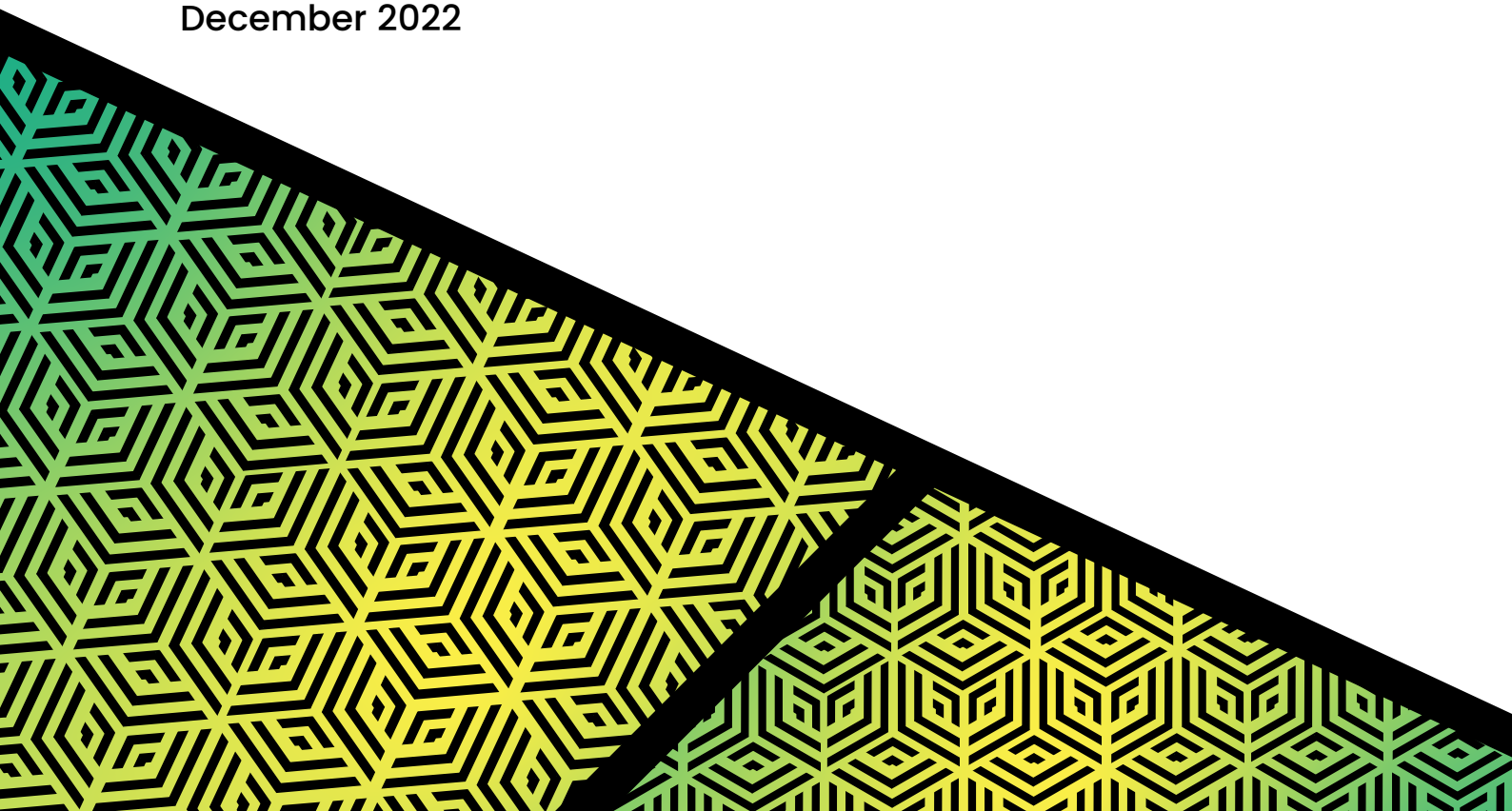
Australian Government
Australian Law Reform Commission

BACKGROUND PAPER FSL9

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law

December 2022



This discussion of unconscionable and misleading or deceptive conduct is the ninth in a series of background papers to be released by the Australian Law Reform Commission ('ALRC') as part of its Review of the Legislative Framework for Corporations and Financial Services Regulation ('the Inquiry').

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

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

View the Financial Services Legislation Background Paper Series.

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

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Background

1. Starting in around 300 BC, the Roman Republic began constructing an extensive road network, connecting the empire's many provinces, with Rome itself at the centre. This is the origin of the common expression, 'all roads lead to Rome'.[1] In much the same way, over the past several decades lawmakers in Australia have undertaken the extensive enactment of provisions designed to proscribe financial service providers from engaging in misleading, deceptive or unconscionable conduct. Much like the Roman road network, this has resulted in a sprawling regime that, at its heart, is targeted at essentially the same kinds of conduct. Unlike the Roman road network, the proliferation of these provisions has served to impede, rather than supplement, the journey of legislative travellers.

2. Based on extensive research by leading academics such as Professors Elise Bant and Jeannie Paterson, together with the views of practitioners, the ALRC's current view is that the proliferation of legislative 'roads to Rome' contributes to unnecessary complexity in the law, and increases compliance and other costs. This Background Paper seeks to draw attention to and explain this problem, as well as to outline potential avenues for reform, which could simplify the law. The proposed solution is to strengthen some of the key legislative 'highways' (the core provisions), and to remove the relatively unused and more complex back streets and alleyways (the lesser used provisions). This is likely to result in a smoother and more efficient journey through the legislative landscape. The analysis arises out of, and is a part of, the ALRC's current *Review of the Legislative Framework for Corporations and Financial Services Regulation*.

3. This Background Paper is divided into three parts, which may be summarised as follows:

- Part I provides background on the rationale for regulation in this area, the need for law reform, what the ALRC has said to date on these issues, and what this Background Paper aims to achieve in greater detail.
- Part II outlines the existing law concerning unconscionable conduct, both at general law and in Commonwealth statutes that govern financial services and corporations — principally, in the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') and *Corporations Act 2001* (Cth). This Part highlights the excessive proliferation and overlap that currently exists between provisions in this field. It also outlines the ALRC's proposed approach for achieving simplification in this area: namely, the repeal of provisions other than ss 12CB and 12CC of the *ASIC Act* (which could potentially be amended, as discussed).
- Part III outlines the existing law concerning misleading or deceptive conduct in the *ASIC Act* and *Corporations Act*. This Part will also highlight the proliferation and overlap that currently exists in relation to provisions in this field of regulation. It goes on to outline the ALRC's proposed approach to simplification in this area: namely, the repeal of provisions other than s 12DA of the *ASIC Act*, the amendment of s 12DA to make it a civil penalty provision, and the enactment of an additional provision, in otherwise similar form, that attracts criminal liability in limited circumstances.

4. This Background Paper builds on work outlined by the ALRC in its Interim Report A.[2] Moreover it builds on the scholarship of leading academics whose extensive research is cited in this paper and which has demonstrated the need for greater simplicity in the law. This Paper aims to draw attention to a problem in the law: the proliferation of provisions directed at broadly similar instances of misconduct, in a way that serves to cloud the fundamental norms and clutter the statute books. The reform proposals floated are intended to ameliorate those problems, but

1 Caillan Davenport and Shushma Malik, 'Mythbusting Ancient Rome — Did All Roads Actually Lead There?', *The Conversation* (Web page, 17 August 2017) <https://theconversation.com/mythbusting-ancient-rome-did-all-roads-actually-lead-there-81746>.

2 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021).

they should be regarded as provisional views only. Given the significance of these provisions, the ALRC welcomes the views of stakeholders on the ideas canvassed, which can be shared via the contact details outlined at the beginning of this Paper. Interim Report C will also discuss issues raised in this Paper and provide an opportunity for stakeholders to make a formal submission.

PART I — Conduct regulation and the need for reform

The rationale for conduct regulation

5. As the ALRC observed in its Interim Report A, conduct regulation affects the way that firms carry on their businesses, including for consumer protection purposes.[3] Over the past several decades, businesses in Australia have faced an increasing amount of conduct regulation. As Professor Horrigan has observed, this has meant that '[c]ommercial enterprises must have an even greater regard than previously for the interests of others with whom they deal'.[4] From the bewilderingly specific, to the sweeping and wide-ranging, these 'expanding legal standards of commercial morality'[5] are principally designed to ensure minimum levels of fair dealing.

