Sheets, reports, and media releases.[2]

12. Suggestions from other submissions included that the ALRC should:

- collect empirical research about the impact of the legislation on a broad cross-section of consumers;[3] and
- conduct 'empirical investigation' of who actually uses the *Corporations Act*, and Chapter 7, in particular.[4]

13. Further mapping was suggested by several submissions in relation to:

- the potential implications of 'any amendments, removal or relocations' of definitions in the *Corporations Act*, given the crossover of definitions into other relevant legislation such as the *Superannuation Industry (Supervision) Act 1993* (Cth), *Income Tax Assessment Act*

1 Financial Planning Association of Australia, *Submission 10*; National Insurance Brokers Association, *Submission 18*; Stockbrokers and Financial Advisers Association, *Submission 19*; Mortgage & Finance Association of Australia, *Submission 44*. See also National Insurance Brokers Association, *Submission 18*, suggesting 'soft law' data specifically relevant to the insurance industry.

2 Financial Planning Association of Australia, *Submission 10*.

3 Ibid; M Nehme, *Submission 15*; The Advisers Association, *Submission 24*; SMSF Association, *Submission 28*. More specifically, the SMSF Association suggested '[c]onsumer and industry surveys and focus groups on how the legal framework affects their understanding of and dealings with financial markets plus the impact on the costs involved'.

4 P Spender and S Bottomley, *Submission 41*. Emeritus Professors Spender and Bottomley note that while 'we can guess' the likely users of the Act, '[w]e have no clear data on who the users are, nor the purposes for which they use the Act' and that the question should be addressed in order to improve access to, and the navigability of, the legislation, as well as better understand its 'functional use'.

1936 (Cth), *Income Tax Assessment Act 1997* (Cth), and the *Tax Agent Services Act 2009* (Cth);[5] and

- 'the relationship of the financial services and financial product laws to other financial sector laws', particularly in such areas as differing licensing requirements and regulation for superannuation trustees under the *Corporations Act* and the *Superannuation Industry (Supervision) Act 1993* (Cth).[6]

14. Several submissions suggested examining the cost of the legislative framework.[7] For example, the Financial Services Council suggested the ALRC examine costs with respect to three measures:

a. the impact of the existing framework against simpler alternatives it proposes
b. mapping the laws and regulations where interpretation has gone beyond the original policy intent envisaged by Parliament and costing this impact and savings that could be achieved by better realigning regulation with legislative intent
c. the cost impact of duplicative laws or siloed policy-making where new laws duplicate or conflict with existing laws and regulations that are not repealed and where carveouts could reduce cost and enable a more seamlessly applied legal framework.[8]

15. Also in regard to questions of cost, the Australian Banking Association suggested the ALRC survey financial services providers 'to gather information about their direct and indirect costs incurred in complying with the current regulatory regime'.[9] They noted that direct and indirect costs may include expenditures on 'necessary internal compliance, risk and in-house legal staff, and obtaining advice from external lawyers and compliance consultants'.[10]

16. Other submissions recommended that the ALRC conduct further analysis regarding the following:

- how many of the citations to the *Corporations Act* in federal court judgments are specific to Chapter 7;[11]
- 'the size and value of the credit market currently operating within … exemptions';[12]
- 'past public and parliamentary inquiry reports that have extensively addressed the respective benefits and limits of fairness-orientated and unconscionability-orientated standards in the law';[13]
- case studies that would illustrate the complexity of the law and how it can lead to 'issues such as fundamental different understandings, poor drafting and inefficiency in the application in practice';[14] and
- 'the strengths and weaknesses of [principles-based regulation] where it has been employed whether that be in an overseas financial services regime or a domestic regulatory system in a different sector of the economy'.[15]

17. Lastly, the Financial Services Institute of Australasia submitted a wide-ranging list of additional data the ALRC could consider, such as:

- consult NZ Law Reform Commission under the Closer Economic Relations.

5 SMSF Association, *Submission 28*.
6 Law Council of Australia, *Submission 49*. See also P Hanrahan, *Submission 36*; D Booth, *Submission 35* (noting the 'one size fits all' approach should be reconsidered).
7 Financial Services Council, *Submission 39*; Australian Banking Association, *Submission 43*.
8 Financial Services Council, *Submission 39*.
9 Australian Banking Association, *Submission 43*.
10 Ibid.
11 Ibid.
12 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
13 B Horrigan, *Submission 11*.
14 Association of Financial Advisers, *Submission 45*.
15 MinterEllison, *Submission 55*.

- research and data on customer harm and dissatisfaction arising from the application of rigid policies and prescriptive regulation when instead the application of professional judgement was needed.
- notification of serious compliance concerns as this may indicate aspects of the law that are not clear or where there are issues with compliance with the law.
- data from the [Financial Ombudsman Service] in addition to the data they have considered from [the Australian Financial Complaints Authority ('AFCA')].
- the policy intent of legislation as captured in second reading speeches to Parliament compared to decisions and outcomes led by regulators such as AFCA and ASIC.
- In examining the complexity of the law - the average number of pages a licensee has to pull together for an adviser to understand their obligations.[16]

18. The ALRC has commenced gathering some of the information and perspectives suggested in submissions, and plans to gather more as the Inquiry unfolds.

When to define, and consistency and design of definitions

19. Question A2 was designed to elicit suggestions about how a number of guiding principles for the use of definitions should be used (or whether the guiding principles should be used) to reduce complexity in corporations and financial services legislation.

Question A2: Definitional principles

Question A2 Would application of the following definitional principles reduce complexity in corporations and financial services legislation?

When to Define (Chapter 4):

a. In determining whether and how to define words or phrases, the overarching consideration should be whether the definition would enhance readability and facilitate comprehension of the legislation.

b. To the extent practicable, words and phrases with an ordinary meaning should not be defined.

c. Words and phrases should be defined if the definition significantly reduces the need to repeat text.

d. Definitions should be used primarily to specify the meaning of words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes.

Consistency of Definitions (Chapter 5):

e. Each word and phrase should be used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act.

f. Relational definitions should be used sparingly.

g. To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation.

16 Financial Services Institute of Australasia, *Submission 53*.

Design of Definitions (Chapter 6):

h. Interconnected definitions should be used sparingly.

i. Defined terms should correspond intuitively with the substance of the definition.

j. It should be clear whether a word or phrase is defined, and where the definition can be found.

20. The majority of submissions that addressed Question A2 expressed support, or qualified support, for the application of the definitional principles.[17] No submissions were made that were not supportive of Question A2.

21. Submissions noted that the (consistent) application of the definitional principles would reduce complexity across corporations and financial services legislation. The Accounting Professional & Ethical Standards Board emphasised their agreement, in particular, that:

- definitions should enhance readability, facilitate comprehension and be used where they significantly reduce the need to repeat text;
- words and phrases should have the same meaning throughout an Act, delegated legislation and across Commonwealth corporations and financial services legislation; and
- it should be clear that a word or phrase is defined.[18]

22. Other submissions emphasised that definitions should be easily understood by the average person. For example, Associate Professor Nehme noted there are a number of current definitions 'that are challenging to understand by the experts let alone the average person'.[19] Kit Legal also noted that:

> Giving words their ordinary meaning, without further definition, allows readers (particularly non-lawyers) to trust their understanding of the words in front of them, rather than having to question whether every ordinary word is in fact defined to mean something quite specific.[20]

23. MinterEllison submitted an additional principle to be applied, namely that 'consistent terminology should be used throughout financial services legislation, including delegated legislation, where a similar concept is being referred to', noting that this was implied by the ALRC but 'it should be explicitly stated'.[21]

24. Those submissions that offered qualified support for Question A2 typically raised the need to guard against unintended consequences. For example, the Australian Restructuring Insolvency & Turnaround Association highlighted that the 'application [of the principles] to existing provisions would require careful and precise consideration to ensure inconsistencies in definitions which

17 Submissions that expressed general support for this question included Australian Financial Markets Association, *Submission 6*; Financial Planning Association of Australia, *Submission 10*; Accounting Professional & Ethical Standards Board, *Submission 12*; Australian Restructuring Insolvency & Turnaround Association, *Submission 14*; M Nehme, *Submission 15*; National Insurance Brokers Association, *Submission 18*; Stockbrokers and Financial Advisers Association, *Submission 19*; G Elkington, *Submission 20*; The Advisers Association, *Submission 24*; Finance Brokers Association of Australia, *Submission 26*; SMSF Association, *Submission 28*; ANZ Banking Group, *Submission 29*; T Peters, *Submission 30*; IG Australia, *Submission 33*; P Hanrahan, *Submission 36*; J Dharmananda, *Submission 38*; Financial Services Council, *Submission 39*; Chartered Accountants Australia and New Zealand, *Submission 40*; Australian Banking Association, *Submission 43*; Mortgage & Finance Association of Australia, *Submission 44*; Association of Financial Advisers, *Submission 45*; Law Council of Australia, *Submission 49*; Kit Legal, *Submission 50*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*; MinterEllison, *Submission 55*.

18 Accounting Professional & Ethical Standards Board, *Submission 12*.

19 M Nehme, *Submission 15*.

20 Kit Legal, *Submission 50*.

21 MinterEllison, *Submission 55*.

currently exist are not inadvertently impacted'.[22] They also noted problems with the existing use of 'signposted definitions which are not fit for purpose', citing the signposted general definition of 'associate' as an example of this problem.[23]

25. The National Insurance Brokers Association noted that

> proper application [of the definitional principles] will require consideration of the context and clarity of policy and relevant provisions, and evidence of issues prior to making any change to ensure those affected are not worse off.[24]

26. The Financial Planning Association of Australia submitted that 'it is vital that the language used allows professionals and consumers (not just lawyers and compliance specialists) to understand the law'.[25]

27. Assistant Professor Dharmananda emphasised the principle that 'definitions should not contain substantive provisions' and suggested a further principle that where possible, 'definitions in the *Acts Interpretation Act 1901* (Cth) should be relied upon'.[26] She also noted that at times,

> an 'intuitive' relationship between a label and the substance of the definition may be challenging, especially where the label is generic (e.g. 'general advice'), or the definition is 'to create a special concept that does not have an ordinary meaning.'[27]

28. The Australian Banking Association indicated particular support for principle (j) — it should be clear whether a word or phrase is defined, and where the definition can be found. In relation to (b) — to the extent practicable, words and phrases with an ordinary meaning should not be defined — they noted that

> while most words do have an 'ordinary meaning', that meaning may vary according to context, in which case a definition is useful in order to avoid ambiguity. For example, s 766C of the *Corporations Act* concerns the meaning of 'dealing' and s 766C(2) sets out when 'arranging' for a person to engage in certain conduct is also a 'dealing'. Prior to the introduction of this provision, 'arranging' had a well-understood meaning in an insurance context but not otherwise, which necessitated substantial ASIC guidance concerning its interpretation of the meaning of this term (now found in ASIC Regulatory Guide 36). Such confusion may have been avoided with an appropriate definition of 'arranging'.[28]

29. The Australian Banking Association highlighted the potential for unintended consequences. For example, in relation to principle (g) — key defined terms should have a consistent meaning — 'care will need to be taken to ensure the creation of "key defined terms" does not operate to expand the ambit of the various regimes which currently regulate financial services'.[29]

30. Professor Hanrahan noted that definitions serve different functions and that this must be taken into consideration when designing definitions. She also highlighted that problems have always 'bedevilled' certain definitions (such as 'managed investment scheme' and 'derivatives'), but that definitions 'should be clear and as detailed as possible — this is a rule of law issue' and that certainty is important as well.[30]

31. The ALRC will consider the comments received in submissions as it refines the principles applicable to statutory definitions.

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22 Australian Restructuring Insolvency & Turnaround Association, *Submission 14*.
23 Ibid.
24 National Insurance Brokers Association, *Submission 18*.
25 Financial Planning Association of Australia, *Submission 10*.
26 J Dharmananda, *Submission 38*.
27 Ibid.
28 Australian Banking Association, *Submission 43*.
29 Ibid.
30 P Hanrahan, *Submission 36*.

Definitions of 'financial product' and 'financial service'

32. Proposals A3 to A6 aim to reduce complexity in the definitions of 'financial product' and 'financial service', including by simplifying how these terms are used in both the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*').

33. The proposed amendments aim to reduce unnecessary complexity by:

- ensuring 'financial product' and 'financial service' are defined consistently across Commonwealth Acts relevant to the regulation of corporations and financial services;
- enacting a functional definition of 'financial product' that relies less on interconnected defined concepts and does not rely on specific inclusions; and
- accommodating varying scopes of regulation without the need to vary the definitions of 'financial product' and 'financial service' for different Acts or provisions.

Proposal A3: Using the defined terms consistently

Proposal A3 Each Commonwealth Act relevant to the regulation of corporations and financial services should be amended to enact a uniform definition of each of the terms 'financial product' and 'financial service'.

34. The majority of submissions that addressed Proposal A3 were supportive of the enactment of a uniform definition of 'financial product' and 'financial service'.[31]

35. Submissions suggested that enactment of a uniform definition of these two terms would reduce complexity, and enhance access to and understanding of the law.[32] For example, the Accounting Professional & Ethical Standards Board expressed the view that this proposal would 'reduce complexity for the financial services industry and assist the interpretability of the relevant corporations and financial services legislation'.[33]

36. Submissions also referred to the desirability of defined terms having a consistent meaning across financial services legislation, in accordance with the general principle outlined in Question A2.[34] ANZ Banking Group considered that uniform definitions should 'also be adopted for other terms not mentioned in the proposals, including "small business"'.[35]

37. Some submissions emphasised that care should be taken in crafting the uniform definitions,[36] including to ensure that the existing regulatory parameters are maintained. In their joint submission, the Consumer Action Law Centre, CHOICE, the Financial Rights Legal Centre and Super Consumers Australia ('consumer advocates') noted the importance of retaining the

31 Certainty Advice Group, *Submission 5*; Australian Financial Markets Association, *Submission 6*; Accounting Professional & Ethical Standards Board, *Submission 12*; M Nehme, *Submission 15*; National Insurance Brokers Association, *Submission 18*; G Elkington, *Submission 20*; The Advisers Association, *Submission 24*; ANZ Banking Group, *Submission 29*; T Peters, *Submission 30*; IG Australia, *Submission 33*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; D Booth, *Submission 35*; P Hanrahan, *Submission 36*; Financial Services Council, *Submission 39*; Chartered Accountants Australia and New Zealand, *Submission 40*; P Spender and S Bottomley, *Submission 41*; CPA Australia, *Submission 42*; Australian Banking Association, *Submission 43*; Association of Financial Advisers, *Submission 45*; Kit Legal, *Submission 50*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*; MinterEllison, *Submission 55*.

32 See, eg, Accounting Professional & Ethical Standards Board, *Submission 12*; M Nehme, *Submission 15*; ANZ Banking Group, *Submission 29*; Kit Legal, *Submission 50*.

33 Accounting Professional & Ethical Standards Board, *Submission 12*.

34 Australian Financial Markets Association, *Submission 6*; ANZ Banking Group, *Submission 29*; T Peters, *Submission 30*; Chartered Accountants Australia and New Zealand, *Submission 40*; MinterEllison, *Submission 55*.

35 ANZ Banking Group, *Submission 29*.

36 Australian Banking Association, *Submission 43*; Insurance Council of Australia, *Submission 52*.

existing breadth of the *ASIC Act* definition of 'financial product', and the inclusion of 'financial service' for the purposes of the consumer protection provisions in Part 2 Div 2.[37] The Australian Banking Association in turn noted that any new definition should be tested to ensure it does not expand the existing scope of regulation.[38]

38. Emeritus Professors Spender and Bottomley also noted that further work will be required on related terms, such as 'security/securities and, to a lesser extent, derivative' to clarify their operation across the *Corporations Act*.[39]

39. The Australian Restructuring Insolvency & Turnaround Association expressed support for simplification of the definitions of 'financial product' and 'financial service', but identified a need for review of the application of the definition of financial service to debt management advice to ensure that all types of such advice are captured.[40]

40. Limited opposition was received in respect of Proposal A3. The Law Council of Australia expressed support for the general principle that 'definitions should be as consistent as possible across the Corporations Act and the ASIC Act at a minimum, and ideally across the whole statute book'.[41] However, the Law Council did not support the enactment of uniform definitions of 'financial product' and 'financial service'. The Law Council noted that

> the differing definitions of 'financial product' and 'financial service' between the Corporations Act and the ASIC Act reflect, in part, the subject matter and current roles of those Acts within the current legislative regime.[42]

41. The ALRC suggested in Interim Report A that justifiable differences in the scope of regulated products and services under the two Acts could be dealt with through the use of application provisions. Such provisions could be used to narrow the scope of particular provisions without the need to maintain different definitions for 'financial product' and 'financial service'.[43] However, the Law Council contended that 'the legislative purpose should drive the definition, not the other way around'.[44]

42. The Law Council additionally advocated for revisiting the distinction between the concepts of 'financial product' and 'financial service', noting that the distinction between these concepts is 'rarely well understood'.[45] They suggest consideration, in particular, of how collective investments 'straddle' these two concepts.

43. Howell and Dr Brown agreed that the ALRC's proposal would reduce existing complexity.[46] However, they considered that the inconsistency between definitions in the *ASIC Act* and the *Corporations Act* could be better resolved through reform of the structure of consumer protection provisions for financial products and services.

44. At present, financial products and financial services are excluded from the consumer protection provisions under the Commonwealth *Australian Consumer Law* by s 131A of the *Competition and Consumer Act 2010* (Cth).[47] Equivalent, though not identical, consumer protection

37 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
38 Australian Banking Association, *Submission 43*.
39 P Spender and S Bottomley, *Submission 41*.
40 Australian Restructuring Insolvency & Turnaround Association, *Submission 14*.
41 Law Council of Australia, *Submission 49*.
42 Ibid.
43 See Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, November 2021) [7.74], [7.165]–[7.167].
44 Law Council of Australia, *Submission 49*.
45 Ibid. See also P Hanrahan, *Submission 36*.
46 N Howell and C Brown, *Submission 47*.
47 Howell and Brown note, however, that there is no equivalent exclusion in state and territory legislation that applies the *Australian Consumer Law* as a law of the relevant State or Territory. They suggest this is a source of further complexity. See also Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.

provisions in respect of financial products and financial services are contained in Part 2 Div 2 of the *ASIC Act*. Howell and Brown suggest that the 'current arrangements add to the complexities in this area of regulation and reduce consistency in the economy-wide consumer protections'.[48] They note, for example, that there may be uncertainty as to which consumer protection provisions apply where the application of the definition of financial product or financial service is unclear, such as in relation to cryptocurrencies.

45. Howell and Brown recommend removing the existing carve-out for financial products and services from the *Australian Consumer Law*, and repealing the equivalent consumer protection provisions in Part 2 Div 2 of the *ASIC Act*.[49] They suggest that the existing division of responsibilities between ASIC and the Australian Competition and Consumer Commission could be maintained through amendments to the definition of 'regulator' in the *Australian Consumer Law*, in conjunction with amendments to the memorandum of understanding between the regulators. They contend that implementation of these reforms would obviate the need for differing definitions of 'financial product' and 'financial services' as between the *ASIC Act* and *Corporations Act*.[50]

46. Consumer advocates agreed that the current arrangements for consumer protection provisions for financial products are a source of complexity and inconsistency.[51]

47. The ALRC will revisit the definitions of 'financial product' and 'financial service' in Interim Report C.

Proposal A4: Using the defined terms to set regulatory boundaries

Proposal A4 In order to implement Proposal A3 and simplify the definitions of 'financial product' and 'financial service', the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to:

a. remove specific inclusions from the definition of 'financial product' by repealing s 764A of the *Corporations Act 2001* (Cth) and omitting s 12BAA(7) of the *Australian Securities and Investments Commission Act 2001* (Cth);

b. remove the ability for regulations to deem conduct to be a 'financial service' by omitting s 766A(1)(f) of the *Corporations Act 2001* (Cth) and s 12BAB(1)(h) of the *Australian Securities and Investments Commission Act 2001* (Cth);

c. remove the ability for regulations to deem conduct to be a 'financial service' by amending ss 766A(2) and 766C(7) of the *Corporations Act 2001* (Cth), and ss 12BAB(2) and (10) of the *Australian Securities and Investments Commission Act 2001* (Cth);

d. remove the incidental product exclusion by repealing s 763E of the *Corporations Act 2001* (Cth);

e. insert application provisions to determine the scope of Chapter 7 of the *Corporations Act 2001* (Cth) and its constituent provisions; and

f. consolidate, in delegated legislation, all exclusions and exemptions from the definition of 'financial product' and from the definition of 'financial service'.

48 N Howell and C Brown, *Submission 47*.
49 Ibid.
50 See further Nicola J Howell, 'Addressing the Contrasting Definitions of Financial Product and Financial Service in Australian Financial Services and Consumer Legislation' (2022) 39(2) *Company and Securities Law Journal* 86.
51 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.

48. The majority of submissions that addressed Proposal A4 expressed support, or qualified support, for the proposed amendments to the definitions of 'financial product' and 'financial service'.[52]

49. Submissions that expressed qualified support for Proposal A4 typically supported particular aspects of the proposed reforms, but had reservations about other aspects. A number of submissions commented on specific aspects of this proposal, but did not address all aspects of the proposal.

50. The proposed consolidation of exclusions and exemptions in delegated legislation was generally supported. The most common sources of disagreement with the proposal were the suggested removal of specific inclusions from 'financial product', and the removal of the incidental product exclusion.

Proposal A4(a)–(c): Removing specific inclusions and deeming powers

51. A number of submissions opposed the removal of specific inclusions from the definition of 'financial product', as contemplated by Proposal A4(a).[53] These submissions generally considered that the specific inclusions are a valuable source of clarity and certainty, particularly for products that may fall at the margins of the functional definition of 'financial product'.

52. For example, Allens considered that removing the list of specific inclusions 'would reduce certainty and doing so would be unnecessary and undesirable'.[54] They noted that they did not oppose simplification of the specific inclusions, but considered that there 'is nothing objectionable about the idea of having specific inclusions'.[55]

53. The Financial Services Institute of Australasia observed that 'the specific inclusions are generally easier for a reader to understand than a broader definition'.[56]

54. Hanrahan emphasised that definitions like 'financial product' and 'financial service', which play a role in determining the application of the law, should be as 'clear and as detailed as possible'.[57] She characterised the clarity of these types of definitions as 'a rule of law issue'.

55. In the absence of the list of specific inclusions, some submissions considered that particular uncertainty would arise in relation to the application of the functional definition of 'financial product' to:

- non-interest bearing bank accounts;[58]
- derivatives or foreign exchange contracts that are not used for a risk management purpose;[59] and
- credit facilities.[60]

52 Submissions that expressed general support for the reforms outlined in Proposal A4 as a whole included: Certainty Advice Group, *Submission 5*; M Nehme, *Submission 15*; G Elkington, *Submission 20*; The Advisers Association, *Submission 24*; ANZ Banking Group, *Submission 29*; T Peters, *Submission 30*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; D Booth, *Submission 35*; Chartered Accountants Australia and New Zealand, *Submission 40*; CPA Australia, *Submission 42*; Kit Legal, *Submission 50*.

53 P Hanrahan, *Submission 36*; Financial Services Council, *Submission 39*; Australian Banking Association, *Submission 43*; Law Council of Australia, *Submission 49*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*; Allens, *Submission 54*; MinterEllison, *Submission 55*.

54 Allens, *Submission 54*.

55 Ibid.

56 Financial Services Institute of Australasia, *Submission 53*. See also Financial Services Council, *Submission 39*; Australian Banking Association, *Submission 43*.

57 P Hanrahan, *Submission 36*. See also Law Council of Australia, *Submission 49*.

58 P Hanrahan, *Submission 36*.

59 MinterEllison, *Submission 55*.

60 ANZ Banking Group, *Submission 29*; Australian Banking Association, *Submission 43*. However, per Proposal A6, the ALRC proposes that the status of credit facilities as a 'financial product' would be clarified through the addition of 'obtains credit' to the functional definition of 'financial product'. See further Australian Law Reform Commission (n 43) [7.194]–[7.212].

56. The ALRC suggested that residual uncertainty from removal of specific inclusions could be partly addressed through the use of legislative examples and regulatory guidance.[61] However, Allens suggested that these were unsatisfactory substitutes for the clarity offered by specific inclusions.[62]

57. By contrast, Kit Legal considered that the changes contemplated by Proposal A4(a)–(c) would 'reduce the current unnecessary complexity and enhance [the] clarity, coherency and effectiveness of the legislation'.[63] Nehme agreed that the inclusion list is redundant in view of the broad functional definition of 'financial product'.[64]

58. Two submissions noted that there would need to be due consideration of how best to reframe definitions that are currently defined by reference to the inclusions in s 764A, such as the definition of 'general insurance product'.[65]

59. The Insurance Council of Australia highlighted the implications of repealing s 764A(1A)–(1B) of the *Corporations Act* in conjunction with the list of specific inclusions in subsection (1).[66] The Insurance Council noted that these provisions serve

> an important function of clarifying that insurance products that provide two or more kinds of cover (for instance in a bundled product), or provide cover for two or more kinds of asset, are to be treated as separate financial products. That distinction is essential to the effective application of the retail client requirements to general insurance, particularly regarding compliance with the Product Disclosure Statement requirements and the Product Design and Distribution Obligations. Without this provision, those requirements could apply to insurance covers or cover for assets which, if they were provided in separate contracts, would not be subject to them.[67]

60. Specific comments on the proposed removal of the ability for regulations to deem conduct to be a 'financial service' were more limited, but the proposed amendments were generally supported by submissions that addressed paragraphs (b)–(c) of Proposal A4. For example, Allens expressed support for these amendments.[68]

Proposal A4(d): Removing the incidental product exclusion

61. The proposed removal of the incidental product exclusion received mixed responses from submissions.

62. Several submissions suggested that the removal of this exclusion would reduce the complexity of the definition of 'financial product'.[69] For example, Kit Legal suggested that this amendment would 'make the journey to determining if a product is a financial product more efficient'.[70]

63. Consumer advocates also noted that the incidental product exclusion 'contributes to inconsistencies and the exploitation of loopholes by firms'.[71] They cited dealer-issued motor

61 See Australian Law Reform Commission (n 43) [7.122].
62 Allens, *Submission 54*.
63 Kit Legal, *Submission 50*.
64 M Nehme, *Submission 15*. See also P Spender and S Bottomley, *Submission 41*.
65 See P Spender and S Bottomley, *Submission 41*; Insurance Council of Australia, *Submission 52*.
66 Insurance Council of Australia, *Submission 52*.
67 Ibid.
68 Allens, *Submission 54*. Other submissions that specifically noted support for Proposal A4(b)–(c) included Certainty Advice Group, *Submission 5*; M Nehme, *Submission 15*; The Advisers Association, *Submission 24*; Australian Banking Association, *Submission 43*; Kit Legal, *Submission 50*.
69 M Nehme, *Submission 15*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; Kit Legal, *Submission 50*.
70 Kit Legal, *Submission 50*.
71 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.

vehicle warranties as an example of products that 'escape effective regulatory oversight because of the incidental product exclusion'.[72]

64. The National Insurance Brokers Association supported the removal of the exclusion, 'provided that specific exclusions and exemptions that industries currently rely upon are identified and applied, for example exemptions relating to discretionary arrangements'.[73] The Insurance Council of Australia similarly recommended a careful review of the implications of removing the exclusion prior to further progression of the proposal.[74]

65. Other submissions considered that the incidental product exclusion fulfils an important function, and has a minimal impact on the complexity of the financial product definition.[75] For example, in Allens' view:

> The exclusion does introduce an additional step in the process, but it is only one step amongst others, and the cases where the additional step requires any real consideration are, in practice, very few and far between. But where the additional step requires any real consideration, we submit that if the arrangement is, on close inspection, only incidentally a financial product, it should be excluded from the regulatory regime.[76]

Proposal A4(e): Application provisions

66. There was limited commentary in submissions on the use of 'application provisions' to vary the scope of particular provisions, thereby avoiding the need for amendments to the definitions of 'financial product' and 'financial service'. Submissions that addressed this approach were, however, generally supportive.[77]

67. The Australian Banking Association expressed support for the use of application provisions, but emphasised that these provisions should be appropriately positioned within the legislation.[78] The Insurance Council of Australia noted that the appropriateness of application provisions would depend on the obligations concerned.[79]

68. Allens noted that there are existing examples of application provisions in Chapter 7 of the *Corporations Act*, including ss 1010A, 1010B, 1016A(1) (definition of 'relevant financial product'), 1017B(2), 1017C(1), and 1017D(1)(b).[80]

69. As Howell and Brown observed, the use of application provisions would be necessary to accommodate differences in the application of Chapter 7 of the *Corporations Act* and Part 2 Div 2 of the *ASIC Act* if uniform definitions of 'financial product' and 'financial service' are enacted pursuant to Proposal A3.[81] However, Howell and Brown expressed reservations about the effect of Proposals A3 and A4 on providers of consumer credit products and services. They observed that these providers

> 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

72 Ibid.
73 National Insurance Brokers Association, *Submission 18*.
74 Insurance Council of Australia, *Submission 52*.
75 B. Ethical Funds Management, *Submission 37*; Allens, *Submission 54*; MinterEllison, *Submission 55*.
76 Allens, *Submission 54*.
77 See, eg, National Insurance Brokers Association, *Submission 18*; Kit Legal, *Submission 50*; Allens, *Submission 54*.
78 Australian Banking Association, *Submission 43*.
79 Insurance Council of Australia, *Submission 52*.
80 Allens, *Submission 54*.
81 N Howell and C Brown, *Submission 47*.

> Chapter 7, when they are going to then be exempted from all but one set of the obligations in Chapter 7.[82]

70. Howell and Brown note that the ALRC's proposals could 'facilitate a future consolidation of the consumer protection provisions in the *ASIC Act* with those in Chapter 7 [of the] *Corporations Act*, and perhaps also the [*National Consumer Credit Protection Act 2009* (Cth)]'.[83] However, they contend that consolidation of consumer credit regulation could also be appropriately pursued as part of their proposed alternative to Proposal A3.[84]

Proposal A4(f): Consolidating exemptions and exclusions in delegated legislation

71. There was broad support for the proposed consolidation of exemptions and exclusions from the definitions of 'financial product' and 'financial service' in delegated legislation.[85]

72. For example, OpenInvest submitted that

> a better defined and designed framework of exclusion from the regulatory burden which currently applies to the sector, would create an environment which would enable those who want help and assistance to find it readily from competent, qualified professionals.[86]

73. The Insurance Council of Australia considered the consolidation of exemptions and exclusions from the definitions of 'financial product' and 'financial service' 'would reduce complexity and improve navigability in relation to these important concepts'.[87]

74. The Law Council of Australia expressed support for 'a single source of truth about what is deemed in or out under [the definitions of "financial product" and "financial service"]'.[88] The Law Council was not supportive of removal of powers to exclude or exempt particular products and services. However, in accordance with Proposal A10, the ALRC has proposed consolidation (rather than removal) of exemption and exclusion powers.

75. Hanrahan noted that an alternative means of creating 'a single source of truth' would be to use a note in the legislation to highlight all the regulations or instruments made pursuant to a consolidated power to expand or narrow the scope of the definitions.[89]

76. The Financial Services Institute of Australasia considered that 'exemptions and exclusions should be consolidated within the relevant Act'.[90] They acknowledged the need to retain the capacity to grant exemptions and exclusions through delegated legislation. However, they suggested that exemptions and exclusions in delegated legislation should be reviewed on a regular basis (for example, annually) 'with a view to absorbing them into the Act'.[91]

82 Ibid.
83 Ibid.
84 See discussion of this approach above at [43].
85 M Nehme, *Submission 15*; National Insurance Brokers Association, *Submission 18*; Australian Banking Association, *Submission 43*; OpenInvest, *Submission 48*; Insurance Council of Australia, *Submission 52*; Allens, *Submission 54*.
86 OpenInvest, *Submission 48*.
87 Insurance Council of Australia, *Submission 52*.
88 Law Council of Australia, *Submission 49*.
89 P Hanrahan, *Submission 36*.
90 Financial Services Institute of Australasia, *Submission 53*.
91 Ibid.

Proposal A5: The functional definition of 'financial product'

Proposal A5 The *Corporations Act 2001* (Cth) and *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to remove the definitions of:

a. 'makes a financial investment' (s 763B *Corporations Act 2001* (Cth) and s 12BAA(4) *Australian Securities and Investments Commission Act 2001* (Cth));

b. 'manages financial risk' (s 763C *Corporations Act 2001* (Cth) and s 12BAA(5) *Australian Securities and Investments Commission Act 2001* (Cth)); and

c. 'makes non-cash payments' (s 763D *Corporations Act 2001* (Cth) and s 12BAA(6) *Australian Securities and Investments Commission Act 2001* (Cth)).

77. The majority of submissions that addressed Proposal A5 expressed support, or qualified support, for the removal of the definitions of 'makes a financial investment', 'manages financial risk', and 'makes non-cash payments'.[92]

78. Submissions in support of this proposal agreed that the definitions of these elements are unnecessary. Spender and Bottomley considered, for example, that the definitions 'do not progress the interpretation of the general definition of "financial product" in section 763A'.[93] Nehme considered that there is 'enough guidance in the case law to provide assistance regarding the interpretation of these terms'.[94]

79. Kit Legal agreed with the ALRC's analysis that the proposal would 'reduce the complexity of the definition of "financial product" by reducing the number of detailed related definitions'.[95]

80. Allens supported the repeal of these definitions, noting that

> it is unnecessary to include the definitions as an intermediary step where there is a functional definition of 'financial product' that is capable of bearing a meaning in accordance with its ordinary terms, and there are specific exclusions and inclusions.[96]

81. However, Allens considered that certain elements of the existing definitions should be imported into the functional definition of 'financial product' or preserved through exclusions.[97] Their submission outlines several elements that they consider ought to be preserved in this way. This includes, for example, 'the elements contained in section 763B and section 12BAA(4) of money or money's worth being given to another person for the purpose of generating a financial return'.[98] Allens suggests that these elements 'provide greater certainty as to the types of arrangements that are intended to be captured (or not captured)'.[99]

82. The Financial Services Council expressed support for repeal of the definitions in ss 763B–763D, as proposed in Proposal A5. However, the model outlined in their submission

92 M Nehme, *Submission 15*; National Insurance Brokers Association, *Submission 18*; G Elkington, *Submission 20*; The Advisers Association, *Submission 24*; T Peters, *Submission 30*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; D Booth, *Submission 35*; Financial Services Council, *Submission 39*; Chartered Accountants Australia and New Zealand, *Submission 40*; CPA Australia, *Submission 42*; Financial Services Institute of Australasia, *Submission 53*; Allens, *Submission 54*.

93 P Spender and S Bottomley, *Submission 41*.

94 M Nehme, *Submission 15*.

95 Kit Legal, *Submission 50*.

96 Allens, *Submission 54*.

97 See also National Insurance Brokers Association, *Submission 18*.

98 Allens, *Submission 54*.

99 Ibid.

would entail retaining the list of specific inclusions (in contrast to Proposal A4), and amending s 763A to serve 'a descriptive (not determinative) purpose'.[100]

83. The Certainty Advice Group supported removal of the definition of 'manages financial risk', but did not support removal of the other two definitions.[101]

84. Consumer advocates noted that they 'generally support the ALRC proposals relating to functional definitions of "financial product" and "credit"'.[102] They noted that this approach is preferable to an 'if it's in, it's in; if it's not in, it's out' approach, which 'incentivises firms to construct and design products in a way that falls outside of the regulatory perimeter'.[103] Nonetheless, their submission noted 'that the practical experience of innovation in the marketplace is that business activity that harms consumers often arises at or near the regulatory perimeter'.[104] Accordingly, they recommended that 'a mechanism be adopted to continuously review and update the regulatory perimeter and whether the core definitions are covering activity that the community would expect'.[105] In making this recommendation, they note the example of the 'perimeter report' which is regularly published by the Financial Conduct Authority, the relevant regulator in the United Kingdom.