6. Prohibitions on engaging in conduct that is misleading, deceptive or unconscionable are an aspect of the broader field of 'conduct regulation'. Conduct regulation serves more than one purpose, but a particularly significant one is to protect consumers from predation. In the financial services context, consumer vulnerability exists for numerous reasons, but includes an asymmetry of information between consumers and issuers or sellers of financial products and services, and a financial incentive on the part of financial services entities to exploit vulnerability in the pursuit of profit. As Professor Armour and colleagues have noted, consumers of financial products and services are 'particularly vulnerable to unscrupulous sellers'.[6] Conduct regulation exists to ensure that minimal levels of commercial morality are abided by, and it does this by seeking to 'direct the way in which firms are expected to carry on their businesses'.[7]

7. The vulnerability of financial consumers, and the need for their protection, was comprehensively demonstrated by the Financial Services Royal Commission, the Final Report of which was delivered in 2019. That report chronicled many instances of exploitative or unfair behaviour by financial services firms — including conduct that might be characterised as misleading, deceptive, or unconscionable (such as the charging of fees for no service). As the Royal Commission found, 'conduct by many entities' had 'broken the law' or 'fallen short of the kind of behaviour the community not only expects of financial services entities but is also entitled to expect of them'.[8]

8. The need for conduct regulation is beyond doubt. However, the way in which that is currently achieved — and whether it could be improved — is deserving of careful attention. In particular, this is because conduct regulation serves an important expressive function,[9] which may be impaired by unnecessarily complex law. Such regulation should be capable of being readily understood by those who must follow its requirements (financial services entitles), or who are entitled to its protection (consumers). It must also be capable of ready enforcement; an object more easily

3 Ibid 502.
4 Bryan Horrigan, 'The Expansion of Fairness-Based Business Regulation - Unconscionability, Good Faith and the Law's Informed Conscience' (2004) 32(3) *Australian Business Law Review* 159, 159.
5 Ibid.
6 John Armour et al, *Principles of Financial Regulation* (Oxford University Press, 2016) 55.
7 Ibid 75.
8 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019) 1.
9 The expressive function of the law has been described as 'the function of law in terms of identifying norms and influencing social action through a legal expression, or statement, about appropriate behaviour': Andrew Godwin, Vivienne Brand and Rosemary Teele Langford, 'Legislative Design — Clarifying the Legislative Porridge' (2021) 38 *Company and Securities Law Journal* 280, 287.

achieved when the law is coherent, clear and navigable. Those objectives — and how the existing law serves to frustrate them — are canvassed in greater detail later in this Background Paper.

The need for law reform in general

9. In Interim Report A, as part of its *Review of the Legislative Framework for Corporations and Financial Services Regulation*, the ALRC highlighted some of the ways in which the existing regulation of corporations and financial services entities is unnecessarily complex.[10] This includes the existence of provisions as long as Hadrian's wall, and as sprawling as the Roman Empire at its height in 100 AD. As the ALRC has observed:

> There has been a level of consensus among stakeholders that the law in this area is 'too complex' and in need of simplification. Acknowledging that a degree of legal complexity is necessary to regulate complex and evolving industries, most stakeholders nevertheless suggest that some aspects of complexity are unnecessary and unhelpful. [11]

10. Unnecessary complexity in the law results in significant detriment to financial services entities, consumers, regulators and other interested parties. As Dr Isdale and Ash observed, unnecessary complexity matters because:

> it makes the law difficult to understand. In turn, this makes it harder for consumers and their advocates to know their rights and be able to exercise them; for practitioners to be able to advise their clients confidently; for regulated entities to know how to comply with the law; and for regulators to enforce the law. Complexity may also give rise to rule of law concerns. We all bear the consequences of legislative complexity, including through increased costs for financial products and services, and in publicly funding courts and regulators to wade through the legislative thicket.[12]

11. In Chapter 13 of Interim Report A, the ALRC outlined why the problem of complexity is particularly acute in the context of conduct regulation.[13] In that chapter the ALRC touched upon the numerous provisions that currently proscribe misleading, deceptive or unconscionable conduct, providing part of the foundation for the analysis that is continued in this Background Paper (alongside the extensive scholarship drawn upon throughout).

12. In general terms, the ALRC observed that, as Professor MacNeil had said in relation to conduct regulation in the UK, the law has 'evolved in a manner whereby the complexity of the rules works against their basic objectives'.[14] The ALRC proposed simplification of the law, including through the consolidation of provisions dealing with misleading, deceptive or unconscionable conduct.

The relevant proposals outlined in Interim Report A

13. Interim Report A contained two proposals relating to the simplification of provisions concerning misleading, deceptive or unconscionable conduct, which are developed in greater detail in this Background Paper. In broad terms, the ALRC noted that both of its

> proposed amendments aim to simplify the law by reducing unnecessary particularisation and removing overlapping provisions that are subject to different and highly technical thresholds, promoting meaningful compliance through a more navigable framework.[15]

10 See also Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021).
11 Australian Law Reform Commission, *Interim Report A Summary: Financial Services Legislation* (Report No 137, 2021) 8 [12].
12 William Isdale and Christopher Ash, 'Undue Complexity in Australia's Corporations and Financial Services Legislation', *ALRC News* (Web page, 30 November 2021) <https://www.alrc.gov.au/news/undue-complexity/>.
13 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) ch 13.
14 Iain MacNeil, *Rethinking Conduct Regulation* (University of Glasgow, 2015) 15.
15 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 500 [13.9].

14. In particular, the relevant proposals outlined in Interim Report A were Proposal A22, in relation to unconscionable conduct, and Proposal A23, in relation to misleading or deceptive conduct. The text of those proposals, and a brief synopsis of what was said about each in Interim Report A, is outlined below.

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.

15. Interim Report A outlined:

> Proposal A22 aims to rationalise legislative provisions proscribing unconscionable conduct by reducing the number of applicable provisions from three to one. Currently, three separate provisions — each subject to different threshold conditions — proscribe very similar conduct. This proliferation of provisions contributes to an unnecessarily complex regime.[16]

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.

16. Interim Report A explained that:

> Proposal A23 would involve the consolidation of at least six separate legislative provisions — each of which addresses very similar conduct, relating to conduct that is false, misleading, or deceptive — into a single provision. This removes unnecessary overlap and redundancy in the law, and would therefore contribute to the achievement of a rationalised and simpler legislative framework which is easier to apply.[17]

17. Interim Report A also floated the idea that simplification could be achieved through greater reliance on the *Corporations Act*'s obligation on financial services licensees to conduct their licensed activities 'efficiently, honestly and fairly' (in s 912A). It was suggested that this obligation may already, in effect, proscribe misleading, deceptive or unconscionable conduct by licensees, and potentially permit repeal of the provisions more specifically related to misleading, deceptive or unconscionable conduct.[18] However, stakeholder feedback on this idea was mostly unsupportive, and the ALRC has come to the provisional view that there may be expressive benefits in retaining two of the more specific provisions discussed in this Paper (namely, 12CB and 12DA of the *ASIC Act*, with some amendments).

What this Background Paper aims to achieve

18. The purpose of this Background Paper is to expand on the initial work undertaken in Interim Report A, by considering how simplification of provisions concerning misleading, deceptive or unconscionable conduct may be achieved. Before outlining possible reforms, the Background Paper provides an overview of the existing regulation of unconscionable and misleading or deceptive conduct.

16 Ibid 525 [13.108].
17 Ibid 529 [13.121].
18 Ibid [13.115], [13.135].

19. In particular, the analysis outlined in this Paper will inform whether Proposals A22 and A23 should become, following an opportunity for further feedback, formal recommendations of the ALRC — whether as originally formulated, or in some modified way. In exploring whether or how that could be done, the ALRC will explain how it has taken into account feedback received on these proposals from stakeholders (who provided written submissions following Interim Report A).

20. This Background Paper aims to provide stakeholders with a sufficiently detailed map of how the ALRC envisages reform in this area, but the ALRC wishes to receive additional feedback from stakeholders before it proceeds to make any recommendations on these issues.

PART II — Unconscionable conduct

A general background on unconscionable conduct

21. As Professors Seddon and Bigwood have observed, unconscionable conduct may be understood as a 'particular species of objectionable behaviour'.[19] In particular, it may be understood as involving the 'abuse of a dominant position: exploitation of serious vulnerability or weakness'.[20] The law provides a range of relief for those who are subject to such conduct, including the setting aside of otherwise legally binding transactions.[21]

22. Unconscionable conduct was first developed in equity (part of the general law), in decisions given by judges.[22] However, in more recent years the doctrine has been enacted in statutes. The legislative approach taken by the Australian Parliament has led in many cases to more extensive relief (compared to what is available at general law), and an expansion in the circumstances in which unconscionability may arise. It is the unconscionablity provisions in Australian corporations and financial services legislation that are the focus of potential simplification in this Background Paper.

23. As will be seen below, the equitable doctrine of unconscionable conduct, and its various statutory enactments, are all variations on a theme. The similarity between the various iterations of this doctrine invites consideration of whether all of these iterations are necessary or desirable, and whether paring back or consolidating the law in this area might be of value. Before considering the prospects of reform, it is necessary to provide an overview of the law as it currently stands, in both its equitable and statutory forms.

The equitable doctrine of unconscionable conduct

24. Courts with equitable jurisdiction may refuse to enforce legal rights where doing so would be unconscionable, and in some circumstances may give an award of equitable damages.[23] Precisely when this may occur is uncertain, since what is 'unconscionable' involves matters of judicial discretion and judgement, about which reasonable minds may sometimes differ. As Sharpe observes, the concept 'is not capable of easy or precise definition'.[24] Courts have usually emphasised that the jurisdiction is incapable of precise definition and involves consideration of all the relevant circumstances.[25]

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19 Nicholas Seddon and Rick Bigwood, *Cheshire & Fifoot Law of Contract* (LexisNexis Butterworths, 11th Australian Edition, 2017) 823.
20 Ibid.
21 Ibid 842. Statutory relief is discussed later in this Background Paper.
22 Ibid 825–845.
23 Michelle Sharpe, *Unconscionable Conduct in Australian Consumer and Commercial Contracts* (LexisNexis Butterworths, 2018) 164.
24 Ibid 47.
25 Gail Pearson, 'The Ambit of Unconscionable Conduct in Relation to Financial Services' (2005) 23(2) *Company & Securities Law Journal* 105, 105. See also *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 276 [304]-[306] (Allsop CJ); *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 442 (Edelman J).

25. While unconscionability may never be capable of precise formulation, the law has developed guidance as to when courts should intervene. In equity, those circumstances may be summarised as being where there is an unconscionable advantage taken of a person who suffers from some special disadvantage. As Mason J put it in the influential case of *Amadio*:

> relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, e.g., a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink.[26]

26. Similarly, Deane J observed in *Commonwealth v Verwayen* that:

> In this as in other areas of equity-related doctrine, conduct which is 'unconscionable' will commonly involve the use of or insistence upon legal entitlement to take advantage of another's special vulnerability or misadventure … in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair-dealing.[27]

27. Conduct that is simply unfair, or even harsh, will not suffice.[28] In this sense, equitable unconscionability imposes a high bar by comparison with some other instances of conduct regulation. For example, in comparison, s 912A(1) of the *Corporations Act* requires financial services licensees to do all things necessary to ensure that their licensed services are provided 'efficiently, honestly and *fairly*' — a considerably lower bar.

28. The core conception of unconscionability described above remains reflected in recent cases of the High Court. To demonstrate how the doctrine operates in practical terms, one of these recent decisions is summarised below.

Stubbings v Jams 2 Pty Ltd [29]

Background

In 2015 Mr Stubbings obtained finance from Jams 2 Pty Ltd to purchase a new property on the Mornington Peninsula, and to re-finance his existing properties. Jams 2 Pty Ltd's business was facilitated Mr Jeruzalski.[30] Two loans were provided to a corporate entity controlled by Stubbings, and were conditional on Stubbings acting as guarantor and providing his properties as security.[31] After just a few months, there was a default on his repayment obligations, and Jams 2 Pty Ltd commenced proceedings to enforce its security over Stubbing's properties.[32]

The High Court unanimously concluded that Jams 2 Pty Ltd (through Mr Jeruzalski) had acted unconscionably.

The law of unconscionability / Stubbing's special disadvantage

The majority observed that, in order to establish unconscionable conduct in equity, it was necessary for Stubbings to establish that he suffered from a 'special disadvantage' — meaning something that 'seriously affects [his] … ability to make a judgement as to his own best interests', and that Jams 2 Pty Ltd had unconscientiously exploited that disadvantage.[33]

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26 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 461.
27 *Commonwealth v Verwayen* (1990) 170 CLR 394, 441.
28 *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 584 (Spiegelman CJ).
29 [2022] HCA 6. The below summary is a revised version of a case note authored by William Isdale and published in [2022] 11 *Queensland Law Reporter* (25 March 2022).
30 *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6, [9].
31 Ibid [13].
32 Ibid [25].
33 Ibid [40].

The majority considered that Stubbings had suffered from a 'special disadvantage' when he entered into the loan agreements.[34] His financial circumstances were, as the trial judge concluded, 'bleak', in that he was unemployed and had no regular income.[35] Further, as the trial judge found, he was 'unsophisticated, naïve and had little financial nous', such that he was 'incapable of understanding the risks involved'.[36] This conclusion was not disputed by Jams 2 Pty Ltd.[37]

How Jams 2 Pty Ltd had unconscientiously exploited Stubbing's disadvantage

The majority considered that Mr Jerusalzki had 'sufficient appreciation of Stubbings's vulnerability, and the disaster awaiting him under the mortgages'.[38] Jams 2 Pty Ltd had 'knowingly and deliberately failed' to make any inquiries about his capacity to service the loans, and the loans were a 'risky and dangerous undertaking' because of their high interest rates.[39] Jams 2 Pty Ltd 'should have known' that Stubbings was bound to lose equity in his Narre Warren properties.[40]

Although Stubbings had obtained certificates of independent legal and accounting advice, it was 'open to draw the inference' that they were 'mere "window dressing"'.[41] Further, there was evidence to suggest that Jams 2 Pty Ltd suspected that Stubbings had not truly received independent advice.[42] In any event, the certificates could 'not negate' Jams 2 Pty Ltd's 'actual appreciation of the dangerous nature of the loans and Stubbing's vulnerability to exploitation'.[43]

In conclusion, there was an 'unconscientious exploitation of Stubbing's special disadvantage', amounting to unconscionable conduct, which justified a refusal to permit the enforcement of Jams 2 Pty Ltd's strict legal rights.[44] In other words, it was not permitted to enforce its security over Stubbing's properties.

29. This case highlights that unconscionable conduct in equity is concerned with unconscientious advantage being taken of another person's special disadvantage. As observed by the Full Federal Court in *Paciocco*, the equitable doctrine has 'at its root, the protection of the vulnerable from exploitation by the strong'.[45]

Benefits and detriments of the equitable doctrine

30. The equitable doctrine has proved to be a powerful tool in providing redress where the enforcement of a legal contract or entitlement by the powerful against the disadvantaged would be detrimental to the latter. However, the equitable doctrine has its limitations, which have led to it being complemented with various statutory iterations.[46]

34 Ibid [42].
35 Ibid [8], [41].
36 Ibid [26], [41].
37 Ibid [42].
38 Ibid [46].
39 Ibid [28]-[29].
40 Ibid [44].
41 Ibid [49].
42 Ibid [50].
43 Ibid [49].
44 Ibid [52].
45 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 [282].
46 See discussion in Sharpe (n 23) 175.

The uncertainty of the equitable doctrine

31. The inexactitude of unconscionability has been a cause of concern for some, particularly as it relates to commerce. For example, Sir Anthony Mason has observed that 'the principle lacks definition and sharpness of focus, leading to some degree of uncertainty'.[47] Similarly, Spiegelman CJ has described unconscionability as a circumstance in which courts are authorised:

> to rearrange the legal rights of persons on the basis of vague general standards which are clearly capable of misuse unless their application is carefully confined.[48]

32. Writing more recently, Middleton J observed that:

> a rationally based system of law needs to set out the limits of acceptable commercial behaviour in order that persons can order their commercial affairs in advance. Such a system cannot depend on the personal approach of a judge, based upon his or her view of commercial morality.[49]

33. Nonetheless, part of the value of unconscionability lies in its principles-based approach, which avoids the need for detailed rules that may be hard to understand, navigate or apply, or which may more easily be gamed or avoided. Norms are particularly important when it comes to matters of conduct. As observed by Allsop CJ in *Paciocco*:

> The place of norms, values and principles in commercial law, lacking particular precision, but stating a value or general standard, can be seen in the common law, statutes on commercial subjects, in Equity, and in other branches of commercial law. Sometimes, a rule can only be expressed at a certain level of generality, often involving a value judgment. To do otherwise, and to seek precise rules for all circumstances, may be to risk complexity, incoherence and confusion.[50]

34. When it comes to financial services regulation, the ALRC's research and consultations to date are supportive of the need to remove undue prescription in the law, and to rely more on a principles-based approach (albeit complemented by greater detail in some circumstances).[51] In the ALRC's view, unconscionability provides a good example of a circumstance in which a principles-based approach is particularly desirable, given the arguable futility, or impossibility, of attempting to exhaustively define such a concept. A principles-based approach requires parties to think for themselves about the implications of their conduct.