85. Some submissions opposed Proposal A5 on the basis that removing the definitions of these three concepts may increase uncertainty in the application of the definition of 'financial product'.[106] For example, the Australian Banking Association considered that 'these provisions clarify the scope of s 763A rather than create complexity'.[107]

86. ANZ Banking Group noted that the natural meaning of these concepts 'may not always be intuitive or clear' and therefore users of the legislation 'would need to resolve any ambiguities through case law, or referring to the repealed definitions'.[108] They also queried whether the amendments 'may also have the effect, perhaps unintentionally, of broadening the definition of "financial product"'.[109]

87. MinterEllison was also 'cautious' about the implications of the proposal, observing:

> The definitions of these terms have received some judicial consideration and we are concerned that repealing the definitions may increase uncertainty. The definitions themselves are principles-based and not unduly complex. If they are repealed, careful consideration should be given to whether the terms themselves need any adjustment to ensure they capture what is intended to be caught. It may also be appropriate to include the definitions in regulations or rules made by the relevant conduct regulator (e.g. ASIC) or enable that to occur.[110]

100 Financial Services Council, *Submission 39*.
101 Certainty Advice Group, *Submission 5*.
102 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
103 Ibid.
104 Ibid.
105 Ibid.
106 ANZ Banking Group, *Submission 29*; Australian Banking Association, *Submission 43*; Law Council of Australia, *Submission 49*; MinterEllison, *Submission 55*.
107 Australian Banking Association, *Submission 43*. See also Law Council of Australia, *Submission 49*.
108 ANZ Banking Group, *Submission 29*.
109 Ibid.
110 MinterEllison, *Submission 55*.

Proposal A6: A functional definition of 'credit'

Proposal A6 In order to implement Proposal A3:

a. reg 7.1.06 of the *Corporations Regulations* 2001 (Cth) and reg 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth) should be repealed;

b. a new paragraph 'obtains credit' should be inserted in s 763A(1) of the *Corporations Act 2001* (Cth) and in s 12BAA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth); and

c. a definition of 'credit' that is consistent with the definition contained in the *National Consumer Credit Protection Act 2009* (Cth) should be inserted in the *Corporations Act 2001* (Cth) and in the *Australian Securities and Investments Commission Act 2001* (Cth).

88. Submissions in response to Proposal A6 were broadly supportive of the aim of aligning definitions of 'credit' across the *Corporations Act*, *ASIC Act*, and *National Consumer Credit Protection Act 2009* (Cth) ('*NCCP Act*').[111] Some submissions expressed general support for the proposed addition of 'obtains credit' to the definition of 'financial product', the repeal of the existing definitions of 'credit facility', and the introduction of a functional definition of credit that aligns with the *NCCP Act*.[112] Other submissions expressed reservations about particular aspects of the proposed reforms, or noted matters that will require further consideration.[113]

89. In expressing support for Proposal A6, or aspects thereof, submissions endorsed the desirability of important terms like 'credit' having a consistent meaning throughout financial services legislation.[114] The Australian Banking Association commented, for example, that

> the differing definitions of 'credit' in Chapter 7 of the *Corporations Act* and the *NCCP Act* (as well as in the *Privacy Act 1988* (Cth), and various regulations) create unwarranted confusion and uncertainty — this results in unnecessary complexity, and there is no clear rationale for the varying positions.[115]

90. The proposed use of the *NCCP Act* definition as the starting point for this uniform definition was generally supported.[116] Consumer advocates noted that the definition of credit as 'any contract, arrangement or understanding where a debt is deferred … aligns with the community understanding of credit'.[117]

111 Australian Retail Credit Association, *Submission 9*; M Nehme, *Submission 15*; G Elkington, *Submission 20*; The Advisers Association, *Submission 24*; ANZ Banking Group, *Submission 29*; T Peters, *Submission 30*; D Booth, *Submission 35*; Financial Services Council, *Submission 39*; CPA Australia, *Submission 42*; Australian Banking Association, *Submission 43*; Mortgage & Finance Association of Australia, *Submission 44*; Law Council of Australia, *Submission 49*; Kit Legal, *Submission 50*; Financial Services Institute of Australasia, *Submission 53*; Allens, *Submission 54*; MinterEllison, *Submission 55*.

112 M Nehme, *Submission 15*; G Elkington, *Submission 20*; The Advisers Association, *Submission 24*; ANZ Banking Group, *Submission 29*; T Peters, *Submission 30*; D Booth, *Submission 35*. CPA Australia indicated that they 'strongly support' this proposal: CPA Australia, *Submission 42*.

113 Australian Retail Credit Association, *Submission 9*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; Financial Services Council, *Submission 39*; P Spender and S Bottomley, *Submission 41*; Australian Banking Association, *Submission 43*; N Howell and C Brown, *Submission 47*; Law Council of Australia, *Submission 49*; Financial Services Institute of Australasia, *Submission 53*; Allens, *Submission 54*.

114 M Nehme, *Submission 15*; MinterEllison, *Submission 55*.

115 Australian Banking Association, *Submission 43*.

116 See, eg, Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; Australian Banking Association, *Submission 43*; Law Council of Australia, *Submission 49*; Financial Services Institute of Australasia, *Submission 53*; Allens, *Submission 54*.

117 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.

91. However, there were questions about how the scope of existing regulation would be maintained. Submissions noted that key issues to resolve would include how the proposed reforms would appropriately accommodate:

- products or facilities that are specifically included in existing definitions of 'credit facility' and 'credit', but may not fall within the general definition of 'credit';[118] and
- products or facilities that would fall within a functional definition of 'credit', but are currently excluded from regulation under the *NCCP Act*.[119]

92. Allens noted, for example, that the specific inclusion of various facilities in the *ASIC Regulations* that arguably do not fall within the general definition of 'credit' serves

> an important consumer protection purpose by ensuring consumers who enter into contracts for these financial products or receive financial services in relation to them have the benefit of those consumer protection provisions under Division 2 Part 2 of the ASIC Act, particularly those in subdivision BA relating to unfair contract terms.[120]

93. The ALRC suggested that this issue could be dealt with through the use of application provisions in the *ASIC Act* to apply the consumer protection provisions to 'guarantees, consumer leases, and other credit-related activities currently captured by the definition of "credit facility"'.[121] Allens and MinterEllison expressed support for this approach.[122] However, Howell and Brown considered that this may 'add to the complexity, and any such approach would need to be alert to the potential for regulatory gaps and arbitrage'.[123] Further, they note it would also 'seem to require an amendment to s 131A *Competition and Consumer Act* to exclude these additional products from the [*Australian Consumer Law*]'.[124]

94. As several submissions noted, the definition of credit in s 3(1) of the *National Credit Code* (Schedule 1 to the *NCCP Act*) is affected by other provisions, including ss 5 and 6 of the *National Credit Code*, and a range of regulations in the *National Consumer Credit Protection Regulations 2010* (Cth).[125] Submissions queried whether, and how, these provisions would be reflected in a uniform definition of credit across the *ASIC Act*, *NCCP Act*, and *Corporations Act*.

95. Allens advised, for example, that the ALRC consider 'whether the various provisions of the National Credit Code … which play a role in defining "credit" under the NCCP Act, should be replicated as part of the general definition'.[126]

96. Consumer advocates were of the view that the policy basis for existing exemptions in the *National Credit Code* is 'unclear', noting that they 'have spawned a range of business models and credit products that escape regulation'.[127]

97. Howell and Brown suggested that 'reliance on these types of exclusions in the NCCPA application is problematic for developing consistent and appropriate regulation of consumer credit products'.[128]

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118 N Howell and C Brown, *Submission 47*; Allens, *Submission 54*; MinterEllison, *Submission 55*.
119 Finance Brokers Association of Australia, *Submission 26*; N Howell and C Brown, *Submission 47*; Law Council of Australia, *Submission 49*; Allens, *Submission 54*.
120 Allens, *Submission 54*.
121 Australian Law Reform Commission (n 43) [7.210].
122 Allens, *Submission 54*; MinterEllison, *Submission 55*.
123 N Howell and C Brown, *Submission 47*.
124 Ibid.
125 Finance Brokers Association of Australia, *Submission 26*; N Howell and C Brown, *Submission 47*; Law Council of Australia, *Submission 49*; Allens, *Submission 54*. Howell and Brown also highlighted the role of deeming provisions such as ss 9–12 of the *National Credit Code* in clarifying potential uncertainty in the application of the general definition to hire-purchase agreements, contracts for sale of land by instalments, and sale of goods by instalments.
126 Allens, *Submission 54*.
127 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
128 N Howell and C Brown, *Submission 47*.

98. The Australian Retail Credit Association additionally emphasised that

> the ALRC should be mindful of, and ensure consistency with, the definition of 'credit' as contained in other legislative instruments such as the Privacy Act, so as to avoid legal uncertainty and/or unintended consequences.[129]

99. As the Australian Retail Credit Association highlighted, the *Privacy Act 1988* (Cth) ('*Privacy Act*') 'adopts an expansive approach when defining "credit"'.[130] This means that products that are not regulated by the *NCCP Act*, such as buy-now-pay-later arrangements, may be captured by credit reporting requirements under the *Privacy Act*.

100. Some submissions expressed reservations about the addition of 'obtains credit' to the definition of 'financial product'.[131] For example, Spender and Bottomley considered that this 'may potentially conflate the regulation of financial and credit products', which 'may lead to consequential unintended effects'.[132] They noted that:

> Traditionally there was a distinction drawn in Australian law between the protection of investors and consumers (including consumers of credit products) … The regulation of the activities of investors and consumers has increasingly converged but has not been completely eliminated because of the underlying policy that investors and comparable consumers of financial products (such as derivatives) assume greater risk than consumers.[133]

101. The Financial Services Institute of Australasia considered that the necessity of incorporating exclusions to various parts of the *Corporations Act* if credit were added to the definition of 'financial product' would 'not achieve the goal of reduced complexity'.[134]

102. A number of submissions endorsed the ALRC giving further consideration to the potential consolidation of aspects of the *NCCP Act*, Chapter 7 of the *Corporations Act,* and the *ASIC Act*.[135] However, as the Australian Retail Credit Association observed, it will be important for the ALRC to 'provide sufficient specificity and clarity in relation to the proposal, so as to enable stakeholders to provide their considered and informed feedback'.[136] For example, they seek clarity on whether provisions of other related legislation might also be consolidated, such as Part IIIA of the *Privacy Act*.

103. Consumer advocates noted that it would be helpful for the ALRC to highlight any international precedents for consolidation of the regulatory regimes for credit and financial products.[137]

104. The Australian Banking Association observed that:

> The possibility of at least consolidating the content of Chapter 7 of the *Corporations Act*, the … *NCCP Act* … and the … *ASIC Act* … into a single Act, to be renamed the *Financial Services and Markets Act* (or similar), would significantly improve navigability, and would benefit consumers, regulators, and all participants in the financial services industry, as well as reducing the length and complexity of the *Corporations Act* itself. Of course, this form of consolidation would also lead to

129 Australian Retail Credit Association, *Submission 9*. See also Law Council of Australia, *Submission 49*.
130 Australian Retail Credit Association, *Submission 9*.
131 See Financial Services Council, *Submission 39*; P Spender and S Bottomley, *Submission 41*; N Howell and C Brown, *Submission 47*; Financial Services Institute of Australasia, *Submission 53*.
132 P Spender and S Bottomley, *Submission 41*.
133 Ibid.
134 Financial Services Institute of Australasia, *Submission 53*.
135 See, eg, ANZ Banking Group, *Submission 29*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; Australian Banking Association, *Submission 43*; Mortgage & Finance Association of Australia, *Submission 44*; Kit Legal, *Submission 50*. The Financial Services Institute of Australasia considered that this would require a separate substantive law review: Financial Services Institute of Australasia, *Submission 53*.
136 Australian Retail Credit Association, *Submission 9*.
137 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.

> significant transition costs for financial services providers and other stakeholders and, as a result, a detailed and structured consultation would be necessary, as highlighted above.[138]

105. The ALRC will revisit the definition of credit, and the potential consolidation of relevant legislation, in Interim Report C.

Disclosure

106. Proposals A7 and A8 aim to reduce unnecessary complexity in Chapter 7 of the *Corporations Act*, improve the navigability of the law, and promote meaningful compliance with the substance and intent of the law by:

- introducing an alternative label for 'responsible person' in Part 7.9 to more accurately reflect the substance of the definition and limit potential confusion with the concept of 'regulated person', particularly in circumstances where they overlap; and
- coupling the obligation to give financial product disclosure with an outcomes-based standard that reflects the underlying policy objective, in order to provide greater flexibility in the application and design of disclosure requirements.

Proposal A7: Replacing 'responsible person' with 'preparer'

Proposal A7 Sections 1011B and 1013A(3) of the *Corporations Act 2001* (Cth) should be amended to replace 'responsible person' with 'preparer'.

107. The majority of submissions that addressed Proposal A7 expressed support for the replacement of 'responsible person' with 'preparer'.[139]

108. Kit Legal, for example, noted their agreement with the view that 'the term "preparer" would better reflect the role of "responsible person" as the person by whom, or on whose behalf, a PDS for a financial product is to be prepared'.[140] They considered that this amendment would 'assist in clarifying the roles and responsibilities in the preparation of the PDS'.[141]

109. Nehme suggested that there should be broader reform to address the issue targeted by this proposal:

> I agree with the premise that we need consistency in the way which certain people are referred to across legislations. Accordingly, I recommend that the review goes further than the suggested proposal and consider ways to harmonise the terms used in the *Corporations Act 2001* (Cth) and the other Federal legislations. Further, the practice of using 'tags' should be discontinued and a more consistent approach should be adopted to lessen the complexity of the law. Consequently, a review of all tag words in Chapter 7 should be conducted.[142]

110. MinterEllison proposed an alternative means of addressing potential confusion generated by the use of 'responsible person', noting 'that use of the term "preparer" has its own confusion when it is intended to mean the person responsible for the Product Disclosure Statement (PDS) rather than the person who did in fact prepare it on their behalf'.[143] In their view, the 'simplest

138 Australian Banking Association, *Submission 43* (citations omitted).
139 Financial Planning Association of Australia, *Submission 10*; National Insurance Brokers Association, *Submission 18*; G Elkington, *Submission 20*; The Advisers Association, *Submission 24*; Financial Services Council, *Submission 39*; Kit Legal, *Submission 50*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*.
140 Kit Legal, *Submission 50*. See also Financial Planning Association of Australia, *Submission 10*, noting that 'preparer' is 'more reflective of the purpose of Part 7.9'.
141 Kit Legal, *Submission 50*.
142 M Nehme, *Submission 15*.
143 MinterEllison, *Submission 55*.

approach may in fact be to refer to the "issuer" or "seller" of the product as that is the person who is responsible for preparing the PDS and liable for its contents'.[144]

111. Hanrahan did not oppose the proposed change, but emphasised that there 'is a bigger problem with this part of the Act'.[145]

112. The primary basis for opposition to Proposal A7 was that it was 'not clear that it resolves any uncertainty'.[146] The Law Council of Australia contended that replacing 'one defined term for another would not simplify the law nor address its underlying issues'.[147] It also noted the need to consider the interaction of any replacement term with the use of 'preparer' and related concepts in the liability provisions for Part 7.9.

113. Chartered Accountants ANZ considered that the replacement of 'responsible person' with 'preparer' would have more fundamental implications, noting that the latter term does not carry the connotation of the person being accountable for the information contained in a PDS.[148] In their view, the existing terminology conveys to retail clients that the person 'has obligations to be accurate and can be held accountable'.[149] Accordingly, they oppose 'diluting the term "responsible person" to "preparer"'.[150]

114. The ALRC will further consider drafting issues relating to disclosure obligations in Interim Report B.

Proposal A8: An outcomes-based standard for disclosure

Proposal A8 The obligation to provide financial product disclosure in Part 7.9 of the *Corporations Act 2001* (Cth) should be reframed to incorporate an outcomes-based standard of disclosure.

115. The majority of submissions that addressed Proposal A8 expressed support for further consideration of how an outcomes-based standard of disclosure could reduce the complexity of disclosure requirements and improve the efficacy of disclosure documents.[151]

116. In expressing their support for the adoption of an outcomes-based standard of disclosure, Spender and Bottomley noted:

> Most observers of the disclosure regime in Chapter 7 would say that it has failed to deliver the policy that underpinned its introduction based on the recommendations of the Wallis Report (particularly the consumer protection aspect) and this amendment would allow the disclosure regime to work more effectively.[152]

144 Ibid.
145 P Hanrahan, *Submission 36*.
146 Australian Banking Association, *Submission 43*. See also Law Council of Australia, *Submission 49*.
147 Law Council of Australia, *Submission 49*.
148 Chartered Accountants Australia and New Zealand, *Submission 40*.
149 Ibid.
150 Ibid.
151 See, eg, Certainty Advice Group, *Submission 5*; Medical Insurance Group Australia, *Submission 7*; Financial Planning Association of Australia, *Submission 10*; M Nehme, *Submission 15*; National Insurance Brokers Association, *Submission 18*; The Advisers Association, *Submission 24*; SMSF Association, *Submission 28*; T Peters, *Submission 30*; Chartered Accountants Australia and New Zealand, *Submission 40*; P Spender and S Bottomley, *Submission 41*; Association of Financial Advisers, *Submission 45*; Avant Mutual, *Submission 46*; Law Council of Australia, *Submission 49*; Financial Services Institute of Australasia, *Submission 53*; MinterEllison, *Submission 55*.
152 P Spender and S Bottomley, *Submission 41*. Other supportive submissions included Certainty Advice Group, *Submission 5*; SMSF Association, *Submission 28*; Avant Mutual, *Submission 46*; Kit Legal, *Submission 50*.

117. Dr Peters noted his support for 'the increased flexibility of an outcomes-based approach which will allow for more innovative and effective approaches to disclosure'.[153]

118. The Association of Financial Advisers commented that:

> The current disclosure regime leads to placing a predominant focus upon definitive compliance and less of a focus upon the consumer outcome. Different clients have different preferences for how they consume information. We believe that it is appropriate to more carefully consider how clients want to receive this disclosure information, and what is most important to them.[154]

119. In their submission, Dr Schmulow and Dr Dreyfus highlighted the linguistic complexity of s 1012C of the *Corporations Act*, one of the myriad provisions that set out the obligation to provide disclosure under Part 7.9.[155]

120. Additional issues raised by submissions in relation to disclosure requirements included:

- the relationship between existing product disclosure requirements and the design and distribution obligations;[156]
- the lack of coherence in the regulatory boundaries between disclosure requirements under Chapter 6D (prospectus) and Part 7.9 (Product Disclosure Statements);[157] and
- the need for appropriate regulation of advertising and marketing.[158]

121. There was limited opposition to further consideration of an outcomes-based approach to disclosure. However, the Financial Services Council considered that such an approach could 'add a level of uncertainty for industry'.[159] The Australian Banking Association commented that:

> an 'outcomes-based' standard may be more likely to increase, not decrease, the cost and complexity of compliance, and will not necessarily reduce the volume of information required to be provided to consumers or make it more likely that they will use or read disclosure materials.[160]

122. A number of submissions acknowledged the potential benefits of an outcomes-based standard of disclosure, but noted that the value and workability of such a standard will depend on how it is implemented. Submissions noted, for example, the need for an appropriate balance between higher-level obligations, and tailored requirements.[161]

123. Submissions also noted the importance of meaningful consultation and testing throughout the process of developing and implementing an outcomes-based disclosure standard.[162]

124. The ALRC intends to publish a Background Paper later in 2022 that will further explore the potential role and framing of an outcomes-based standard for disclosure. Specific feedback received in relation to Proposal A8 will be considered further as part of this paper.

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153 T Peters, *Submission 30*.
154 Association of Financial Advisers, *Submission 45*. See also the discussion of different consumer learning preferences in Financial Planning Association of Australia, *Submission 10*.
155 A Schmulow and S Dreyfus, *Submission 56*.
156 Financial Planning Association of Australia, *Submission 10*; P Hanrahan, *Submission 36*; Australian Banking Association, *Submission 43*.
157 P Hanrahan, *Submission 36*; Law Council of Australia, *Submission 49*.
158 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
159 Financial Services Council, *Submission 39*.
160 Australian Banking Association, *Submission 43*. See also ANZ Banking Group, *Submission 29*.
161 See, eg, Medical Insurance Group Australia, *Submission 7*; Law Council of Australia, *Submission 49*; MinterEllison, *Submission 55*.
162 See, eg, M Nehme, *Submission 15*; National Insurance Brokers Association, *Submission 18*; The Advisers Association, *Submission 24*; D Booth, *Submission 35*; Chartered Accountants Australia and New Zealand, *Submission 40*.

Exclusions, exemptions, and notional amendments

125. Proposals A9 and A10, and Question A11, outline reforms to establish a new legislative architecture that aims to facilitate:

- significant simplification;
- greater transparency and navigability; and
- an appropriate arrangement of principles and prescription.

126. Although Proposals A9 and A10, and Question A11, were presented separately, the ALRC views these reforms as a package that would facilitate the development of an alternative legislative architecture for corporations and financial services laws. Implementation of one proposal in the absence of broader reforms would be ineffective and potentially have significant unintended consequences. This was identified by some submissions. A visual representation of the combined effect of the reforms outlined in Proposals A9 and A10, and Question A11, is included in Appendix B.

127. In summary, the proposed legislative architecture would replace all existing exclusion, exemption, and notional amendment powers with respect to Chapter 7 of the *Corporations Act* with a new sole power to make exclusions and exemptions in a single, consolidated legislative instrument. All powers to omit, modify, or vary provisions of Chapter 7 of the *Corporations Act* through notional amendments would be replaced by a single power to make 'rules' in legislative instruments regarding specified matters.

128. Proposal A12 suggests an interim measure to improve the visibility and accessibility of material that is currently implemented by way of notional amendments to the *Corporations Act* and *Corporations Regulations*.

Proposals A9 and A10: Exclusions, exemptions, and notional amendments

Proposal A9 The following existing powers in the *Corporations Act 2001* (Cth) should be removed:

a. powers to grant exemptions from obligations in Chapter 7 of the Act by regulation or other legislative instrument; and

b. powers to omit, modify, or vary ('notionally amend') provisions of Chapter 7 of the Act by regulation or other legislative instrument.

Proposal A10 The *Corporations Act 2001* (Cth) should be amended to provide for a sole power to create exclusions and grant exemptions from Chapter 7 of the Act in a consolidated legislative instrument.

129. The majority of submissions that addressed Proposals A9 and A10 were supportive of:

- the repeal of existing powers to notionally amend provisions of Chapter 7 of the *Corporations Act*; and
- the replacement of existing powers to grant exemptions from Chapter 7 with a sole power to create exclusions and grant exemptions in a consolidated legislative instrument.[163]

163 See, eg, Financial Planning Association of Australia, *Submission 10*; Australian Restructuring Insolvency & Turnaround Association, *Submission 14*; National Insurance Brokers Association, *Submission 18*; Stockbrokers and Financial Advisers

130. Submissions generally agreed that the existing powers have been a driver of complexity in the legislative framework. For example, the Stockbrokers and Financial Advisers Association noted that 'exclusions, exemptions and notional amendments make the law difficult to navigate, make the regulatory regime opaque and compound the existing level of complexity in the legislative regime'.[164]

131. Some submissions nonetheless emphasised that the existing powers are a necessary component of the current framework. For example, Hanrahan considered that exemptions, modifications, and 'crafted regimes' are necessary for the functioning of Chapter 7.[165] In her submission, she notes that the 'dynamic nature of the financial sector combined with the overinclusive and untailored nature of Chapter 7' makes it necessary to enable 'timely case-by-case or class adjustments'.[166] The ALRC's proposed approach aims to accommodate the need for flexibility within the legislative framework through the replacement of existing exemption and modification powers with a consolidated exemption power (Proposal A10), and a power to make 'rules' (Question A11).

132. Further, as Chartered Accountants ANZ noted in their submission, if 'the law is clear and easy to comply with, there will be less need for ASIC to issue [legislative instruments and regulatory guidance]'.[167] The ALRC aims to make recommendations that would reduce the need for reliance on exemptions and exclusions as part of this Inquiry, in addition to increasing the navigability and transparency of necessary exemptions and exclusions.

Removal of notional amendment powers

133. Submissions noted that powers to notionally amend the law raise principled rule of law issues, as well as practical challenges for navigating regulatory requirements. For example, King Irving observed that:

> Notional amendments have inadvertently created a 'shadow' legislative system. Licensees must be aware of the obligations under the Corporations Act 2001. They must locate, analyse and reconcile these obligations with ASIC instruments which potentially, notionally amend their rights and obligations under the Corporations Act 2001. The frequency with which the notional amendment powers have been exercised amplifies this issue.[168]

134. Doug Clark Consulting highlighted an example of a notional amendment that replaces the 'further market related advice' exception in relation to Statements of Advice with a broader 'further advice' exception.[169] They note that the relevant amendments have been in effect since 2005, yet 'for the uninitiated user, if they look-up the sub-section, they see the (apparently) operative provisions of [further market related advice]'.[170]

135. Dharmananda submitted that 'it is highly questionable whether there should be any power to notionally amend Chapter 7 provisions'.[171] She noted that such powers are 'in effect, a type

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Association, *Submission 19*; G Elkington, *Submission 20*; King Irving, *Submission 22*; The Advisers Association, *Submission 24*; SMSF Association, *Submission 28*; Institute of Public Accountants, *Submission 31*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; D Booth, *Submission 35*; J Dharmananda, *Submission 38*; CPA Australia, *Submission 42*; Australian Banking Association, *Submission 43*; Kit Legal, *Submission 50*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*. Certainty Advice Group supported Proposal A9, but not Proposal A10: Certainty Advice Group, *Submission 5*.

164 Stockbrokers and Financial Advisers Association, *Submission 19*.

165 P Hanrahan, *Submission 36*. See also Australian Financial Markets Association, *Submission 6*.

166 P Hanrahan, *Submission 36*.

167 Chartered Accountants Australia and New Zealand, *Submission 40*. See also Association of Financial Advisers, *Submission 45*.

168 King Irving, *Submission 22*.

169 Doug Clark Consulting, *Submission 2*. See further *Corporations Act 2001* (Cth) s 946B(1); *Corporations Regulations 2001* (Cth) regs 7.7.10B, 7.7.10C, 7.7.10AE.

170 Doug Clark Consulting, *Submission 2*.

171 J Dharmananda, *Submission 38*.

of Henry VIII clause which effectively permits amendment of a statute, without the appropriate parliamentary scrutiny required for statutory amendment'.[172]

136. By contrast, ANZ Banking Group did not support the proposed removal of the power to notionally amend provisions of Chapter 7 of the *Corporations Act*, noting:

> We acknowledge that the power of a regulator to notionally amend legislation is not common internationally, and gives discretion to the regulator to alter the regulatory regime. However, we think it is important that there be a mechanism for the legislation to be amended promptly should the need arise. Such a mechanism should be retained in some form.[173]

137. Nehme did not consider that the existing powers to grant exemptions and notionally amend Chapter 7 were a source of complexity, commenting:

> I question the need for such a change. In regard to the power to grant exemptions, omit, modify or vary the rules, this power should be a reflection of the intention of the Parliament and as such should be linked to the necessary provisions in the Statute itself. It does not really add any complexity to the legislation. The complexity comes elsewhere when people have to go to another piece of rules to figure out the exemption regime for instance. There are more appropriate investments that can be made that would lead to simplification of our financial services laws. This is not one of them.[174]

A sole power to grant exclusions and exemptions

138. The repeal and replacement of powers to grant exemptions and create exclusions in accordance with Proposals A9 and A10 is intended to facilitate the consolidation of exclusions and class exemptions 'in a single "layer" of the legislative hierarchy and in a single location'.[175] Submissions were in general agreement that creating a consolidated legislative instrument for exemptions and exclusions would make the law easier to navigate and understand.[176]

139. Nonetheless, submissions cautioned that care will need to be taken in the design and maintenance of the legislative instrument to ensure these benefits are realised.[177] MinterEllison noted that consolidation within a single instrument 'does not guarantee the navigability of the instrument', citing the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* as an example of a consolidated legislative instrument which is 'not always organised in a clear or consistent manner'.[178]

140. Some submissions also expressed views on issues in relation to the design of the replacement power, including:

- the criteria for the exercise of the power;[179]
- whether the power should be vested with the Minister or ASIC;[180]
- requirements for consultation and transparency;[181] and

172 Ibid. The Law Council of Australia also highlighted the potential inconsistency of existing powers with the separation of powers and the rule of law: Law Council of Australia, *Submission 49*.
173 ANZ Banking Group, *Submission 29*.
174 M Nehme, *Submission 15*.
175 Australian Law Reform Commission (n 43) [10.43].
176 See, eg, Stockbrokers and Financial Advisers Association, *Submission 19*; King Irving, *Submission 22*; J Dharmananda, *Submission 38*; Kit Legal, *Submission 50*.
177 Financial Services Council, *Submission 39*; Association of Financial Advisers, *Submission 45*; Insurance Council of Australia, *Submission 52*; MinterEllison, *Submission 55*.
178 MinterEllison, *Submission 55*.
179 See, eg, King Irving, *Submission 22*; Insurance Council of Australia, *Submission 52*.
180 See, eg, Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; Financial Services Council, *Submission 39*; Financial Services Institute of Australasia, *Submission 53*.
181 See, eg, Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; Chartered Accountants Australia and New Zealand, *Submission 40*.

- the potential involvement of a new policy body based on the former Corporations and Markets Advisory Committee.[182]

141. Allens submitted that 'considerable further work is needed to develop a more coherent and developed structure for the proposed changes'.[183] This will be a focus of Interim Report B in this Inquiry.

142. The Law Council of Australia suggested that the consolidation of secondary legislation may be a matter that should be resolved through the *Legislation Act 2003* (Cth), which is currently under review.[184]

143. The Insurance Council of Australia raised the lack of consistency in the availability of exemption powers between the *Corporations Act*, *ASIC Act*, and *Insurance Contracts Act 1984* (Cth).[185]

144. Submissions also noted that the role of class exemptions differs from that of individual, case-by-case relief from the regulator.[186] As these submissions observed, it would be inappropriate for individual relief to be included within the consolidated legislative instrument. Proposals A9 and A10 are not intended to address individual relief powers, as highlighted in the model illustrated in Appendix B.

145. The ALRC will give further consideration to the design of the replacement power to grant exemptions, as well as the role of individual relief powers as part of Interim Report B. Feedback received in response to Proposals A9 and A10 will inform the ALRC's analysis in this regard.

Question A11: Managing complexity through the use of rules

Question A11 In order to implement Proposals A9 and A10:

a. Should the *Corporations Act 2001* (Cth) be amended to insert a power to make thematically consolidated legislative instruments in the form of 'rules'?

b. Should any such power be granted to the Australian Securities and Investments Commission?

Question A11(a): Introduction of a power to make 'rules'

146. There was strong support in submissions for the introduction of a power to make thematically consolidated legislative instruments in the form of 'rules'.[187]

147. Submissions agreed that the introduction of such a power would enhance comprehension and navigation of the law. For example, the Advisers Association commented that the introduction of this power 'will support a better principled legislative hierarchy and a shorter Corporations Act, making it easier to understand and navigate'.[188]

182 Australian Financial Markets Association, *Submission 6*; IG Australia, *Submission 33*.
183 Allens, *Submission 54*.
184 Law Council of Australia, *Submission 49*. See also P Hanrahan, *Submission 36*.
185 Insurance Council of Australia, *Submission 52*.
186 P Hanrahan, *Submission 36*; Law Council of Australia, *Submission 49*.
187 See, eg, National Insurance Brokers Association, *Submission 18*; G Elkington, *Submission 20*; King Irving, *Submission 22*; The Advisers Association, *Submission 24*; Institute of Public Accountants, *Submission 31*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; B. Ethical Funds Management, *Submission 37*; P Spender and S Bottomley, *Submission 41*; CPA Australia, *Submission 42*; Australian Banking Association, *Submission 43*; Law Council of Australia, *Submission 49*; Kit Legal, *Submission 50*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*; Allens, *Submission 54*; MinterEllison, *Submission 55*.
188 The Advisers Association, *Submission 24*.

148. Consumer advocates noted their support for 'the transparency that a rulebook could create'.[189] They highlight the National Electricity Rules, which are published online by the Australian Energy Market Commission, as 'a good example of an easily navigable rulebook'.[190]

149. The Law Council of Australia indicated that it 'strongly supports the idea of rules — in the form of a thematically consolidated legislative instrument — combining all financial services-related regulations and other modifications'.[191] In relation to the structure of these rules, the Law Council considered 'it may be best to envision the financial services rules as one chapter (or several chapters) of what would eventually be a larger book of rules for the Corporations Act in its entirety'.[192]

150. In her submission, Hanrahan outlines a potential model for reorganising the *Corporations Act* around thematic 'books' or schedules (such as 'insolvency', 'financial markets operators and participants', and 'financial services providers'), which could each be underpinned by a set of rules.[193]

151. The Association of Financial Advisers recommended the use of sector-specific rule books rather than a single rule book that covered all sectors, noting the breadth of sectors that are covered by the *Corporations Act*.[194]

152. B. Ethical Funds Management considered that 'the scope of the proposed rules should be expanded to cover no action positions taken by ASIC'.[195] Other submissions raised the interaction of 'rules' with ASIC regulatory guidance as an area for further clarification.[196]

153. In relation to the terminology of 'rules', the Institute of Public Accountants noted its support for 'the use of the word "rules", which is easily understandable for regulated entities and the public'.[197]

154. By contrast, Dharmananda considered that 'there are challenges with legislative instruments being rules rather than regulations'.[198] To ensure a high standard of drafting, she suggested that it is preferable to rely on regulations, which must be drafted by the Office of Parliamentary Counsel. She suggested that absent empirical evidence, 'it is not clear that "rules" have any more communicative value about legal weight than 'regulations', a long existing and well-established form of delegated legislation'.[199]

155. The Financial Planning Association of Australia similarly considered that it is 'unclear as to why a separate term, such as "rules" needs to be referenced if these would be included in legislative instruments'.[200]

Question A11(b): Granting power to make 'rules' to ASIC

156. The majority of submissions that commented on Question A11(b) expressed general support for granting the proposed rule-making power to ASIC, as the specialist regulator in this area.[201]

189 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
190 Ibid.
191 Law Council of Australia, *Submission 49*.
192 Ibid.
193 P Hanrahan, *Submission 36* (attachment).
194 Association of Financial Advisers, *Submission 45*. See also Financial Planning Association of Australia, *Submission 10*.
195 B. Ethical Funds Management, *Submission 37*.
196 Financial Planning Association of Australia, *Submission 10*; Association of Financial Advisers, *Submission 45*.
197 Institute of Public Accountants, *Submission 31*.
198 J Dharmananda, *Submission 38*.
199 Ibid.
200 Financial Planning Association of Australia, *Submission 10*.
201 See, eg, National Insurance Brokers Association, *Submission 18*; SMSF Association, *Submission 28*; King Irving, *Submission 22*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; Chartered Accountants Australia and New Zealand, *Submission 40*; Kit Legal, *Submission 50*; Financial

157. King Irving commented, for example, that:

> As the industry regulator, ASIC has considerable industry and market insight. ASIC can anticipate and rapidly respond to new and unique business models, changing industry practices and financial technologies. Its position allows it to do so with an understanding of the legal limitations and implications of proposed rules and understanding of their practicality.[202]

158. Consumer advocates suggested that 'regulatory decision-making by an independent and transparent regulator can aid effective administration of law, and remove opportunities for politicisation'.[203]

159. Some submissions considered that ASIC should be supported, or subject to oversight, by an advisory body in its exercise of such a power.[204] The Australian Banking Association considered that the power 'could be appropriately granted to either the Treasury or ASIC, so long as it is accompanied by mandatory consultation requirements and a mechanism for disallowance by Parliament'.[205]

160. There was also support for the exercise of the power being subject to consultation requirements,[206] parliamentary disallowance,[207] and Ministerial oversight or consent.[208] In their joint submission, Schmulow and Dreyfus emphasised the importance of avoiding unnecessary prescription in the exercise of delegated powers.[209] They highlight the regulations issued by the South African regulator as an example of best practice, noting that these regulations 'add granularity only where strictly necessary'.[210]

161. Some submissions expressly opposed granting the proposed power to make 'rules' to ASIC. The Institute of Public Accountants and CPA Australia each expressed a preference for the power being granted to the responsible Minister and being subject to parliamentary oversight.[211]

162. In noting its opposition to ASIC being granted such a power, the Institute of Public Accountants expressed the view that 'ASIC has a history of inadequately considering stakeholder feedback and input'.[212] CPA Australia considered that 'there should be separation between the "rule makers" and the "rule enforcers"'.[213]

163. The Law Council of Australia recommended 'the establishment of a new body, the Corporations Rules Committee (CRC), in order to promulgate the content of the rule book'.[214] The Law Council considered that the creation of 'yet another regulatory body' would be justified because

> the Corporations Act rule book will represent a core method of governance for the financial services industry and Australian business law generally (if all Chapters are covered). The creation and administration of the rule book should have the funding, focus and expertise that such a significant role deserves.[215]

Services Institute of Australasia, *Submission 53*; Allens, *Submission 54*; MinterEllison, *Submission 55*.