35. The perception that unconscionability is too uncertain, is partly ameliorated in the context of statutory unconscionability in s 12CB of the *ASIC Act*, through the articulation of statutory indicators or considerations.[52] That provision — and the opportunity it provides for simplification — is discussed in greater detail later in this Paper.

Other limitations of the equitable doctrine

36. There are a number of other limitations to the equitable doctrine, which have motivated the development of complementary statutory provisions (as discussed later). In particular those limitations include:

- *Enforcement issues* — the equitable doctrine is typically invoked by a party who has been exploited in the course of some commercial dealing. Limited access to legal services for those of modest means presents a practical limitation on access to relief founded on the equitable doctrine.

47 Sir Anthony Mason, 'Themes and Prospects' in Paul Finn (ed), *Essays in Equity* (Law Book Company Limited, 1985) 242, 244.
48 *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583.
49 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 [402].
50 Ibid [267].
51 Australian Law Reform Commission, 'Initial Stakeholder Views' (Background Paper FSL1, June 2021).
52 In *Australian Securities and Investments Commission Act 2001* (Cth) s 12CC.

As will be discussed, statutory unconscionability provisions seek to remedy this problem through the availability of regulator enforcement.

- *Constraints on the equitable doctrine's scope* — in particular, the doctrine requires that there be a 'victim' whose 'special disadvantage' has been unconscientiously exploited. The disadvantage they suffer must be a special one; an average consumer, who is merely inattentive or confused, for example, might be exploited without any entitlement to equitable redress.

  As will be discussed below, at least one of the statutory provisions — s 12CB of the *ASIC Act* — dispenses with this requirement for a 'victim' who suffers from a 'special disadvantage'. It provides redress in a broader range of circumstances, as compared to the equitable doctrine.

Statutory proscriptions on unconscionable conduct

37. More recently, the equitable doctrine of unconscionable conduct has been complemented by a 'bewildering myriad' of statutory provisions,[53] all of which invoke similar language (to each other and the equitable doctrine), but which are different in some respects.

38. This proliferation has resulted in a degree of overlap and redundancy in the law. This creates unnecessary complexity, and invites consideration of reforms directed at simplification. As Mann and Drummond have observed, there are now 'a number of (sometimes overlapping) legislative prohibitions against "unconscionable conduct"'.[54] As Horrigan has written:

> the contemporary reality confronting all stakeholders is that terms and notions that are expressly or implicitly associated with one or more meanings of unconscionable conduct are now littered throughout state, territory, and federal laws, most notably in corporate law …[55]

39. As the above quotation indicates, the proliferation of statutory unconscionability provisions is not limited to Commonwealth legislation, nor directed only at financial services or corporations.

40. The focus of this Background Paper is on simplification in the context of Commonwealth law concerning financial services and corporations, and within existing policy settings (consistent with the terms of reference for the ALRC's current *Review of the Legislative Framework for Corporations and Financial Services Regulation*). The provisions canvassed in detail below all fall within that context. For that reason, this Paper does not, for example, consider the simplification that could be achieved through reliance on the misleading or deceptive conduct or unconscionability provisions in the Australian Consumer Law (if that law were amended so as to apply to financial products and services).[56]

41. The ALRC acknowledges that the problem of statutory proliferation extends beyond the provisions discussed in this Background Paper. The ALRC hopes that this Background Paper may serve to animate reform efforts aimed at statutory simplification in other contexts, and serve as a blueprint for how that may be achieved.

42. The four unconscionability provisions relevant to this Background Paper are outlined in Table 1 below.

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53 Sharpe (n 23) xi.

54 Peter Mann and Stanley Drummond, 'Utmost Good Faith, Unconscionable Conduct and Other Notions of Fairness - Where Are We Now?' (2017) 29 *Insurance Law Journal* 1, 20.

55 Bryan Horrigan, Submission No 15 to the Senate Economics Committee, *Inquiry into the Statutory Definition of Unconscionable Conduct* (2008) 14.

56 Whether such consolidation would be desirable would involve substantive policy issues beyond the remit of the ALRC's Inquiry. More general issues relating to reframing or restructuring the legislative framework for financial services regulation will be discussed in Interim Report C, to be provided to government by 25 August 2023.

Table 1 — Unconscionability provisions in financial services and corporations legislation

Act	Section	Title of section
Corporations Act	991A	Financial services licensee not to engage in unconscionable conduct
ASIC Act	12CA	Unconscionable conduct within the meaning of the unwritten law of the States and Territories
	12CB	Unconscionable conduct in connection with financial services
	12CC	Matters the court may have regard to for the purposes of section 12CB

The core meaning of the statutory provisions

43. None of these provisions attempts to exhaustively define what constitutes unconscionable conduct, although s 12CC of the *ASIC Act* does contain a number of statutory indicators for the purposes of s 12CB. As Horrigan has observed:

> the failure to include a definition of unconscionable conduct meant that the scope of the new statutory concept was essentially left to the courts to decide. In turn, this carried the risk of an ongoing debate as to how far the statutory concept extended in promoting ethical conduct in business transactions.[57]

44. In broad terms, courts have considered that unconscionability under the statutory provisions has a meaning that includes the equitable definition of unconscionability.[58] This is consistent with a principle of statutory interpretation that statutory adoption of legal concepts that have an established meaning carry that meaning absent indication otherwise.[59] The adoption of that equitable meaning is clearest in s 12CA of the *ASIC Act*, which expressly references conduct that is 'unconscionable within the meaning of the unwritten law'. As Paterson, Bant and Clare observe, '[u]nconscionable conduct has a meaning in equity which must be relevant in interpreting the statute because it is invoked by the language used to describe the prohibition'.[60] Accordingly, Horrigan observes, 'in s 12CA of the *ASIC Act* and probably s 991A of the *Corporations Act* as well', unconscionability 'largely embodies the equitable notion of unconscionable conduct'.[61]

45. In comparison to s 991A *Corporations Act* and s 12CA *ASIC Act*, s 12CB of the *ASIC Act* seeks to go further — to move beyond unconscionability as understood in equity. Notably, s 12CB(4) states that it was the intention of Parliament that it 'is not limited by the unwritten law of the States and Territories relating to unconscionable conduct', and is 'capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour'.

46. For one thing, as the Full Federal Court noted in *Unique International College Pty Ltd v ACCC*, the extension of unconscionable conduct under s 12CB to a system or pattern of behaviour

57 Horrigan (n 55) 9.

58 For example, in *ASIC v Kobelt*, Kiefel CJ and Bell J wrote of statutory unconscionability under s 12CB of the *ASIC Act* as including 'the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage': *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 [14]. Quoting *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 [296].

59 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 67.

60 Jeannie Marie Paterson, Elise Bant and Matthew Clare, 'Doctrine, Policy, Culture and Choice in Assessing Unconscionable Conduct under Statute: *ASIC v Kobelt*' (2019) 13 *Journal of Equity* 81, 92.

61 B Horrigan, *Submission 11*. There is an argument that these provisions may also enable relief in relation to other equitable doctrines that, broadly speaking, involve notions of conscience, but as Horrigan observes 'that door seems closed for the moment': Ibid 35. See authorities cited therein.

'removes the necessity for revealed disadvantage to any particular individual'.[62] In the Explanatory Memorandum that accompanied the *ASIC Act* provisions, it was further indicated that 'it follows from the principle that a specific person need not be identified that a special disadvantage is not a necessary component of the prohibition'.[63]

47. In addition, s 12CC sets out a number of things a court 'may have regard to' when determining whether conduct is 'in all the circumstances, unconscionable' (as proscribed by s 12CB). The list of considerations in s 12CC are said to be provided '[w]ithout limiting the matters to which the court may have regard'.

48. As Horrigan observes, due to s 12CB it is:

> [A]bundantly clear that something more is contemplated than simply playing around at the edges of the discrete doctrine of unconscionable conduct concerned with unconscionable advantage-taking of a victim of special disadvantage at the point of executing an agreement. There is a set of legislated presumptions of interpretation just for statutory unconscionability. They direct courts that statutory unconscionability goes beyond the judge-made law.[64]

49. However, just how much further s 12CB goes is not free from doubt. As Paterson, Bant and Clare observe, there

> has been ongoing uncertainty about the scope of this statutory prohibition on unconscionable conduct, how far it extends beyond the doctrine in equity and the standard used to measure its contravention.[65]

50. Doubts about the scope of s 12CB particularly arise from the use of the term 'unconscionable conduct', and whether as a result of the use of that language, the equitable conception will exercise a restraining influence on how broadly the provision may otherwise be construed.