202 King Irving, *Submission 22*. See also Kit Legal, *Submission 50*; Financial Services Institute of Australasia, *Submission 53*.
203 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
204 Australian Financial Markets Association, *Submission 6*; King Irving, *Submission 22*; IG Australia, *Submission 33*; Kit Legal, *Submission 50*; Allens, *Submission 54*.
205 Australian Banking Association, *Submission 43*.
206 Financial Planning Association of Australia, *Submission 10*; King Irving, *Submission 22*; Chartered Accountants Australia and New Zealand, *Submission 40*; Australian Banking Association, *Submission 43*.
207 Australian Banking Association, *Submission 43*; Financial Services Institute of Australasia, *Submission 53*.
208 National Insurance Brokers Association, *Submission 18*; Kit Legal, *Submission 50*.
209 A Schmulow and S Dreyfus, *Submission 56*.
210 Ibid.
211 Institute of Public Accountants, *Submission 31*; CPA Australia, *Submission 42*.
212 Institute of Public Accountants, *Submission 31*.
213 CPA Australia, *Submission 42*. See also Law Council of Australia, *Submission 49*.
214 Law Council of Australia, *Submission 49*.
215 Ibid.

164. In relation to the membership of such a body, the Law Council considered that

> ASIC can make an invaluable contribution to the rule development process due to its direct experience of what can go wrong in the financial services industry and its roles in administration and enforcement, including processing relief applications.[216]

165. Accordingly, the Law Council suggested that initially 'the CRC be comprised of two members from ASIC, two from Treasury and a Chair who is an independent expert, perhaps reporting to the Senate's Economics Legislation Committee'.[217]

Proposal A12: Steps towards implementation

Proposal A12 As an interim measure, the Australian Securities and Investments Commission, the Department of the Treasury (Cth), and the Office of Parliamentary Counsel (Cth) should develop a mechanism to improve the visibility and accessibility of notional amendments to the *Corporations Act 2001* (Cth) made by delegated legislation.

166. There was universal support for the proposed development of mechanisms to improve the visibility and accessibility of notional amendments to the *Corporations Act*.[218]

167. Kit Legal considered, for example, that

> given any amendments to the Corporations Act would take years to implement, it would be beneficial if there was an interim solution to make all amendments/exclusions to the obligations in Chapter 7 easy to find and follow.[219]

168. Dharmananda also noted that she strongly endorses this proposal as an interim measure, and observed that

> practically speaking, it would be expected that the significant and substantial empirical work already done by the ALRC to identify instruments containing notional amendments should facilitate these bodies being able to efficiently and promptly improve the visibility and accessibility of those instruments using the Federal Register of Legislation.[220]

169. The ALRC presented four options for how Proposal A12 might be pursued:

- Option A: ASIC legislative instruments to include full text of notionally amended provisions.
- Option B: ASIC to periodically publish a version of the Act and Regulations incorporating all in force notional amendments.
- Option C: Office of Parliamentary Counsel to publish the Act and Regulations so as to identify and hyperlink to delegated legislation that notionally amends provisions.
- Option D: Office of Parliamentary Counsel to publish the Act and Regulations incorporating notional amendments.

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216 Ibid.
217 Ibid.
218 Supportive submissions included: M Nehme, *Submission 15*; National Insurance Brokers Association, *Submission 18*; The Advisers Association, *Submission 24*; SMSF Association, *Submission 28*; Institute of Public Accountants, *Submission 31*; P Hanrahan, *Submission 36*; J Dharmananda, *Submission 38*; Financial Services Council, *Submission 39*; Australian Banking Association, *Submission 43*; Law Council of Australia, *Submission 49*; Kit Legal, *Submission 50*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*; MinterEllison, *Submission 55*.
219 Kit Legal, *Submission 50*.
220 J Dharmananda, *Submission 38*.

170. There was support among submissions for Option B,[221] Option C,[222] and Option D.[223]

171. The Insurance Council of Australia considered, for example, that Option C 'would be optimal and should be explored as a matter of priority'.[224] They note that:

> While that option will not reduce the existing complexity in the legislation or the need to jump between different levels of regulation to determine how a particular product or service is regulated in the relevant circumstance, as an interim measure this would improve the transparency and navigability of the regulatory landscape (at least when in digital format).[225]

172. There were no objections to Proposal A12. However, the Association of Financial Advisers commented:

> Whilst we note that we support this proposal, we are also very conscious that it is very difficult to implement, and potentially the benefit will be short lived if the underlying objectives of the ALRC Review can be achieved in the legislation.[226]

Definition of 'financial product advice'

173. Proposals A13 to A15 are designed to simplify, clarify, and improve the navigability of concepts relating to 'financial product advice'. More specifically, the proposals are to:

- eliminate an unnecessary and unhelpful intermediary concept by removing the defined term 'financial product advice';
- distinguish more clearly between different regulatory regimes by decoupling the concepts of 'personal advice' and 'financial service'; and
- convey more clearly the subject of regulation by renaming the concept of 'general advice'.

174. In broad terms, there was support for the view that definitions concerning 'financial product advice' merit reform. However, a number of submissions considered that reforms should only be considered after the completion of the Department of the Treasury's Quality of Advice Review.[227]

175. The ALRC will make final recommendations concerning financial product advice after it has carefully considered the outcomes of the Quality of Advice Review. The ALRC will continue to engage with stakeholders on advice-related issues in the meantime, and will follow the progress of the Quality of Advice Review closely.

Proposal A13: Remove the concept of 'financial product advice'

Proposal A13 The *Corporations Act 2001* (Cth) should be amended to:

a. remove the definition of 'financial product advice' in s 766B;
b. substitute the current use of that term with the phrase 'general advice and personal advice' or 'general advice or personal advice' as applicable; and
c. incorporate relevant elements of the current definition of 'financial product advice' into the definitions of 'general advice' and 'personal advice'.

221 MinterEllison, *Submission 55*.
222 Institute of Public Accountants, *Submission 31*; Insurance Council of Australia, *Submission 52*; MinterEllison, *Submission 55*.
223 National Insurance Brokers Association, *Submission 18*; Institute of Public Accountants, *Submission 31*; MinterEllison, *Submission 55*.
224 Insurance Council of Australia, *Submission 52*.
225 Ibid.
226 Association of Financial Advisers, *Submission 45*.
227 See Stockbrokers and Financial Advisers Association, *Submission 19*; The Advisers Association, *Submission 24*; SMSF Association, *Submission 28*; ANZ Banking Group, *Submission 29*; D Booth, *Submission 35*; Australian Banking Association, *Submission 43*; Law Council of Australia, *Submission 49*.

176. Most stakeholders that addressed Proposal A13 indicated support for the proposed removal of 'financial product advice' as an intermediary term.[228]

177. Submissions noted the unnecessary complexity caused by having three definitions. For example, King Irving observed that 'the practical reality of the current trichotomy provides no further clarification or practical use and, as the report has accurately identified, only furthered complexity unnecessarily'.[229]

178. Those who expressed reservations in relation to Proposal A13 included IG Australia, which did 'not believe it is appropriate to deal with this matter as a technical definitional issue'.[230] The Insurance Council of Australia did 'not consider there to be a sufficiently good reason for replacing the definition of "financial product advice"' in the way suggested.[231] Finally, MinterEllison considered that there was 'merit in retaining the general concept of "financial product advice" as an activity that is regulated, requires a licence and is subject to licensing obligations'.[232]

Proposal A14: Decouple 'personal advice' from 'financial service'

Proposal A14 Section 766A(1) of the *Corporations Act 2001* (Cth) should be amended by removing from the definition of 'financial service' the term 'financial product advice' and substituting 'general advice'.

179. There were mixed views on the proposed decoupling of 'personal advice' from the definition of 'financial service'. Amongst those in support of the proposed reform were the Accounting Professional & Ethical Standards Board, which considered that the proposed reform 'will enhance and clarify the regulatory distinction between general advice and personal advice, the latter which is subject to more extensive requirements'.[233]

180. Kit Legal also indicated their support for Proposal A14, on the basis that it 'should be very clear which obligations apply to the relevant service provided'.[234] They agreed that it was worth considering 'aggregating aspects of regulation that are specific to personal advice', and considered that it was 'currently not clear on the face of Chapter 7 that certain aspects are only applicable to personal, not general, advice'.[235]

181. In expressing support for the proposed reforms, some submissions noted their support for substantive reconsideration of the existing connection between financial advice and 'financial products' in the regulatory framework.[236] The ALRC noted in Interim Report A that the proposed

228 See, eg, Financial Planning Association of Australia, *Submission 10*; Accounting Professional & Ethical Standards Board, *Submission 12*; M Nehme, *Submission 15*; National Insurance Brokers Association, *Submission 18*; G Elkington, *Submission 20*; Maurice Blackburn, *Submission 27*; SMSF Association, *Submission 28*; Financial Services Council, *Submission 39*; Chartered Accountants Australia and New Zealand, *Submission 40*; P Spender and S Bottomley, *Submission 41*; CPA Australia, *Submission 42*; Association of Financial Advisers, *Submission 45*; Financial Services Institute of Australasia, *Submission 53*. Certainty Advice Group agreed with the removal of 'financial product advice', but did not support the consequential changes outlined by the ALRC: Certainty Advice Group, *Submission 5*.

229 King Irving, *Submission 22*.

230 IG Australia, *Submission 33*.

231 Insurance Council of Australia, *Submission 52*.

232 MinterEllison, *Submission 55*.

233 Accounting Professional & Ethical Standards Board, *Submission 12*. Other submissions in support of Proposal A14 included Financial Planning Association of Australia, *Submission 10*; National Insurance Brokers Association, *Submission 18*; G Elkington, *Submission 20*; King Irving, *Submission 22*; Maurice Blackburn, *Submission 27*; CPA Australia, *Submission 42*; Association of Financial Advisers, *Submission 45*; Kit Legal, *Submission 50*; Financial Services Institute of Australasia, *Submission 53*.

234 Kit Legal, *Submission 50*.

235 Ibid.

236 See, eg, SMSF Association, *Submission 28*; CPA Australia, *Submission 42*; Association of Financial Advisers, *Submission 45*; Avant Mutual, *Submission 46*.

reforms could facilitate, though would not necessitate, more substantive changes to the regulation of financial advice.[237]

182. By contrast, the Insurance Council of Australia considered that Proposal A14 could 'have the potential to increase, rather than reduce, complexity in relation to the operation of the advice provisions in the Corporations Act'.[238] Nehme agreed that the proposed reforms may result in greater confusion, and suggested that the relative obligations of financial service providers when providing personal advice versus general advice could instead be clarified through the inclusion of a table setting out the different obligations in the statute.[239]

183. Both Hanrahan and the Law Council of Australia queried whether 'general advice' should continue to be regulated as a financial service.[240] In their view, general advice is a 'business communication' and therefore should 'be addressed under the consumer laws', whereas regulating it as a financial service 'creates an expectation that an agency, such as ASIC, is overseeing it for quality'.[241]

184. MinterEllison also noted that it has 'concerns with this proposal', because if only 'general advice' is 'included in the definition of financial service, then that would suggest that general advice requires a licence but personal advice does not'.[242]

Proposal A15: Replace the label for 'general advice'

Proposal A15 Section 766B of the *Corporations Act 2001* (Cth) should be amended to replace the term 'general advice' with a term that corresponds intuitively with the substance of the definition.

185. The majority of submissions that responded to Proposal A15 indicated support for replacing the label for 'general advice' in favour of a term that better reflects the substance of the definition.[243]

186. Submissions in support of Proposal A15 broadly agreed that 'general advice' was not reflective of the underlying definition and may mislead people.[244] For example, the National Insurance Brokers Association supported replacement of the existing label 'to better communicate the important difference between general and personal advice to consumers'.[245]

187. Some submissions expressed doubts, however, about whether a satisfactory replacement term could be found.[246] The Stockbrokers and Financial Advisers Association emphasised that they would not support the reclassification of 'general advice' as 'information' or 'product sales

237 Australian Law Reform Commission (n 43) [11.59].
238 Insurance Council of Australia, *Submission 52*.
239 M Nehme, *Submission 15*.
240 P Hanrahan, *Submission 36*; Law Council of Australia, *Submission 49*. See also Chartered Accountants Australia and New Zealand, *Submission 40*.
241 Law Council of Australia, *Submission 49*.
242 MinterEllison, *Submission 55*.
243 Certainty Advice Group, *Submission 5*; Financial Planning Association of Australia, *Submission 10*; Accounting Professional & Ethical Standards Board, *Submission 12*; National Insurance Brokers Association, *Submission 18*; G Elkington, *Submission 20*; The Advisers Association, *Submission 24*; Maurice Blackburn, *Submission 27*; SMSF Association, *Submission 28*; ANZ Banking Group, *Submission 29*; P Spender and S Bottomley, *Submission 41*; CPA Australia, *Submission 42*; Australian Banking Association, *Submission 43*; Kit Legal, *Submission 50*; Financial Services Institute of Australasia, *Submission 53*; MinterEllison, *Submission 55*.
244 See, eg, Financial Planning Association of Australia, *Submission 10*; Maurice Blackburn, *Submission 27*; SMSF Association, *Submission 28*; Law Council of Australia, *Submission 49*; Financial Services Institute of Australasia, *Submission 53*; MinterEllison, *Submission 55*.
245 National Insurance Brokers Association, *Submission 18*.
246 New South Wales Bar Association, *Submission 25*; J Dharmananda, *Submission 38*; Association of Financial Advisers, *Submission 45*.

information' because 'this would have significant implications for the provision of research reports on listed securities'.[247]

188. Other submissions questioned the utility of replacing the label for 'general advice'.[248] Consumer advocates suggested the problems with 'general advice' related to 'the circumstances in which the advice was provided, rather than the legal definition'.[249] They considered that amending the definition would lead to 'no improvement for consumers' and that an amendment would 'send a message that recent problems with "general advice" are now solved', thereby 'wasting limited legislative resources and delaying proper resolution' of the issues.[250] Other submissions supported the replacement of the label for 'general advice', but emphasised the need for more substantive change to the regulation of advice.[251]

Definitions of 'retail client' and 'wholesale client'

189. Questions A16 and A17 invited views on how the definitions of 'retail client' and 'wholesale client' could be amended to simplify the application of the definitions, and achieve greater clarity and coherence. In particular, the questions invited feedback on:

- whether the multi-limbed test for 'retail client' in s 761G should be simplified by removing product-specific provisions and exceptions tied to monetary thresholds, or in some other manner; and
- what criteria or conditions should be considered for the sophisticated investor exception contained in s 761GA.

Question A16: Simplifying the definition of 'retail client'

Question A16 Should the definition of 'retail client' in s 761G of the *Corporations Act 2001* (Cth) be amended:

a. to remove:
   i. subsections (5), (6), and (6A), being provisions in relation to general insurance products, superannuation products, RSA products, and traditional trustee company services; and
   ii. the product value exception in sub-s (7)(a) and the asset and income exceptions in sub-s (7)(c); or

b. in some other manner?

Question A16(a): Proposed amendments to 'retail client' definition

190. There was some support for the proposed removal from s 761G of product-specific provisions, and the product value and asset and income exceptions, but a number of submissions were not supportive of some, or all, of the proposed amendments.[252]

247 Stockbrokers and Financial Advisers Association, *Submission 19*.
248 See, eg, M Nehme, *Submission 15*; New South Wales Bar Association, *Submission 25*.
249 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
250 Ibid.
251 See, eg, Financial Planning Association of Australia, *Submission 10*; Maurice Blackburn, *Submission 27*; SMSF Association, *Submission 28*; Financial Services Institute of Australasia, *Submission 53*.
252 Submissions that expressed general disagreement with the package of proposed reforms included: Certainty Advice Group, *Submission 5*; Financial Planning Association of Australia, *Submission 10*; Australian Banking Association, *Submission 43*. Submissions that expressed general support for the package of proposed reforms included: Accounting Professional & Ethical Standards Board, *Submission 12*; N Howell and C Brown, *Submission 47*.

Provisions in relation to general insurance and superannuation products

191. The ALRC noted in Interim Report A that the proposed removal of product-specific provisions from the multi-limbed test was directed towards expressing the test in a clearer manner rather than changing the existing policy boundaries.[253]

192. There was greater support for removal of the product-specific provisions in relation to superannuation products than for removal of provisions dealing with general insurance products.[254] For example, Kit Legal agreed with removal of the exceptions in relation to superannuation products 'as there is much confusion about when a product or service "relates to" superannuation'.[255]

193. The Actuaries Institute similarly supported simplification in the application of the retail client definition to superannuation and RSA products.[256] However, they advocated for changes to the existing treatment of employers (other than small businesses) and smaller Australian Prudential Regulation Authority regulated superannuation funds as retail clients with respect to superannuation and RSA products. In their view, these persons would be 'better considered as professional investors'.[257]

194. Some submissions did not agree with the proposed removal of s 761G(6), but did support clarification of the application of this provision to self-managed superannuation fund trustees.[258]

195. MinterEllison also expressed support for removal of the 'superannuation specific-definitions of retail client', since it is 'quite anomalous to require financial services providers to treat the same person as a retail client in relation to their superannuation investments and a wholesale client in respect of their other investments'.[259] However, they did not agree with the proposal to remove the general insurance-specific provisions, since the industry has a

> clear and long-lasting delineation between domestic and commercial insurance products and the protections that should be available in the case of the former which broadly corresponds with the definition of retail client in the Corporations Act.[260]

196. The Financial Services Institute of Australasia considered that there was 'sound policy reasons' for the differential treatment of general insurance products, as well as superannuation and RSA products, and traditional trustee company services.[261]

197. Other submissions also disagreed with the removal of the general insurance-specific provisions.[262] For example, the Medical Insurance Group Australia did not support this amendment on the basis that it would result in the inappropriate classification of professional indemnity insurance products as retail products (where they are provided to a small business).[263] The Insurance Council of Australia highlighted other general insurance products that the proposed amendments may affect, including 'insurance for management liability, ... crime, commercial property, cyber insurance, medical indemnity and other commercial classes'.[264] The ALRC had suggested that the existing treatment of products such as professional indemnity insurance could be maintained through the use of specific exclusions.[265] The ALRC considered that this would

253 Australian Law Reform Commission (n 43) [12.40].
254 Submissions expressing support for the removal of the superannuation-specific provisions included: Actuaries Institute, *Submission 13*; Herbert Smith Freehills, *Submission 16*; Kit Legal, *Submission 50*; MinterEllison, *Submission 55*.
255 Kit Legal, *Submission 50*.
256 Actuaries Institute, *Submission 13*.
257 Ibid.
258 Australian Banking Association, *Submission 43*; Law Council of Australia, *Submission 49*.
259 MinterEllison, *Submission 55*.
260 Ibid. See also Herbert Smith Freehills, *Submission 16*.
261 Financial Services Institute of Australasia, *Submission 53*.
262 Medical Insurance Group Australia, *Submission 7*; Avant Mutual, *Submission 46*; Insurance Council of Australia, *Submission 52*.
263 Medical Insurance Group Australia, *Submission 7*.
264 Insurance Council of Australia, *Submission 52*.
265 Australian Law Reform Commission (n 43) [12.44].

represent a clearer way to implement the policy of excluding certain insurance products from the scope of retail client obligations.

Product value exception, and asset and income exceptions

198. There were mixed views on the proposed removal of the product value exception, and asset and income exceptions.

199. Submissions in support generally agreed that these were inappropriate and arbitrary measures for determining the application of retail client protections.[266]

200. For example, the Accounting Professional & Ethical Standards Board noted that there has been a '1000% increase' in the estimated number of households that meet the asset and income exceptions and suggested the exceptions appear to have 'become arbitrary, outdated and inconsistent with underlying policies'.[267] Maurice Blackburn commented that, in their experience, 'many high net worth consumers who have been classed as "wholesale clients" were, in fact, inexperienced or risk averse consumers'.[268]

201. Submissions that did not support the proposed removal of the product value exception and asset and income exceptions cited the potential for increased uncertainty in the classification of clients.[269] For example, ANZ Banking Group suggested that the current exception is 'clear and relatively simple for businesses to administer', and that removing it would create difficulty in classifying clients.[270]

Question A16(b): Other amendments to 'retail client' definition

202. Question A16(b) sought stakeholder feedback on other ways in which the definition of 'retail client' in s 761G could be improved or simplified.

203. There was strong support for amending the definition of 'retail client' in s 761G of the *Corporations Act* in some other manner. Noticeable trends from the submissions included support for:

- aligning the concepts of 'retail client' and 'consumer' across federal legislation affecting financial services;[271]
- using an indexation method to ensure that monetary thresholds remain appropriate;[272] and
- a holistic review of the policy settings underpinning the retail client and wholesale client distinction.[273]

266 See, eg, Accounting Professional & Ethical Standards Board, *Submission 12*; Maurice Blackburn, *Submission 27*; P Spender and S Bottomley, *Submission 41*. See also comments in CPA Australia, *Submission 42*; Financial Services Institute of Australasia, *Submission 53*.

267 Accounting Professional & Ethical Standards Board, *Submission 12*.

268 Maurice Blackburn, *Submission 27*.

269 See, eg, Queensland Consumers Association, *Submission 23*; ANZ Banking Group, *Submission 29*; Australian Banking Association, *Submission 43*; Kit Legal, *Submission 50*. Other submissions that opposed these amendments included: Herbert Smith Freehills, *Submission 16*; Law Council of Australia, *Submission 49*.

270 ANZ Banking Group, *Submission 29*. The Australian Banking Association also noted that the exceptions were currently 'widely relied on': Australian Banking Association, *Submission 43*.

271 M Nehme, *Submission 15*; National Insurance Brokers Association, *Submission 18*; Queensland Consumers Association, *Submission 23*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; Australian Banking Association, *Submission 43*; MinterEllison, *Submission 55*. Howell and Brown highlighted the challenges of achieving consistent definitions of the persons protected by the key consumer/investor protection statutes in financial services: N Howell and C Brown, *Submission 47*.

272 Financial Planning Association of Australia, *Submission 10*; Herbert Smith Freehills, *Submission 16*; Queensland Consumers Association, *Submission 23*; ANZ Banking Group, *Submission 29*; Financial Services Council, *Submission 39*; Australian Banking Association, *Submission 43*; Law Council of Australia, *Submission 49*.

273 Australian Financial Markets Association, *Submission 6*; SMSF Association, *Submission 28*; IG Australia, *Submission 33*; CPA Australia, *Submission 42*; Association of Financial Advisers, *Submission 45*.

204. Some stakeholders suggested further proposals for reform, including:

- removal of the concept of 'retail client' altogether,[274] or replacement of 'retail client' with the concept of a 'financial consumer';[275]
- separating the definitions for business and individuals;[276]
- if asset and income exceptions are to remain, limiting the assets relevant to assessment to '"investable assets" which would exclude, for example, a principal place of residence';[277]
- making 'allowance for a financial product or a financial product to which a financial service relates that is in a recognised wholesale market such as a licensed derivative market (such as the ASX 24 market)';[278]
- requiring the provision of an offer document with relevant warnings when products are made available to investors meeting the product value, gross income, and net assets tests;[279] and
- removing the inclusion of medical indemnity insurance as a product that is always provided to a person as a retail client.[280]

205. Herbert Smith Freehills proposed an alternative model for the determination of whether a person is a retail client, which adapts the model suggested by the ALRC in Question A16(a).[281] This model would retain the 'quantum-based tests', and differential treatment for general insurance products (though with modifications to the treatment of small business).

206. The Stockbrokers and Financial Advisers Association, by contrast, questioned whether any changes to the definitions of retail client and wholesale client are necessary, suggesting that 'calls for change to the wholesale investor test appear to be a solution looking for a problem'.[282]

Question A17: Conditions or criteria for the 'sophisticated investor' exception

Question A17 What conditions or criteria should be considered in respect of the sophisticated investor exception in s 761GA of the *Corporations Act 2001* (Cth)?

207. Submissions expressed divergent views on what conditions or criteria should be considered for the sophisticated investor exception.

208. A number of stakeholders suggested that a test of financial literacy should be included. For example, the Financial Planning Association of Australia considered there should be both a monetary value threshold and a 'financial capability measure'.[283] Herbert Smith Freehills also suggested that the subjective aspect of the test should be 'replaced by an objective list of factors and attributes' which could be 'prescribed by an industry standard checklist and could be tailored for certain categories of product or service'.[284]

274 Certainty Advice Group, *Submission 5*; Institute of Public Accountants, *Submission 31*.
275 P Hanrahan, *Submission 36*. The Law Council of Australia noted that some of its practitioner members supported this amendment: Law Council of Australia, *Submission 49*.
276 Financial Services Institute of Australasia, *Submission 53*.
277 Ibid.
278 ASX, *Submission 21*.
279 Law Council of Australia, *Submission 49*. See also similar suggestions from Financial Planning Association of Australia, *Submission 10*; Queensland Consumers Association, *Submission 23*.
280 Avant Mutual, *Submission 46*; Insurance Council of Australia, *Submission 52*.
281 Herbert Smith Freehills, *Submission 16*.
282 Stockbrokers and Financial Advisers Association, *Submission 19*. See further Stockbrokers and Financial Advisers Association, 'Does the Wholesale Investor Test Need to Change?' (Discussion Paper, February 2022).
283 Financial Planning Association of Australia, *Submission 10*.
284 Herbert Smith Freehills, *Submission 16*.

209. Many stakeholders emphasised the need for the test for the exception to be capable of objective determination.[285] For example, the Australian Banking Association noted that the current tests in s 761GA are 'highly subjective, which reduces the practical utility of this exception'.[286] Likewise, Kit Legal said that the tests should be 'as objective as possible' and that some people (such as finance professionals) should 'qualify automatically'.[287] MinterEllison also supported reforming the exception by 'making it more objective to remove the need for a licensee to certify clients for the exemption', and submitted that the option of enabling clients to obtain a wholesale qualification by undertaking a course 'seems attractive'.[288]

210. In comparison, the Advisers Association favoured a 'combination of subjective and objective assessments', which 'could be achieved using technology, independent assessments, their levels of risk tolerance, previous experience and behaviours'.[289]

211. Another suggestion, raised by King Irving, was that individuals should be able to self-certify as falling within the exception, which would place 'the onus and responsibility upon the investor to prove they are a "sophisticated investor" through self-certification'.[290]

212. IG Australia suggested that it would be wise to 'look to global regulatory precedence for regimes which have a similar concept', and highlighted the approach taken by the European Union in this regard, which incorporates both subjective and objective elements.[291]

213. Queensland Consumers Association preferred the removal of the concept of a 'sophisticated investor' altogether.[292]

214. The ALRC will revisit the retail client definition, and its alignment with other statutory concepts, in future Inquiry reports.

Conduct obligations

215. Questions and Proposals A18–A24 aim to simplify, rationalise, and promote compliance with conduct obligations, which are intended to guide the behaviour of regulated entities to ensure standards of competence and to facilitate consumer protection. The proposed reforms seek to promote this aim by:

- including norms as an objects clause to enhance the communicative power of the law;
- clarifying the 'efficiently, honestly and fairly' obligation in s 912A(1)(a) of the *Corporations Act*;
- removing prescription from the licensee obligations set out in s 912A(1);
- consolidating provisions relating to unconscionable conduct, and false, deceptive or misleading conduct or representations; and
- simplifying the best interests duty safe harbour and related provisions.

216. The ALRC will further consider simplification of existing conduct obligations in future Inquiry reports.

285 See, eg, ANZ Banking Group, *Submission 29*; Kit Legal, *Submission 50*; MinterEllison, *Submission 55*.
286 Australian Banking Association, *Submission 43*.
287 Kit Legal, *Submission 50*. The ASX suggested that this category of persons might include ASX trading participants, as professionals in financial markets: ASX, *Submission 21*.
288 MinterEllison, *Submission 55*. See also G Elkington, *Submission 20*.
289 The Advisers Association, *Submission 24*.
290 King Irving, *Submission 22*.
291 IG Australia, *Submission 33*.
292 Queensland Consumers Association, *Submission 23*. See also Certainty Advice Group, *Submission 5*; G Elkington, *Submission 20*.

Question A18: Inclusion of conduct norms in an objects clause

Question A18 Should Chapter 7 of the *Corporations Act (2001)* (Cth) be amended to insert certain norms as an objects clause?

217. Support for the inclusion of the fundamental principles, or norms, that underlie more prescriptive conduct regulation as an objects clause was mixed.

218. Submissions in favour of incorporating norms as an objects clause generally considered that it would enhance understanding of the law, and would have expressive force.[293] For example, the Australian Financial Markets Association suggested that norms could 'give interpretive guidance to particular and detailed rules'.[294] Dharmananda considered the inclusion of clearer objects clauses could assist to 'give "practical content" to protean expressions or general words'.[295]

219. Some submissions suggested that the proposed reform should go further — namely, by making the norms directly enforceable, instead of merely operating as an objects clause.[296] For instance, consumer advocates submitted that the norms would be 'more effective if they are actually enforceable by the consumer and the regulator'.[297] Similarly, Hanrahan considered that if 'we want to legislate for open-textured standards … we should do so — and use it as an opportunity to remove prescriptive black-letter offences and duties'.[298] Schmulow and Dreyfus also indicated support for enforceable norms.[299]

220. Those who expressed reservations included the Financial Planning Association of Australia, who indicated that it would 'create further confusion and require clarification'.[300] Nehme questioned the need for the change, suggesting that the inclusion of norms as an objects clause would 'not necessarily clarify existing provisions or lessen their complexity'.[301] Others also argued that the proposed change might be of limited additional value, or risk creating additional complexity.[302]

Question A19: What norms should be included in an objects clause?

Question A19 What norms should be included in such an objects clause?

221. Many submissions that responded to Question A19 expressed support for inclusion of the six norms identified in the Royal Commission into Misconduct in the Banking, Superannuation and

293 Supportive submissions included: Certainty Advice Group, *Submission 5*; Australian Financial Markets Association, *Submission 6*; National Insurance Brokers Association, *Submission 18*; The Advisers Association, *Submission 24*; SMSF Association, *Submission 28*; T Peters, *Submission 30*; IG Australia, *Submission 33*; D Booth, *Submission 35*; Financial Services Council, *Submission 39*; P Spender and S Bottomley, *Submission 41*; N Howell and C Brown, *Submission 47*; Kit Legal, *Submission 50*; Insurance Council of Australia, *Submission 52*; MinterEllison, *Submission 55*.

294 Australian Financial Markets Association, *Submission 6*.

295 J Dharmananda, *Submission 38*. See also P Spender and S Bottomley, *Submission 41*.

296 MinterEllison, *Submission 55*; N Howell and C Brown, *Submission 47*.

297 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.

298 P Hanrahan, *Submission 36*.

299 A Schmulow and S Dreyfus, *Submission 56*.

300 Financial Planning Association of Australia, *Submission 10*.

301 M Nehme, *Submission 15*.

302 Financial Planning Association of Australia, *Submission 10*; Association of Financial Advisers, *Submission 45*; Law Council of Australia, *Submission 49*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*; Allens, *Submission 54*.

Financial Services Industry ('Financial Services Royal Commission') Final Report in an objects clause.[303]

222. Several submissions queried whether it was necessary to include 'obey the law' in an objects clause.[304] For example, the Financial Services Council considered that inclusion of 'obey the law' was unnecessary 'given that it is not specific to financial services and virtually all businesses and consumers would consider obeying the law is "a given"'.[305] On the other hand, Peters considered that 'given the misconduct revealed by the Financial Services Royal Commission, it would appear that this is a fundamental norm that has consistently been disregarded' and that emphasising this as a requirement 'would highlight that accepting the penalties for a breach of the law is not an acceptable "cost of doing business"'.[306]

223. By contrast, Dharmananda expressed doubts about the appropriateness of characterising the six norms identified by the Financial Services Royal Commission as objects.[307] She commented that most of the norms are 'in effect operative rather than aspirational'.[308]

224. There was also support for the Financial Conduct Authority's 'Principles for Business', which apply in the United Kingdom.[309] In particular, Spender and Bottomley thought these principles would 'have greater utility' than the six norms identified in the Financial Services Royal Commission Final Report.[310] MinterEllison advocated for a set of norms that drew on a variety of sources, including the Principles for Business in the United Kingdom, the Financial Services Royal Commission norms, and the existing obligations on financial services licensees in s 912A of the *Corporations Act*.[311]

225. Professor Horrigan supported the inclusion of 'norms relating to unconscionable conduct', as well as 'a norm of fairness'.[312] He also raised the question of whether the norm of fairness expressed by the Financial Services Royal Commission 'should be amplified to include related elements, in the light of industry co-regulation accepting broader notions of integrity (eg "Act fairly" versus "Act fairly and ethically")'.[313]

Proposal A20: 'Efficiently, honestly and fairly'

Proposal A20 Section 912A(1)(a) of the *Corporations Act 2001* (Cth) should be amended by:

a. separating the words 'efficiently', 'honestly' and 'fairly' into individual paragraphs;

b. replacing the word 'efficiently' with 'professionally'; and

c. inserting a note containing examples of conduct that would fail to satisfy the 'fairly' standard.

303 See, eg, The Advisers Association, *Submission 24*; T Peters, *Submission 30*; IG Australia, *Submission 33*; D Booth, *Submission 35*; Financial Services Council, *Submission 39*; Law Council of Australia, *Submission 49*; Allens, *Submission 54*. The Australian Financial Markets Association considered these six norms were 'a good starting point', but 'considerably more thought and debate' is required: Australian Financial Markets Association, *Submission 6*.
304 Financial Services Council, *Submission 39*; Australian Banking Association, *Submission 43*; Allens, *Submission 54*.
305 Financial Services Council, *Submission 39*.
306 T Peters, *Submission 30*.
307 J Dharmananda, *Submission 38*.
308 Ibid.
309 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
310 P Spender and S Bottomley, *Submission 41*.
311 MinterEllison, *Submission 55*.
312 B Horrigan, *Submission 11*.
313 Ibid.

226. Submissions that commented on Proposal A20 were mostly supportive of the proposed reforms to clarify the meaning of 'efficiently, honestly and fairly' in s 912A(1)(a), although the level of support for each of the proposed reforms varied.

Proposal A20(a): Separating 'efficiently, honestly and fairly'

227. A substantial number of submissions that responded to Proposal A20(a) indicated some level of support for splitting the expression 'efficiently, honestly and fairly' into its constituent elements in order to clarify that it imposes three separate obligations (not a single compendious one).[314]

228. Many stakeholders considered that separating the obligations in s 912A(1)(a) was warranted in order to resolve uncertainty in the case law as to whether or not the existing obligation should be read compendiously. For example, the Financial Planning Association of Australia suggested that it is essential to clarify the interpretation of s 912A(1)(a) 'given the enormity of the implications of this phrase for licensees'.[315]

229. Herbert Smith Freehills agreed that recent case law (including cases published since Interim Report A) revealed a 'judicial trend' towards reading the words separately and noted the 'uncertainty across industry that has arisen due to this shifting judicial trend'.[316] They observed that the ALRC's proposal would be 'consistent with this trend', and noted that they would 'welcome any clarification'.[317]

230. Many of those who did not support the proposal queried whether there was any uncertainty in relation to the nature of the obligation to do all things necessary to ensure that financial services are provided 'efficiently, honestly and fairly'.[318] For instance, Professor Latimer considered that there was 'no evidence of the mischief' which the proposal sought to address.[319]

231. Other submissions considered that separating out the obligations may have unintended consequences.[320] For example, the New South Wales Bar Association submitted that the proposal raised the risk of the existing case law being 'cast aside', thereby increasing the need for litigation.[321] The Australian Banking Association suggested that the proposal may 'create a lower threshold for each of the obligations, rather than allowing a holistic consideration of a licence holder's conduct'.[322]

232. Other submissions considered there was a need for more substantive reforms to the obligation in s 912A(1)(a).[323]

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314 See, eg, Financial Planning Association of Australia, *Submission 10*; Herbert Smith Freehills, *Submission 16*; National Insurance Brokers Association, *Submission 18*; SMSF Association, *Submission 28*; ANZ Banking Group, *Submission 29*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; J Dharmananda, *Submission 38*; Association of Financial Advisers, *Submission 45*; Financial Services Institute of Australasia, *Submission 53*.

315 Financial Planning Association of Australia, *Submission 10*. See also Association of Financial Advisers, *Submission 45*.

316 Herbert Smith Freehills, *Submission 16*. See also Financial Services Institute of Australasia, *Submission 53*; MinterEllison, *Submission 55*.

317 Herbert Smith Freehills, *Submission 16*.

318 See, eg, P Latimer, *Submission 3*; G Elkington, *Submission 20*; New South Wales Bar Association, *Submission 25*; Kit Legal, *Submission 50*.