51. The outer bounds of s 12CB were tested in the case of *ASIC v Kobelt*, in which the High Court delivered judgment in 2019. That case is summarised below.

Australian Securities and Investments Commission v Kobelt [66]

Background

Mr Kobelt operated a general store in the remote town of Mintabie, South Australia, selling a range of groceries, fuel and second-hand cars. Almost all of Mr Kobelt's customers were Aboriginal people who lived in two remote communities, and were characterised by their 'poverty and their low levels of literacy and numeracy'.[67]

62 *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 362 ALR 66 [104].
63 Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2010 (Cth) [2.22].
64 B Horrigan, *Submission 11*.
65 Paterson, Bant and Clare (n 60) 91.
66 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1.The below summary is a revised version of a case note authored by William Isdale and published in [2019] 24 *Queensland Law Reporter* (21 June 2019).
67 Ibid [20].

Mr Kobelt supplied credit to his Indigenous customers under a 'book-up system', in which payment for goods was deferred, subject to the customer handing over their bank card and PIN for an account into which their wages or Centrelink payments were paid.[68] Mr Kobelt would withdraw the whole, or nearly the whole, of the available funds from customers' accounts on a periodic basis.[69] He would then apply at least 50% of the funds to reduce their indebtedness, but would also exercise control over the remaining 50%, which he would allow customers to use to purchase goods from him (or do other things with, subject to his discretion).[70]

The Australian Securities and Investments Commission ('ASIC') brought proceedings against Mr Kobelt in the Federal Court, including for alleged contravention of s 12CB of the *ASIC Act* (for the supply of financial services to a person in a manner that is, 'in all the circumstances, unconscionable').[71]

The reasons of the majority — that the system was not unconscionable

Kiefel CJ and Bell J (writing together) and Keane and Gageler JJ (each writing separately) considered that Mr Kobelt's conduct had not been unconscionable within the meaning of s 12CB.[72]

Kiefel CJ and Bell J observed that the term 'unconscionable' is not defined in the *ASIC Act* and is to be 'understood as bearing its ordinary meaning'. The question of whether the system was 'against conscience' had to be determined by a consideration of the values that informed the standard of conscience fixed by the section, which had been identified as including honesty, absence of trickery or sharp practice, fairness when dealing with customers, and the protection of the vulnerable from those who would 'victimise, predate or take advantage'.[73] Their Honours considered that an absence of '*unconscientious* advantage' having been obtained by Mr Kobelt was determinative that he did not act unconscionably.[74]

Their Honours emphasised cultural factors which suggested that the system suited the Aboriginal customers, including protection from 'humbugging' for cash and the 'boom and bust cycle of expenditure', by enabling access to basic goods in the interval between receipt of wages or Centrelink payments.[75]

Gageler and Keane JJ (each in separate reasons) gave similar reasons for dismissing ASIC's appeal.[76]

52. As Paterson, Bant and Clare have argued, *ASIC v Kobelt* 'does not go very far in providing greater clarity' about the scope of s 12CB of the *ASIC Act*.[77] However, the judgments of the majority indicate a limited interpretation being given to the provision, constrained by reference to the meaning of the doctrine in equity. Notably, Kiefel CJ and Bell J wrote that the appeal did not provide the occasion to consider 'any suggestion that statutory unconscionability no longer requires consideration of … special disadvantage'.[78] Further, Gageler J wrote that s 12CB does

68 Ibid [21].
69 Ibid [22].
70 Ibid [23], [193].
71 Ibid [5]. [7].
72 Ibid [79], [112]-[113].
73 See the reasons of Allsop CJ in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199.
74 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 [19].
75 Ibid [66]-[69].
76 Ibid [105]-[110], [124]-[129].
77 Paterson, Bant and Clare (n 60) 91.
78 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 [48].

not 'dilute' the gravity of conduct required to contravene the provision, as compared to the doctrine in equity.[79] Similarly, Keane J considered that:

> The legislative choice of 'unconscionability' … confirms that the moral obloquy involved in the exploitation of victimisation that is characteristic of unconscionable conduct [in equity] is also required for a finding of unconscionability under s 12CB.[80]

53. The High Court's judgment in *ASIC v Kobelt* has been criticised for its narrow construction of s 12CB. For example, Paterson, Bant and Clare consider that it 'might be questioned' whether the limited construction 'can be justified in terms of judicial method or statutory interpretation'.[81] They concede that the equitable meaning 'must be relevant' because that meaning is 'invoked by the language used to describe the prohibition'.[82] However, that meaning also 'cannot be determinative of what is required', because s 12CB expressly purports to not be limited by the meaning of unconscionable conduct in equity.[83]

Conclusion on the core meaning of the statutory provisions

54. As the above analysis shows, s 991A of the *Corporations Act* and s 12CA of the *ASIC Act* are essentially statutory incantations of the equitable doctrine. The benefit those provisions provide (for consumers), over and above the equitable doctrine, is in access to statutory remedies, and the ability to be enforced by a regulator (and not merely by a consumer themselves).

55. However, s 12CB of the *ASIC Act*, read in light of the factors outlined in s 12CC, clearly goes further. How much further is open to some doubt, as indicated by *ASIC v Kobelt*, but it clearly picks up the conception of unconscionability reflected in equity (of unconscientious exploitation of a person with a special disadvantage), as *Kobelt* indicated. Accordingly, s 12CB likely captures conduct that otherwise falls within s 991A of the *Corporations Act* and s 12CA of the *ASIC Act*. If that is the case (as the ALRC considers), there appears to be no rationale for those additional provisions. This issue is canvassed further below.

The scope of application of the unconscionability provisions

56. The scope of application of the unconscionability provisions differ from eachother in some respects. Since it is relevant to the prospects of reform, it is worth briefly outlining those differences.

Section 991A Corporations Act

57. This provision applies to a 'financial services licensee', which must not, 'in or in relation to the provision of a financial service, engage in conduct that is, in all the circumstances, unconscionable'.

58. The *Corporations Act* extensively details circumstances in which a financial services licence ('AFS licence') must be held in order to provide financial services, or engage in certain other conduct.[84] It also contains numerous exemptions and exceptions to the requirement to hold an AFSL. In this way, the application of s 991A is limited, as compared to ss 12CA and 12CB of the *ASIC Act*. As Professor Pearson has observed of s 991A:

> In light of the *ASIC Act* provisions, this is a curious provision. It applies only to the financial services licensee and, therefore, at first blush, excludes the conduct of authorised representatives. It should

79 Ibid [90].
80 Ibid [119].
81 Paterson, Bant and Clare (n 60) 92.
82 Ibid.
83 Ibid 92–93.
84 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) ch 8.

> be noted that other conduct provisions such as s 1041H, the misleading and deceptive conduct provision, apply to a person.[85]

59. In a submission to the ALRC, Howell and Dr Brown observe that s 991A of the *Corporations Act* is not subject to the qualification that offending conduct must be 'in trade or commerce' (in comparison to the *ASIC Act* provisions).[86] They query whether, as a result, the removal of s 991A (while retaining either or both of the *ASIC Act* provisions) may 'reduce protections in practice'.[87]

60. Although s 991A is not expressly said to be limited to conduct in 'trade or commerce', the ALRC suggests that its application only to a 'financial services licensee' 'in or in relation to the provision of a financial service' is likely to achieve a similar, if not the same, limitation in practice. That is because the provision of a financial service by an AFS Licensee will very likely be undertaken in the course of 'trade or commerce'. In the case of *Concrete Constructions (NSW) Pty Ltd v Nelson*, it was said that the qualification of 'in trade or commerce' refers to conduct 'which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character'.[88] The provision of financial services by an AFS licensee is very likely to bear such a trading or commercial character.[89] Accordingly, it is very unlikely that the repeal of s 991A would result in any protections being lost in practice.

Sections 12CA and 12CB ASIC Act

61. Both s 12CA and 12CB of the *ASIC Act* apply to a 'person' who must not, 'in trade or commerce' engage in the proscribed conduct 'in relation to financial services'. As observed above, despite the qualification of 'in trade or commerce', in its application to any 'person', the coverage of these provisions is wider than s 991A *Corporations Act*.