319 P Latimer, *Submission 3*.

320 New South Wales Bar Association, *Submission 25*; Financial Services Council, *Submission 39*; Australian Banking Association, *Submission 43*.

321 New South Wales Bar Association, *Submission 25*.

322 Australian Banking Association, *Submission 43*.

323 See, eg, the proposed reforms outlined by: P Hanrahan, *Submission 36*; Allens, *Submission 54*; MinterEllison, *Submission 55*.

Proposal A20(b): Replacing 'efficiently' with 'professionally'

233. The majority of stakeholders that responded to Proposal A20(b) supported the proposed replacement of the word 'efficiently' with 'professionally' on the basis that it more accurately expresses the meaning which courts have held it to imply.[324]

234. A number of stakeholders shared the view, however, that 'competently' would be a more suitable replacement for 'efficiently' than 'professionally'.[325] For example, Herbert Smith Freehills considered that '"competently" would better accord with the meaning that has been attributed to the word "efficiently" by the courts'.[326] Similarly, ANZ Banking Group preferred this term because while 'professionalism implies competence, it also suggests belonging to a profession', and '[m]any holders of Australian financial services licences … would not formally be "professionals" in this way'.[327] The Australian Banking Association submitted that 'competently' would be 'a more appropriate substitution' because 'professionally' 'may imply fiduciary-like obligations'.[328] Kit Legal indicated 'competently' would be more suitable because it was a 'simpler and less ambiguous term' than 'professionally'.[329]

235. Those who expressed reservations about Proposal A20(b) included the Medical Insurance Group of Australia, who argued that the reading of 'efficiency' settled on by courts was 'unconvincing', and that a standard of 'professionally' could 'create expectations of certain qualifications in order to provide financial services'.[330]

236. The New South Wales Bar Association and Dharmananda both noted that changing the word might encourage arguments that the meaning had been changed.[331] However, Dharmananda noted that, if the proposal was adopted, then 'there must be clear evidence available to the courts that the new word is substituted as a matter of clearer drafting only and is not intended to change the meaning'.[332] Horrigan also recommended consideration of equivalent uses of the notion of 'efficiency' across the Commonwealth statute book prior to proceeding with the proposed replacement of the term in s 912A(1)(a).[333]

Proposal A20(c): Examples of conduct in relation to the 'fairly' requirement

237. The majority of stakeholders that responded to Proposal A20(c) indicated support for the inclusion of examples of conduct that would contravene the requirement s 912A(1)(a) to do all things necessary to ensure that a licensee's financial services are provided 'fairly'.[334]

238. Submissions that supported the inclusion of examples agreed this could provide greater clarity in relation to the nature of the standard.[335] For instance, ANZ Banking Group indicated

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324 See, eg, Financial Planning Association of Australia, *Submission 10*; Accounting Professional & Ethical Standards Board, *Submission 12*; National Insurance Brokers Association, *Submission 18*; G Elkington, *Submission 20*; SMSF Association, *Submission 28*; T Peters, *Submission 30*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; P Spender and S Bottomley, *Submission 41*; Association of Financial Advisers, *Submission 45*.

325 Herbert Smith Freehills, *Submission 16*; ANZ Banking Group, *Submission 29*; Financial Services Council, *Submission 39*; Australian Banking Association, *Submission 43*; Mortgage & Finance Association of Australia, *Submission 44*; Kit Legal, *Submission 50*; MinterEllison, *Submission 55*.

326 Herbert Smith Freehills, *Submission 16*.

327 ANZ Banking Group, *Submission 29*. See also P Hanrahan, *Submission 36*.

328 Australian Banking Association, *Submission 43*. See also MinterEllison, *Submission 55*.

329 Kit Legal, *Submission 50*.

330 Medical Insurance Group Australia, *Submission 7*. Other submissions that did not support the replacement of 'efficiently' as proposed included: M Nehme, *Submission 15*; The Advisers Association, *Submission 24*; P Hanrahan, *Submission 36*; Law Council of Australia, *Submission 49*; Allens, *Submission 54*.

331 New South Wales Bar Association, *Submission 25*; J Dharmananda, *Submission 38*.

332 J Dharmananda, *Submission 38*.

333 B Horrigan, *Submission 11*.

334 See, eg, National Insurance Brokers Association, *Submission 18*; ANZ Banking Group, *Submission 29*; Financial Services Council, *Submission 39*; Association of Financial Advisers, *Submission 45*; Kit Legal, *Submission 50*; Allens, *Submission 54*.

335 See, eg, ANZ Banking Group, *Submission 29*; Kit Legal, *Submission 50*; Allens, *Submission 54*.

that the inclusion of examples of acting 'fairly' could be useful, noting that it was unclear 'whether the term is intended to mean distributional fairness, procedural fairness, or both (or something else)'.[336] They considered that more specification 'would facilitate greater understanding of the obligation and, in turn, compliance'.[337]

239. The Financial Planning Association of Australia acknowledged that examples 'may assist in the interpretation of fairly', but considered that examples may in themselves 'create further confusion'.[338] The National Insurance Brokers Association also broadly agreed with the suggested examples outlined by the ALRC in Interim Report A, but argued for various modifications — for instance a qualification that conduct would only be unfair if the conduct was 'carried out knowingly or that the person was reckless'.[339]

240. Other submissions emphasised that care would be required in drafting and presenting the examples. For example, Peters submitted that examples should 'not diminish the principled-based nature of these obligations'.[340] Dharmananda considered that if the examples were intended to be part of the substantive provision, 'then the examples should be drafted to ensure that … [they] will not be regarded as contextual indicators that favour a limited reading of the substantive obligation'.[341]

241. Consumer advocates expressed the view that there was 'benefit in keeping the legislative obligation relating to fairness broad and simple, without particularisation'.[342] They considered that the 'more particularisation and examples that are provided, the more industry will seek to adhere to the strict words or scenarios outlined and identify loopholes in them'.[343]

242. The Law Council of Australia similarly indicated that examples 'often tend to be unhelpful and may serve to undermine the hortatory effect of the standard'.[344] Lastly, the Mortgage & Finance Association of Australia submitted that examples 'may add to rather than reduce complexity', and that examples would be better placed in regulatory guidance, rather than in the legislation.[345]

Proposal A21: Removing prescription in s 912A

Proposal A21 Section 912A(1) of the *Corporations Act 2001* (Cth) should be amended by removing the following prescriptive requirements:

a. to have in place arrangements for the management of conflicts of interest (s 912A(1)(aa));

b. to maintain the competence to provide the financial services (s 912A(1)(e));

c. to ensure representatives are adequately trained (s 912A(1)(f)); and

d. to have adequate risk management systems (s 912A(1)(h)).

336 ANZ Banking Group, *Submission 29*.
337 Ibid.
338 Financial Services Council, *Submission 39*.
339 National Insurance Brokers Association, *Submission 18*.
340 T Peters, *Submission 30*. Horrigan also noted that 'greater and more detailed specificity about examples, indicators, or even presumptive factors does not necessarily produce greater clarity and certainty in the law': B Horrigan, *Submission 11*.
341 J Dharmananda, *Submission 38*.
342 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
343 Ibid.
344 Law Council of Australia, *Submission 49*. See also Medical Insurance Group Australia, *Submission 7*; G Elkington, *Submission 20*.
345 Mortgage & Finance Association of Australia, *Submission 44*.

243. There was less support from stakeholders for the proposal to remove certain prescriptive requirements from s 912A on the basis they are arguably already captured by more general requirements.

244. Many of those in support saw the proposed reform as a means of reducing unnecessary clutter, and focusing more on high-level principles.[346] For example, Allens agreed with the proposal to remove these provisions because they are an 'exercise in redundancy for the law'.[347]

245. Qualified support came from the Financial Services Council, which agreed with 'the objective of removing provisions in the Corporations Act that are already captured by the "efficiently, honestly and fairly" obligation', but suggested caution in respect of removing s 912A(1)(aa) and (1)(h) on the basis that ASIC had 'emphasised the importance of these two aspects in their surveillance activities in relation to management of conflicts and risks in recent years'.[348]

246. A number of stakeholders did not support the proposed removal of the identified requirements from s 912A.[349] It was suggested that doing so would reduce certainty or clarity. For example, Medical Insurance Group Australia said the proposal would involve 'replacing clear obligations with a broader, nebulous one'.[350] Similarly, the Financial Planning Association of Australia submitted that the current prescriptiveness 'provides specificity to licensees of what exactly is required'.[351] The Finance Brokers Association of Australia considered that removal of prescription would leave regulated entities 'more vulnerable to actions against them for falling short of obligations or standards of conduct that are not clearly defined'.[352]

Proposal A22: Consolidating unconscionability provisions

Proposal A22 In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, s 991A of the *Corporations Act 2001* (Cth) and s 12CA of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed.

247. There was strong support from stakeholders for the proposed consolidation of the plethora of provisions which, broadly speaking, proscribe unconscionable conduct.[353]

248. There was widespread recognition that there is a proliferation of overlapping provisions concerning unconscionable conduct, which should be consolidated. For example, MinterEllison

346 Support was expressed by: Certainty Advice Group, *Submission 5*; National Insurance Brokers Association, *Submission 18*; The Advisers Association, *Submission 24*; SMSF Association, *Submission 28*; Institute of Public Accountants, *Submission 31*; Allens, *Submission 54*.

347 Allens, *Submission 54*.

348 Financial Services Council, *Submission 39*.

349 See, eg, Medical Insurance Group Australia, *Submission 7*; Financial Planning Association of Australia, *Submission 10*; M Nehme, *Submission 15*; New South Wales Bar Association, *Submission 25*; Finance Brokers Association of Australia, *Submission 26*; ANZ Banking Group, *Submission 29*; Australian Banking Association, *Submission 43*; Association of Financial Advisers, *Submission 45*; Law Council of Australia, *Submission 49*; Kit Legal, *Submission 50*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*; MinterEllison, *Submission 55*.

350 Medical Insurance Group Australia, *Submission 7*.

351 Financial Planning Association of Australia, *Submission 10*.

352 Finance Brokers Association of Australia, *Submission 26*.

353 See, eg, E Bant, *Submission 8*; Financial Planning Association of Australia, *Submission 10*; M Nehme, *Submission 15*; National Insurance Brokers Association, *Submission 18*; G Elkington, *Submission 20*; The Advisers Association, *Submission 24*; ANZ Banking Group, *Submission 29*; T Peters, *Submission 30*; P Hanrahan, *Submission 36*; Australian Banking Association, *Submission 43*; Association of Financial Advisers, *Submission 45*; Law Council of Australia, *Submission 49*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*; Allens, *Submission 54*; MinterEllison, *Submission 55*.

observed that the prohibitions on unconscionable conduct are 'overlapping' and that this 'adds cost by increasing compliance costs and creates confusion and complexity'.[354]

249. Horrigan's submission includes detailed analysis in relation to reforms of statutory unconscionability.[355] Based on this analysis, he agreed that s 991A of the *Corporations Act* should be removed, but did not support the proposal to repeal s 12CA of the *ASIC Act*. He considered that removal of s 12CA 'at this point in the evolution of the law' could risk substantive impacts 'on how widely statutory unconscionability is interpreted'.[356] He noted, for example, that the proposal could break the symmetry with similar provisions in the *Australian Consumer Law*.

250. Kit Legal also indicated that 'more analysis is needed to support repealing 12CA', noting they understand 'that s 12CA is intended to capture specific common law unconscionable conduct, and that s 12CB picks up systemic, harder-to-capture conduct'.[357]

251. Howell and Brown contended that repealing s 991A of the *Corporations Act* could 'reduce protections in practice' because, unlike s 12CB of the *ASIC Act*, it does not include a qualification that the offending conduct must occur in trade or commerce.[358]

252. The ALRC intends to publish a Background Paper later this year, which will examine the potential for simplification of unconscionability and misleading and deceptive conduct and related provisions in greater detail. The Paper will build on the analysis outlined in Interim Report A, and specifically identify how simplification of these provisions could be achieved.

Proposal A23: Consolidating misleading and deceptive conduct provisions

Proposal A23 In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, proscriptions concerning false or misleading representations and misleading or deceptive conduct in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be consolidated into a single provision.

253. All stakeholders that responded to Proposal A23 expressed support for the consolidation of proscriptions concerning false or misleading representations, and misleading or deceptive conduct.[359]

254. As with Proposal A22, stakeholders emphasised the unnecessary overlap that currently exists between provisions concerning these topics. For example, Allens observed that it was their experience that 'the proliferation of similar provisions unnecessarily complicates the conduct of litigation in this area'.[360]

255. Professor Bant noted that her work mapping statutory prohibitions on misleading conduct 'provides very strong support' for Proposal A23.[361] She explains that the

354 MinterEllison, *Submission 55*. See also Allens, *Submission 54*.
355 B Horrigan, *Submission 11*.
356 Ibid.
357 Kit Legal, *Submission 50*.
358 N Howell and C Brown, *Submission 47*.
359 Including from E Bant, *Submission 8*; Financial Planning Association of Australia, *Submission 10*; M Nehme, *Submission 15*; National Insurance Brokers Association, *Submission 18*; G Elkington, *Submission 20*; ANZ Banking Group, *Submission 29*; IG Australia, *Submission 33*; P Hanrahan, *Submission 36*; P Spender and S Bottomley, *Submission 41*; Australian Banking Association, *Submission 43*; Association of Financial Advisers, *Submission 45*; Law Council of Australia, *Submission 49*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*; MinterEllison, *Submission 55*.
360 Allens, *Submission 54*.
361 E Bant, *Submission 8*.

> core prohibition, as expressed in s18 [of the *Australian Consumer Law*], and its remedial regime, have been replicated, with unexplained variations, across a wide range of statutes. These doppelganger provisions then sit alongside other different legislative provisions also concerned with misleading conduct, but which approach their regulation in quite distinct ways (for example, through specific rules or prohibitions).[362]

256. Bant expressed support for a 'return to the form of the core prohibition originally in s52 Trade Practice Act and now found in s18 [of the *Australian Consumer Law*]', which she considers 'is well-understood and readily applicable across the range of financial service and product areas'.[363]

257. A number of stakeholders noted difficulties that may attend any consolidation. For instance, the New South Wales Bar Association noted that 'policy decisions will need to be made as to a number of matters', particularly in relation to remedial consequences and when they would be enlivened.[364]

258. Howell and Brown also noted 'different consequences for non-compliance' between the provisions which 'suggest that consolidation of the various false or misleading prohibitions … may not be a straightforward exercise'.[365]

Question A24: Reducing complexity of the best interests duty

Question A24 Would the *Corporations Act 2001* (Cth) be simplified by:

a. amending s 961B(2) to re-cast paragraphs (a)–(f) as indicative behaviours of compliance, to which a court must have regard when determining whether the primary obligation in sub-s (1) has been satisfied; and

b. repealing ss 961C and 961D?

259. Most submissions that responded to Proposal A24 generally expressed support for the proposed reforms, which aim to reduce the likelihood of a 'tick a box' approach to compliance and address misapprehensions about what is required to satisfy the 'best interests' duty in s 961B.

Question A24(a): Recasting 'safe harbour' provisions for the best interests duty

260. A majority of stakeholders that responded to Proposal A24 indicated some support for recasting the 'safe harbour' provisions as indicative behaviours of compliance.[366]

261. For example, Bant indicated that the current provisions were undesirable because they 'promote formalistic and legalistic approaches to "compliance" ... nicely labelled as a "tick a box" mentality'.[367] This was echoed by the Association of Financial Advisers who observed that the safe harbour has 'become a very prescriptive tightly applied obligation that has unfortunately added significantly to the complexity and cost of providing financial advice'.[368]

262. Dr He and Dr Liu considered that recasting the provisions as indicative behaviours could, 'in theory, create a non-exhaustive list to help retain discretion of the courts'.[369] The SMSF Association

362 Ibid.
363 Ibid.
364 New South Wales Bar Association, *Submission 25*.
365 N Howell and C Brown, *Submission 47*. See also Kit Legal, *Submission 50*.
366 See, eg, W He and H Liu, *Submission 4*; E Bant, *Submission 8*; Accounting Professional & Ethical Standards Board, *Submission 12*; G Elkington, *Submission 20*; The Advisers Association, *Submission 24*; SMSF Association, *Submission 28*; T Peters, *Submission 30*; P Hanrahan, *Submission 36*; P Spender and S Bottomley, *Submission 41*; Association of Financial Advisers, *Submission 45*; Law Council of Australia, *Submission 49*; Kit Legal, *Submission 50*.
367 E Bant, *Submission 8*.
368 Association of Financial Advisers, *Submission 45*.
369 W He and H Liu, *Submission 4*.

supported the reform on the basis that it would 'allow advisers and licensees to use their ethical and professional judgement'.[370]

263. However, a number of submissions expressed reservations in relation to the proposed reforms.[371] For example, the Australian Banking Association suggested that, if the proposal were adopted, 'ambiguity and subjectivity will be introduced'.[372] MinterEllison considered that the proposal 'risks misconceiving the purpose' of the best interests duty in s 961B, which was 'intended to be a process based duty'.[373] Others raised the possibility of other unintended consequences.[374]

264. Consumer advocates considered that recasting the safe harbour steps as indicative behaviours of compliance would be 'unlikely to have any material effect on the provision of advice because advisers are currently not actually required to follow the safe harbour requirements in s 961B(2)'.[375] They suggest that:

> The root cause of the 'box ticking' problem outlined by the ALRC has been slavish adherence to the guidance by industry participants. … As such the law itself is not necessarily at fault, rather the industry has placed all of its emphasis on compliance and ignored the policy intention. The solutions are cultural change within the industry, so that it takes a more consumer centric focus.[376]

265. A number of stakeholders considered that reform in this area should occur as part of, or at least wait until finalisation of, the Quality of Advice Review.[377]

Question A24(b): Removing unnecessary definitions relating to the best interests duty

266. There was strong support in relation to the repeal of the definitions set out in ss 961C and 961D from submissions that addressed Proposal A24(b).[378]

267. Submissions generally agreed that these definitions were unhelpful and redundant. For example, Kit Legal suggested that ss 961C and 961D do not 'provide meaningful guidance and instead introduce long definitions for ordinary words'.[379] The Financial Services Institute of Australasia considered the definitions 'probably reflect a commonsense interpretation of the words in any case'.[380]

268. In comparison, the Insurance Council of Australia submitted that the proposed removal of the sections would 'introduce considerable uncertainty'.[381] IG Australia considered a policy review was needed.[382]

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370 SMSF Association, *Submission 28*. The Insurance Council of Australia also thought the proposal would introduce considerable uncertainty: Insurance Council of Australia, *Submission 52*.