62. Like s 991A of the *Corporations Act*, these provisions also only apply 'in relation to' 'financial services' as legislatively defined. However, as Interim Report A explains, the term 'financial service' is defined more broadly in the *ASIC Act* than it is in the *Corporations Act*, and covers all of — and more than — the same ground. As that report observed,

> At a high level, the *ASIC Act* definitions of 'financial product' and 'financial service' are broader than the definitions in the *Corporations Act*. This reflects the intention that the consumer protection provisions in the *ASIC Act* should apply more broadly than obligations contained in the *Corporations Act*.[90]

63. In summary, the scope of application of ss 12CA and 12CB of the *ASIC Act* encompasses, and is broader than, the scope of application of s 991A of the *Corporations Act*.

Remedies for the unconscionability provisions

64. Having discussed the content and application of the unconscionability provisions, it is now worth considering the available remedies. Table 2 summarises these.

85 Pearson (n 25) 128.
86 N Howell and C Brown, *Submission 47*.
87 Ibid.
88 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 603.
89 However, it must be conceded that some doubt may remain, including because the precise scope of s 991A *Corporations Act* and its meaning has 'yet to be judicially considered': Mann and Drummond (n 54) 46.
90 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 276.

Table 2 — Remedies for contraventions of unconscionability provisions

Available remedies for a contravention	
Sections 12CA and 12CB *ASIC Act*	• civil penalty order and/or adverse publicity order (s 12GBA) • ASIC infringement notice (s 12GXA) • damages (s 12GF) • statutory injunction (s 12GD) • non-punitive orders, such as a community service order, probation order, disclosure of information order, or publication order (s 12GLA) • such other orders as the court thinks appropriate (s 12GM)
Section 991A *Corporations Act*	• damages (s 991A(2)) • statutory injunction (s 1324)

65. As Mann and Drummond note, Subdivision G of Part 2 of the *ASIC* Act contains 'a broad range of enforcement and remedial provisions' that are applicable to ss 12CA and 12CB.[91] Notably, the available remedies for ss 12CA and 12CB include those available for s 991A of the *Corporations Act*, but go beyond those.

66. Importantly, as shown above, ss 12CA and 12CB are civil penalty provisions (unlike s 991A of the *Corporations Act*). The availability of such penalties, alongside the other more extensive range of potential remedies, allows 'the regulator to take action' to establish appropriate behavioural standards in the market.[92] ASIC, alongside other interested parties, is more constrained in the relief it may obtain for a contravention of s 991A of the *Corporations Act*.

67. In summary, there is no remedial benefit provided by s 991A of the *Corporations Act*, compared to the *ASIC Act* provisions.

The problem of proliferation

68. The inclusion of several statutory provisions aimed at essentially the same conduct, in circumstances where one provision would appear to be sufficient, adds complexity to the law. Aside from the general problems caused by legislative complexity outlined earlier in this Paper, there are three that are particularly worth emphasising:

- *First, the expressive power of the prohibition against unconscionable conduct may be reduced on account of unnecessary proliferation and complexity.* There are expressive benefits in having a single, powerful and broad prohibition, rather than several variations which may serve to cloud or obscure what is intended to be achieved. In Interim Report A, analysis along these lines informed the suggestion that terminology should be used consistently to reflect the same or similar concepts.[93] For the same reason, statutory prohibitions that invoke the standard of unconscionability should refer to the same thing, absent compelling reasons to justify some other approach.
- *Secondly, the existence of several statutory prohibitions, rather than one, may unnecessarily invite or require parties to consider, and potentially plead, more than the one provision.* That has particularly proved to be the case in relation to the misleading or deceptive conduct provisions, discussed later in this Paper.[94]

91 Mann and Drummond (n 54) 35.
92 Pearson (n 25) 105.
93 Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) ch 5.
94 Emily Klotz, 'Misleading or Deceptive Conduct in the Provision of Financial Services: An Empirical and Theoretical Critique

- *Thirdly, and more generally, a more complex statute — on account of unnecessary proliferation and overlapping provisions — is simply more difficult to comprehend and apply.*

69. Moreover, there does not appear to be a rationale for the current state of proliferation and overlap. In particular, there is no identified reason why provisions other than s 12CB are necessary to achieve a regulatory objective that would not otherwise be achieved by s 12CB. Sections 12CA and 12CB of the *ASIC Act* were included within that legislation at the time of its commencement in 2001. Subsequently, in the same year, s 991A was added into the *Corporations Act*.[95] However, the explanatory memorandum accompanying that legislation did not offer an explanation of why it was considered necessary.[96]

70. Further, there is no apparent explanation or rationale for why s 12CA was considered necessary in light of s 12CB. Both provisions were added, at the same time, to the *Australian Securities and Investments Commission Act 1989* (Cth), the predecessor to the *ASIC Act.* The explanatory memorandum accompanying the introduction of those provisions merely provides that s 12CA 'will preserve the availability of remedies for breaches of the common law dealing with unconscionable conduct'.[97] It goes on to state that, '[s]imilarly', s 12CB will 'prohibit engaging in unconscionable conduct' in the circumstances outlined by the provision.[98] The explanatory memorandum provides no explanation as to why, given the apparent overlap, both provisions were considered necessary.

The path to simplification

71. A possible path out of the current legislative tangle would be to repeal unconscionability provisions other than s 12CB of the *ASIC Act* (accompanied by s 12CC). This provides a possible path for the three reasons canvassed above:

a. Section 12CB prohibits 'unconscionable conduct' in the broadest sense of all the provisions;
b. Section 12CB applies to the broadest class of persons and in the broadest set of circumstances; and
c. Section 12CB enables the broadest possible range of statutory remedies. Most importantly, it enables regulator action to secure a civil penalty, so as to enable more effective standard-setting about appropriate commercial behaviour.

72. In other words, s 12CB covers the conduct captured by s 991A of the *Corporations Act* and s 12CA of the *ASIC Act*, and provides access to the same (and greater) remedies. Repealing s 991A of the *Corporations Act* and s 12CA of the *ASIC Act* would not change existing policy settings or protections, but would simplify the law.

73. As Mann and Drummond observe:

> The prohibition in s 12CB of the *ASIC Act* is the most important of these three prohibitions [*cf.* 12CA *ASIC Act* and s 991A of the *Corporations Act*], because of its scope (which is broader than the prohibition in s 12CA) and because it is a civil penalty provision (unlike the prohibition in s 991A).[99]

74. In the ALRC's view, the analysis outlined above fortifies the view reached in Interim Report A, which was reflected in Proposal A22.

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of the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth)' (2015) 33(7) *Company and Securities Law Journal* 451, 451–2.

95 *Financial Services Reform Act 2001* (Cth).
96 Revised Explanatory Memorandum, *Financial Services Reform Bill 2001* (Cth) [13.36].
97 Explanatory Memorandum 2, Financial Sector Reform (Consequential Amendments) Bill 1998 (Cth) [4.31]-[4.32].
98 Ibid.
99 Mann and Drummond (n 54) 22.

Stakeholder support

75. Since the publication of Interim Report A, the ALRC has had the benefit of submissions from a range of stakeholders, including in response to Proposal A22. Overwhelmingly, that feedback was supportive of Proposal A22, and recognised the need for reform in this area.[100]

Other stakeholder feedback

76. The ALRC received several submissions which, while offering qualified support in relation to at least some aspects of Proposal A22, also raised some concerns. Namely:

- Bant, while favouring Proposal 22 '[o]n balance', queried whether removing s 12CA might 'sever too sharply the ongoing connection and capacity for principled cross-pollination between the equitable doctrine and its broader statutory counterparts'.[101] She also raised the concern that consolidation of the unconscionable conduct prohibitions 'in the context of financial services will not address the many other contexts in which replication of norms occurs'.[102]
- Howell and Brown agreed that it 'seems that s 12CA adds little, if anything, to the legislation'.[103] However, they raised the concern that repeal of s 12CA of the *ASIC Act* 'would add to the divergence between the general consumer protections in the *ASIC Act* and the general consumer protections in the *ACL*'.[104]
- Kit Legal agreed with the proposal to repeal s 991A of the *Corporations Act*.[105] However, they considered that 'more analysis is needed to support repealing s 12CA'.[106] Their concern was whether s 12CB of the *ASIC Act* would pick up unconscionable conduct within the meaning of the unwritten law, as currently captured by s 12CA of the *ASIC Act*.[107]
- Horrigan considered that 'at least some reform is desirable and appropriate in the name of simplification and rationalisation', and supported the repeal of s 991A of the *Corporations Act*.[108] However, he did not support the repeal of s 12CA of the *ASIC Act*, because in his view there are 'unresolved questions' about whether that provision 'might catch conduct' that would not be caught by 'the amplified notion of unconscionable conduct' in s 12CB.[109]

77. The ALRC is grateful to all stakeholders who provided feedback. In the section below, this Paper will address the concerns raised by stakeholders under a number of different headings, alongside consideration of other concerns that may be raised in respect of Proposal A22.

78. In the ALRC's view, each of the concerns raised by stakeholders — and other potential objections — can be satisfactorily addressed (as detailed below).

Objections to simplification

79. There are a number of general 'risks' that may accompany simplification of the unconscionability provisions discussed in this Paper.

100 Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022) 43–44.
101 E Bant, *Submission 8*.
102 Ibid 8.
103 N Howell and C Brown, *Submission 47*.
104 Ibid 9. The other concern raised by Howell and Brown, that repeal of s 991A *Corporations Act* may reduce protections, because its application is not limited to 'in trade or commerce' (as ss 12CA and 12CB *ASIC Act* are) was addressed earlier in this Part.
105 Kit Legal, *Submission 50*.
106 Ibid 12.
107 Ibid.
108 B Horrigan, *Submission 11*.
109 Ibid 5.

80. When considering these risks, it is also necessary to bear in mind another risk: the risk of doing nothing. The existing state of the law in this area is complex and scattered, without any good reason for being so. Potential downsides of any reform must be weighed against the known downsides of persisting with the current morass. Moreover, successful reform of the unconscionability provisions can provide a roadmap for the many other contexts in which there is replication of legislative norms.

The risk that something would be lost

81. In this section the ALRC considers the risk that repeal of s 12CA, which captures unconscionability within the meaning of the unwritten law, may reduce protections.[110] This was the concern of Horrigan, who authored a detailed submission to the ALRC.[111] It was also raised by Kit Legal, which suggested that s 12CB may not capture everything caught by s 12CA.

82. The ALRC considers that there are two answers to these concerns:

- *First, the risk is small*. It is highly likely that s 12CB already captures all conduct otherwise caught by s 12CA. Section 12CB captures conduct that is, 'in all the circumstances, unconscionable'. As already argued, on its most plausible construction this would include at least the well-established conception of unconscionable conduct in equity. To conclude otherwise would be contrary to the provision's protective purpose, and contrary to the interpretive principle that legislative references to legal concepts carry that meaning (absent indication otherwise).[112] Moreover, the reasons of the majority in *ASIC v Kobelt* were supportive of the equitable conception informing the meaning of 'unconscionable' within that provision.[113]
- *Secondly, the risk can be addressed*. The intention behind the ALRC's suggested reforms is not to remove statutory redress for conduct that is unconscionable within the meaning of the unwritten law. The risk that a Court would conclude otherwise may be addressed in two ways. First, any amending legislation that serves to implement Proposal A22 should be accompanied by a clear statement in the Explanatory Memorandum indicating that there is no intention to remove statutory redress for unconscionability within the meaning of the unwritten law. Second, s 12CB could be amended so as to make it clear that it includes unconscionability within the meaning of the unwritten law. That would likewise address the concern, raised by Bant, about severing too sharply the connection to the equitable doctrine.[114]

The risk of ignoring the broader context

83. There is a risk that amendments to unconscionability provisions, in the context only of Commonwealth corporations and financial services legislation, ignore the broader context of statutory unconscionability. In particular, that context includes the Australian Consumer Law, which contains equivalent unconscionability provisions applicable more broadly in trade or commerce (but not in relation to financial services). As an Explanatory Memorandum accompanying amendments to the ACL observed, the provisions there were 'drafted in almost identical terms' to ss 12CB and 12CC of the *ASIC Act*, and 'the meaning of unconscionable conduct under each provision was intended to be the same'.[115]

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110 The risk that repeal of s 991A *Corporations Act* might reduce protections, because it is not limited in or in relation to 'trade or commerce' (as ss 12CA and 12CB *ASIC Act* are), was addressed earlier in this Paper.
111 B Horrigan, *Submission 11*.
112 Pearce (n 59) 67.
113 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 [14] (Kiefel CJ and Bell J), [90] (Gageler J), [118]-[119] (Keane J).
114 E Bant, *Submission 8*.
115 Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2011 (Cth) 17 [2.10].

84. Notably, the submission of Howell and Brown raised the concern of adding to 'divergence between the general consumer protections in the *ASIC Act* and the general consumer protections in the *ACL*'.[116] And as Horrigan has observed elsewhere, if equivalency is not maintained between both sets of unconscionability provisions:

> [T]he different statutory regimes will become out of sync and the body of federal and state judicial guidance on one set of provisions will, to that extent, be less applicable across all of these statutory regimes.[117]

85. The ALRC agrees that equivalency with the ACL is desirable, and that simplification of unconscionability provisions in other statutory contexts should be reviewed. If possible, government should consider making equivalent changes at the same time. However, if that is not possible, the ALRC does not consider that the identified problems with the law in this area should be retained, simply because they cannot be fixed in all contexts simultaneously.

The risk of creating more uncertainty

86. Finally, there is the risk that amending the law will result in uncertainty, or require 'another settling-in period in which all stakeholders will need to await a sufficient number of judicial test cases to know what (if any) impact' such changes have made.[118]

87. However, the ALRC does not consider that the proposed changes are likely to appreciably increase uncertainty. Importantly, the ALRC does not envisage the creation of a wholly new provision; instead, it simply seeks to rely more heavily on the pre-existing s 12CB of the *ASIC Act* (potentially with a small amendment to make it clear that it includes general law unconscionability). Although the outer limits of s 12CB may be uncertain, that is already the case.

Conclusion on the unconscionability provisions

88. Part II of this Background Paper has argued that the existing proliferation of unconscionability provisions in Commonwealth corporations and financial services law gives rise to undesirable complexity in the law. That complexity is unnecessary because s 12CB of the *ASIC Act* likely already captures all that is covered by ss 991A of the *Corporations Act* and 12CA of the *ASIC Act*.

89. The risk that s 12CB *ASIC Act* alone might miss something, that the broader context (including equivalent provisions in the ACL) is ignored, or that changes to the law may result in uncertainty, can be appropriately addressed. To counter those risks, the ALRC suggests an amended form of Proposal A22, which includes measures to reduce the risk of s 12CB of the *ASIC Act* not encompassing unconscionability within the meaning of the unwritten law, and to reduce the risk of losing symmetry with ACL provisions. The amended Proposal A22 is outlined below (with changes in italics).

116 N Howell and C Brown, *Submission 47*.
117 Horrigan (n 55) 10.
118 Ibid 17.

Amended Proposal A22

(a) 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.

(b) *Section 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) should be amended so that it expressly provides that it encompasses unconscionability within the meaning of the unwritten law.*

(c) *Government should, after careful consultation, consider making equivalent changes to the Competition and Consumer Act 2010 (Cth) unconscionable conduct provisions, so as to facilitate greater reliance on s 21 of the Australian Consumer Law as the core unconscionability provision.*

90. The ALRC seeks stakeholder feedback on whether this is a suitable means of addressing the current proliferation of unconscionability provisions within corporations and financial services law. And, if it is not, what other avenues for simplification might be more suitable.

PART III — Misleading or deceptive conduct

General background on misleading or deceptive conduct

91. As Lockhart observes, '[m]isleading or deceptive conduct in trade or commerce is proscribed by a range of statutory provisions'.[119] Like the unconscionability provisions discussed earlier, these provisions serve a consumer protection purpose, and promote 'informed commercial activity, not based on misinformation, but rather on accurate information'. [120]

92. This field of regulation was largely inaugurated with the introduction of s 52 of the *Trade Practices Act 1974* (Cth). The successor to that provision is now s 18 of the *Australian Consumer Law*, which simply provides that:

> A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

93. As Bant and Paterson argue, s 52 and its successors have been 'remarkably successful in promoting an effective and principled regulation of that misconduct'.[121] However, '[u]nfortunately, from this relatively positive starting position, affairs have degenerated' due to an 'enthusiastic burst of legislative activity in the field'.[122] Like a legislative Mount Vesuvius, Parliament has spewed forth an enormous array of provisions. As Bant and McCracken have detailed, there are '[a]t least 114 statutory prohibitions on misleading or deceptive conduct … spanning 69 statutes and nine jurisdictions'.[123]

94. The focus in this Paper is on misleading or deceptive conduct provisions in corporations and financial services law. However, the ALRC recognises that the problems of proliferation are more widespread. The particularly parlous state of the law in this area undermines its effectiveness in guiding conduct, and increases costs and delays for consumers, regulated entities, the regulator,

119 Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (LexisNexis Butterworths, 5th ed, 2019) 4.
120 *Bullabidgee Pty Ltd v McCleary* [2011] NSWCA 259, [69] (Allsop P).
121 Elise Bant and Jeannie Marie Paterson, 'Developing a Rational Law of Misleading Conduct' in Michael Douglas, John Eldridge and Claudia Carr (eds), *Economic Torts and Economic Wrongs* (Hart Publishing, 2021) 275, 287.
122 Ibid.
123 Elise Bant and Alex McCracken, 'Returning to Sample the Remedial "Smorgasbord" for Misleading Conduct' (2022) 49(2) *University of Western Australia Law Review* 113, 116.

and courts.[124] To simplify the law, the ALRC suggests a return to the core, principled provision in s 12DA of the *ASIC Act* (accompanied by other amendments discussed below) as the sole statutory prohibition.