371 Certainty Advice Group, *Submission 5*; Medical Insurance Group Australia, *Submission 7*; New South Wales Bar Association, *Submission 25*; Maurice Blackburn, *Submission 27*; Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*; Australian Banking Association, *Submission 43*; Insurance Council of Australia, *Submission 52*; Financial Services Institute of Australasia, *Submission 53*; MinterEllison, *Submission 55*.

372 Australian Banking Association, *Submission 43*.

373 MinterEllison, *Submission 55*.

374 New South Wales Bar Association, *Submission 25*; Maurice Blackburn, *Submission 27*; Financial Services Institute of Australasia, *Submission 53*.

375 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.

376 Ibid.

377 Australian Financial Markets Association, *Submission 6*; National Insurance Brokers Association, *Submission 18*; Stockbrokers and Financial Advisers Association, *Submission 19*; The Advisers Association, *Submission 24*; ANZ Banking Group, *Submission 29*; IG Australia, *Submission 33*; Mortgage & Finance Association of Australia, *Submission 44*.

378 See, eg, Financial Planning Association of Australia, *Submission 10*; G Elkington, *Submission 20*; The Advisers Association, *Submission 24*; P Hanrahan, *Submission 36*; P Spender and S Bottomley, *Submission 41*; Law Council of Australia, *Submission 49*; Kit Legal, *Submission 50*; Financial Services Institute of Australasia, *Submission 53*.

379 Kit Legal, *Submission 50*.

380 Financial Services Institute of Australasia, *Submission 53*.

381 Insurance Council of Australia, *Submission 52*. Certainty Advice Group also disagreed with this proposal, though they did not specify the basis for their disagreement: Certainty Advice Group, *Submission 5*.

382 IG Australia, *Submission 33*.

Feedback on recommendations

269. This section looks at the feedback received in response to the recommendations contained in Interim Report A. The ALRC made 13 recommendations in Interim Report A on technical matters which it considered could be immediately implemented. Given that the ALRC did not specifically request stakeholder feedback on the recommendations, submissions in respect of the recommendations were fewer than those in respect of the proposals and questions. Nonetheless, a number of submissions addressed and expressed support, or qualified support, for the recommendations.[383]

270. In addition to broad general support, several submissions identified specific recommendations for support as outlined below. There were no submissions indicating a lack of support for the recommendations, and no submissions raised issues which would impede implementation of the recommendations.

When to define

271. Chapter 4 of Interim Report A outlines guiding principles for when to use definitions and discusses overlapping definitions in the *Corporations Act* and *ASIC Act.*

272. The chapter also addresses terms that are defined but not used, thereby making legislation longer than it needs to be and potentially distracting readers of the dictionary by causing them to be 'alert' for uses of that term if it is of potential relevance to their circumstances.

Recommendation 1 Section 5(3) of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to remove reference to non-existent Part 1.3 of the *Corporations Act 2001* (Cth).

Recommendation 2 The definitions of all words and phrases that are not used as defined terms in the *Corporations Act 2001* (Cth) should be removed from that Act.

273. There were no submissions specifically addressing **Recommendations 1** and **2**.

Consistency of definitions

274. Chapter 5 outlines principles for the consistent use of definitions in legislation, and assesses the consistency of current definitions and concepts across the *Corporations Act* and related Commonwealth legislation, by reference to examples, including those in **Recommendations 3–6**.

275. The chapter discusses a number of aspects relating to consistency of definitions, namely:

- there is a strong argument that all defined terms should have only one meaning throughout an Act;
- it is helpful for terms to have the same meaning in an Act and in all delegated legislation made under it; and

383 Australian Financial Markets Association, *Submission 6*; Australian Retail Credit Association, *Submission 9*; National Insurance Brokers Association, *Submission 18*; Stockbrokers and Financial Advisers Association, *Submission 19*; The Advisers Association, *Submission 24*; SMSF Association, *Submission 28*; J Dharmananda, *Submission 38*; P Spender and S Bottomley, *Submission 41*; CPA Australia, *Submission 42*; N Howell and C Brown, *Submission 47*; Law Council of Australia, *Submission 49*; Kit Legal, *Submission 50*; Insurance Council of Australia, *Submission 52*; MinterEllison, *Submission 55.*

- there would be advantages in achieving greater consistency in the use of terms and concepts between related Acts, and it would improve consistency if the current version of the *Acts Interpretation Act* applied to the *Corporations Act* and the *ASIC Act*.

Recommendation 3 Section 9 of the *Corporations Act 2001* (Cth), and ss 5 and 12BA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), should be amended to remove all qualifications that definitions or rules of interpretation apply unless a 'contrary intention appears'.

Recommendation 4 Section 9 of the *Corporations Act 2001* (Cth) should be amended to remove the definitions of 'for' and 'of'.

Recommendation 5 Section 5C of the *Corporations Act 2001* (Cth) and s 5A of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed.

Recommendation 6 All definitions that duplicate existing definitions in the *Acts Interpretation Act 1901* (Cth) should be removed from the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).

276. Dharmananda noted that **Recommendations 5** and **6** are natural consequences of the principle that 'where possible, definitions in the *Acts Interpretation Act 1901* (Cth), should be relied upon' with the aim of 'making Commonwealth legislation shorter, less complex and more consistent in operation'.[384]

Design of definitions

277. Chapter 6 discusses challenges and principles relating to the design of legislative definitions and suggests ways in which legislation can be made more readable and navigable when using definitions, including the measures outlined in **Recommendations 7–12**. These measures would reduce unnecessary complexity in corporations and financial services legislation.

278. Topics discussed in this chapter include: limiting use of interconnected definitions; using 'intuitive labels' for defined terms; making clear whether definitions are exhaustive or inclusive; and appropriate use of technology-neutral language in definitions.

Recommendation 7 The *Corporations Act 2001* (Cth) should be amended to include a single glossary of defined terms.

Recommendation 8 Section 7 of the *Corporations Act 2001* (Cth) should be replaced by a provision that lists where dictionary provisions appear and the scope of their application.

384 J Dharmananda, *Submission 38*.

Recommendation 9 The *Corporations Act 2001* (Cth) should be amended so that the heading of any provision that defines one or more terms (and that does not contain substantive provisions) includes the word 'definition'.

Recommendation 10 The Office of Parliamentary Counsel (Cth) should develop drafting guidance to draw attention to defined terms each time they are used in corporations and financial services legislation.

Recommendation 11 The Office of Parliamentary Counsel (Cth) should investigate the production of Commonwealth legislation using extensible markup language (XML).

Recommendation 12 The Office of Parliamentary Counsel (Cth) should commission further research to improve the user-experience of the Federal Register of Legislation.

279. The Australian Retail Credit Association expressed support for **Recommendation 7** and indicated that implementing a single glossary of defined terms would benefit other federal legislation, such as the *Privacy Act*, as well. In their view, a single glossary may 'promote a sense of certainty and clarity' for legislation users, as compared to the current situation where 'there is a risk of key definitions being missed' when situated across legislation and other regulatory instruments.[385]

280. Spender and Bottomley expressed agreement with **Recommendations 7** and **8**, subject to noting that 'the use of the term "dictionary" in the Act is inaccurate' because, while some entries in s 9 (as well as in other sections) define 'the meaning of key words and phrases, others simply explain the scope or intended usage of a word or phrase'.[386] In their view, the term 'glossary' is preferable to 'dictionary'.

281. The Australian Retail Credit Association supported **Recommendation 9** and indicated that incorporating the word 'definition' into the heading of provisions which define terms (and do not contain substantive provisions) would, again, assist when navigating other federal legislation.[387]

282. Additionally, Howell and Brown supported the need for increased navigability and agreed 'in principle with **Recommendations 7–10** and the concept of including a single glossary of defined terms'.[388] However, they also identified the risk of 'unintended definition inconsistencies' if relevant legislation (and schedules) are not included 'as part of the preparation and maintenance of the glossary'.[389]

283. The Australasian Society for Computers and Law expressed support for **Recommendation 11** but noted this is 'only an initial step, and may not go far enough' and made several recommendations in relation to technology, including that the ALRC 'explicitly promote the use of digital legal technology in the drafting process to help avoid the current problems highlighted in its review of the *Corporations Act*'.[390]

385 Australian Retail Credit Association, *Submission 9*.
386 P Spender and S Bottomley, *Submission 41*.
387 Australian Retail Credit Association, *Submission 9*.
388 N Howell and C Brown, *Submission 47*.
389 Ibid.
390 Australasian Society for Computers and Law, *Submission 51*.

284. The Australian Retail Credit Association also supported **Recommendation 12**, considering there to be merit in exploring ways to improve the end-user's experience with the Federal Register of Legislation.[391]

Licensing

285. The focus of Chapter 8 is on the nature and structure of the Australian Financial Services licensing regime, the core obligation in s 911A of the *Corporations Act* to hold a licence, and particular aspects of the regime that create complexity and challenges to navigability.

286. **Recommendation 13** addresses regulation 7.6.02AGA of the *Corporations Regulations 2001* (Cth) which appears to be spent and therefore should be repealed. Repealing the regulation would remove over 1,400 words from the *Corporations Regulations 2001* (Cth).[392]

> **Recommendation 13** Regulation 7.6.02AGA of the *Corporations Regulations 2001* (Cth) should be repealed.

287. There were no submissions specifically addressing **Recommendation 13**.

Feedback on the scope of the Inquiry

288. The Terms of Reference issued by the Attorney-General for this Inquiry refer to 'the importance, within the context of existing policy settings, of having an adaptive, efficient and navigable legislative framework for corporations and financial services'. The ALRC has not been asked to consider reforms to the substantive law by which corporations and financial services are regulated. Accordingly, the focus of the ALRC's Inquiry is on achieving the greatest simplification within existing underlying policy settings.

289. There was strong support from submissions for the aims of the ALRC's Inquiry.[393] For example, the Mortgage & Finance Association of Australia considered that 'there is significant opportunity to simplify and modernise what we consider has become an unnecessarily complex, duplicative and often-times impenetrable legislative framework'.[394] The Australian Banking Association observed that:

> To the extent that the current regulatory framework can be made 'clear, coherent, effective, and readily accessible', reform will benefit all stakeholders and best serve the interests of consumers.[395]

290. However, a number of submissions raised the exclusion of policy issues from the scope of this Inquiry as a challenge for achieving meaningful reform. Consumer advocates noted that 'any "simplification" of legislative concepts … necessarily engages with policy choices', and that 'questions of policy' are 'central to legislative simplification'.[396] The Association of Financial Advisers noted their hope 'that this review will help to highlight a number of fundamental policy issues that must be addressed to reduce the level of complexity and the resultant level of inefficiency'.[397]

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391 Australian Retail Credit Association, *Submission 9*.
392 Australian Law Reform Commission (n 43) [8.45].
393 See, eg, ASX, *Submission 21*; ANZ Banking Group, *Submission 29*; T Peters, *Submission 30*; Institute of Public Accountants, *Submission 31*; Chartered Accountants Australia and New Zealand, *Submission 40*; CPA Australia, *Submission 42*; Australian Banking Association, *Submission 43*; Mortgage & Finance Association of Australia, *Submission 44*; Law Council of Australia, *Submission 49*; Insurance Council of Australia, *Submission 52*.
394 Mortgage & Finance Association of Australia, *Submission 44*.
395 Australian Banking Association, *Submission 43*.
396 Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia, *Submission 34*.
397 Institute of Public Accountants, *Submission 31*; Association of Financial Advisers, *Submission 45*.

291. Hanrahan suggested that 'the fundamental problems with the Corporations Act … cannot be solved "within the context of existing policy settings" as required by the reference, unless "policy" is very broadly conceived'.[398] This view was shared by the Law Council of Australia, which considered that many of the problems in the law 'cannot be fixed by way of the technical changes envisioned in the Interim Report'.[399] Similarly, CPA Australia considered that 'meaningful simplification would require wholesale policy reform from the Government'.[400]

292. Some submissions identified the broad framework for the regulation of financial products and services, adopted in accordance with recommendations from the 1997 Wallis Inquiry, as a fundamental issue with the existing law.[401] Booth suggested that the 'one size fits all' approach to financial services regulation in Chapter 7 is no longer fit for purpose, and that there should be a focus on developing 'regulatory structures and processes more appropriate for the respective areas of activity'.[402] He cautioned that

> taking some steps to simplify some of the definitions and concepts in the Corporations Act will ease some of the burden of complexity, but will not significantly improve the regulatory framework for consumers, other financial services clients, product manufacturers and product distributors and advisers.[403]

293. By contrast, the Law Council of Australia did not support 'a return to product-by-product or service-by-service financial sector regulation'.[404] However, it suggested that

> if the approach in the Wallis Report is to be retained in areas currently captured under Chapter 7 of the Corporations Act, this approach should be properly reviewed to take account of differing policy considerations within the overarching framework and its relationship with other statute and licensing regimes for the financial sector.[405]

294. Some stakeholders were concerned that implementation of certain proposals in Interim Report A would have substantive policy implications. For example, the Australian Financial Markets Association considered that the ALRC's proposals 'have merit', but that 'a more holistic policy process is needed to take the Report A proposals forward'.[406] They suggested that the Department of the Treasury, or a body modelled on the former Corporations and Markets Advisory Committee, would be suitable bodies to undertake such a policy review.[407]

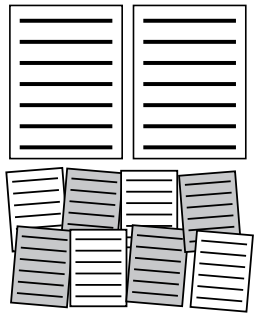
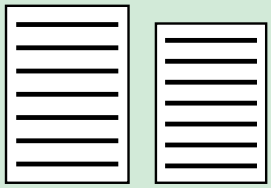
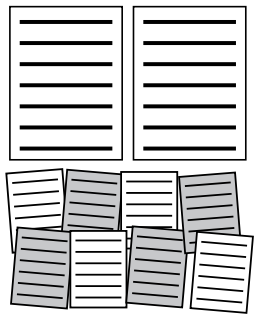
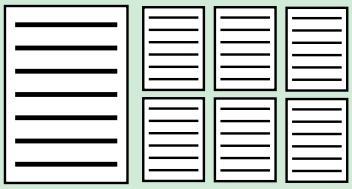
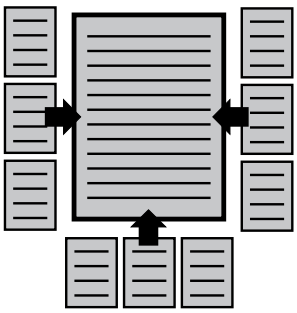
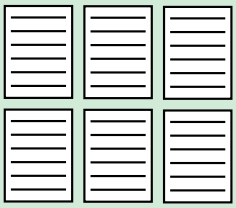
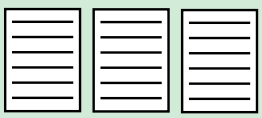
398 P Hanrahan, *Submission 36*.
399 Law Council of Australia, *Submission 49*.
400 CPA Australia, *Submission 42*.
401 See D Booth, *Submission 35*; P Hanrahan, *Submission 36*; Law Council of Australia, *Submission 49*.
402 D Booth, *Submission 35*.
403 Ibid.
404 Law Council of Australia, *Submission 49*. See also P Hanrahan, *Submission 36*.
405 Law Council of Australia, *Submission 49*.
406 Australian Financial Markets Association, *Submission 6*. This view was repeated in respect of a number of specific proposals, including Proposals A4–A8, A13–A17, A19–A21, and A23–A24.
407 Ibid. See also IG Australia, *Submission 33*.

Appendix A: List of submissions

1. Not published
2. Doug Clark Consulting
3. P Latimer
4. W He and H Liu
5. Certainty Advice Group
6. Australian Financial Markets Association
7. Medical Insurance Group Australia
8. E Bant
9. Australian Retail Credit Association
10. Financial Planning Association of Australia
11. B Horrigan
12. Accounting Professional & Ethical Standards Board
13. Actuaries Institute
14. Australian Restructuring Insolvency & Turnaround Association
15. M Nehme
16. Herbert Smith Freehills
17. Not published
18. National Insurance Brokers Association
19. Stockbrokers and Financial Advisers Association
20. G Elkington
21. ASX
22. King Irving
23. Queensland Consumers Association
24. The Advisers Association
25. New South Wales Bar Association
26. Finance Brokers Association of Australia
27. Maurice Blackburn
28. SMSF Association
29. ANZ Banking Group
30. T Peters

31. Institute of Public Accountants
32. Not published
33. IG Australia
34. Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre and Super Consumers Australia
35. D Booth
36. P Hanrahan
37. B. Ethical Funds Management
38. J Dharmananda
39. Financial Services Council
40. Chartered Accountants Australia and New Zealand
41. P Spender and S Bottomley
42. CPA Australia
43. Australian Banking Association
44. Mortgage & Finance Association of Australia
45. Association of Financial Advisers
46. Avant Mutual
47. N Howell and C Brown
48. OpenInvest
49. Law Council of Australia
50. Kit Legal
51. Australasian Society for Computers and Law
52. Insurance Council of Australia
53. Financial Services Institute of Australasia
54. Allens
55. MinterEllison
56. A Schmulow and S Dreyfus

Appendix B: Illustration of Proposals A9–10 and Question A11

CURRENT MODEL	PROPOSED MODEL	POTENTIAL BENEFITS
Class Exemptions		
Act + Regulations + Legislative Instruments 	Act + Implementation Order 	• Single instrument for most class exemptions. • Fewer conditional exemptions. • Clearer location for different types of legislative material, making exemptions easier to find and improving navigability between levels of the legislative hierarchy.
Prescriptive Rules		
Act + Regulations + Legislative Instruments 	Act + Rules 	• More principled Act accompanied by appropriate detail in subject-specific Rules. • Eliminating proliferation of legislative instruments and consolidating prescriptive detail. • Clearer location for different types of legislative material, making detail easier to find and improving navigability between levels of the legislative hierarchy.
Notional Amendments		
Act affected by over 1,200 notional amendments 	Textual Amendments 	• Fewer or no notional amendments as Rules can be textually amended. • Eliminating proliferation of legislative instruments and consolidating the effect of pre-existing notional amendments.
Individual Relief		
		• Reduced need for individual relief instruments as Rules can be tailored for a range of circumstances.