General law

95. Unlike unconscionability, the law relating to misleading and deceptive conduct is not linked to any single predecessor doctrine at general law. As Sabbagh, Bant and Paterson note, misleading or deceptive conduct at general law is instead:

> the subject of numerous doctrines, including contractual warranty, deceit, negligent misstatement, injurious falsehood, defamation, rescission for fraudulent misrepresentation and passing off. In equity, relevant doctrines that regulate or respond to misleading conduct include rescission for fraudulent and innocent misrepresentation, estoppel and breach of fiduciary duty.[125]

96. Further, unlike some of the statutory unconscionability provisions discussed earlier, the misleading or deceptive conduct provisions draw less on general law concepts or understandings. Instead, Parliament decided to preclude 'over-reliance on common law and equitable remedial analogues'.[126] As Professors Bant and Paterson note, for example:

> By removing the need to prove intention to mislead and opening up a veritable 'smorgasbord' of remedies, the [statutory] regime built upon, but also consciously departed from, its surrounding general law context.[127]

97. The introduction of misleading or deceptive conduct provisions also provided two key advantages:

- first, the availability of regulator enforcement; and
- secondly, access to 'a suite of flexible and wide-ranging remedies'.[128]

When conduct is misleading or deceptive

98. In the sections below, the specifics of the key statutory provisions addressing misleading and deceptive conduct in Commonwealth corporations and financial services law are examined. Although those provisions differ in some respects, it is worth outlining what may be understood as the core doctrine — what it is that, broadly understood, the provisions in this area are designed to address.

99. In essence, as Professor North writes, 'conduct is misleading or deceptive if it leads the victim into error'.[129] An influential description was given by Brennan J in *World Series Cricket Pty Ltd v Parish*, where his Honour remarked that:

> Before a statement can be said to be misleading or deceptive or falsely to represent a fact, it must convey a meaning inconsistent with the truth. A statement which conveys no meaning but the truth cannot mislead or deceive or falsely represent; although a statement which is literally true may nonetheless convey another meaning which is untrue, and be proscribed accordingly. [130]

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124 Klotz (n 94).
125 Joseph Sabbagh, Elise Bant and Jeannie Marie Paterson, 'Mapping Misleading Conduct: Challenges in Legislative Design' (2022) 49(2) *University of Western Australia Law Review* 144, 149.
126 Bant and McCracken (n 123) 126.
127 Elise Bant and Jeannie Marie Paterson, 'Misleading Conduct Before the Federal Court: Achievements and Challenges' in Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018) 165, 168.
128 Jeannie Marie Paterson and Elise Bant, 'Misrepresentation, Misleading Conduct and Statute through the Lens of Form and Substance' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 403, 404.
129 Gill North, 'Companies Take Heed: The Misleading or Deceptive Conduct Provisions Are Gaining Prominence' (2012) 30 *Company & Securities Law Journal* 342, 345.
130 *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181, 200–201.

100. Importantly, some of the provisions discussed below also capture conduct that is '*likely to* mislead or deceive'.[131] In those instances, 'it is not necessary to demonstrate actual deception to establish a contravention'.[132] Further, some of the provisions do not require proof of fault or intent on the part of the person engaged in the impugned conduct (while others do).[133] As Bant and Paterson note, some of the prohibitions are 'strict' and 'may be contravened by conduct that was unintentionally misleading'.[134]

101. In assessing whether conduct is misleading or deceptive, or likely to mislead or deceive, the effect (or likely effect) of the conduct on its target audience is of critical significance. As Lockhart writes, s 18 of the ACL and its 'equivalents' (including the provisions discussed below) are 'concerned with the effect or likely effect of conduct upon the minds' of those to whom that conduct is directed.[135]

Statutory provisions on misleading or deceptive conduct

102. Provisions prohibiting misleading or deceptive conduct in corporations and financial services law can be found in the *Corporations Act* and *ASIC Act*. The core provisions are listed in Table 3 below. The following sections of this Paper provide a detailed exploration of those provisions. Their tortuous language and technicality will require a reader to muster the Stoic strength of Marcus Aurelius. Following this, opportunities for simplification will be considered.

Table 3 — Provisions on misleading or deceptive conduct

Act	*Section*	*Title of section*
Corporations Act	1041E	False or misleading statements
	1041F	Inducing persons to deal
	1041H	Misleading or deceptive conduct (civil liability only)
ASIC Act	12DA	Misleading or deceptive conduct
	12DB	False or misleading representations
	12DC	False or misleading representations in relation to financial products that involve interests in land
	12DF	Certain misleading conduct in relation to financial services

103. The above provisions comprise the 'core' of statutory regulation of misleading and deceptive conduct in corporations and financial services law. However, there are other provisions which also invoke the 'misleading or deceptive' concept in the context of more specific prohibitions. For instance, in relation to takeover[136] and disclosure documents.[137]

131 Emphasis added.
132 *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, [6] (French CJ, Crennan and Kiefel JJ).
133 Lockhart (n 119) 94. See also *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 197, where Gibbs CJ observed in relation to s 52 of the *Trade Practices Act* that there is nothing in the provision 'that would confine it to conduct which was engaged in as a result of a failure to take reasonable care'.
134 Bant and Paterson (n 121) 278.
135 Lockhart (n 119) 109. Quoting *SWF Hoists & Industrial Equipment Pty Ltd v State Government Insurance Commission* (1990) ATPR 51, 607-9 (von Doussa J).
136 *Corporations Act 2001* (Cth) s 670A.
137 Ibid s 728. See also ss 1308 and 1308B, which relate to 'false or misleading' statements. Such provisions may also be capable of consolidation with misleading or deceptive conduct provisions (assuming that a statement that is 'false' will also be either deceptive or misleading).

104. The analysis that follows focuses on the provisions listed in Table 3, which contains the provisions of the broadest scope and relevance. However, the ALRC's suggested path to simplification can also accommodate the consolidation (at least in part) of other prohibitions that involve misleading or deceptive conduct, such as in relation to takeover and disclosure documents.

The core statutory provisions applicable to financial products and services

105. Before outlining the specifics of the core provisions, it is worth noting that the concept of 'financial product' or 'financial service' is common to each of them. Those terms limit the scope of application of the provisions discussed. Importantly, those terms are exhaustively defined in the *Corporations Act*, in terms that are narrower than the definitions given to the same terms in the *ASIC Act* (as discussed further below).[138]

Section 1041E of the Corporations Act

106. In summary, s 1041E provides that '[a] person must not … make a statement or disseminate information, if it is 'false in a material particular or is materially misleading' and is likely to: induce persons to apply, dispose or acquire financial products, or have an effect on prices for trading in such products; and where the person 'does not care whether the statement or information is true or false' or 'ought reasonably have known' that it is 'false in a material particular or is materially misleading'.

107. Notably, failure to comply with this provision is an offence.[139] It contains a fault element.

108. This provision is broad in its application to 'persons', but it is limited to the making of a statement or dissemination of information, and only applies where that statement or information is false in a 'material particular' or is 'materially misleading'. Further, as outlined in subsection (b), the statement or information must be likely to have one or other of certain effects. All of these circumstances involve 'financial products', as defined by the *Corporations Act*.

109. As a result of the above features, s 1041E is in many respects limited in its scope of application.

Section 1041F of the Corporations Act

110. In summary, s 1041F(1) provides that '[a] person must not … induce another person to deal in financial products' by 'making or publishing a statement, promise or forecast' if the person knows (or is reckless) as to whether it is 'misleading, false or deceptive', or there is a 'dishonest concealment of material facts' or 'recording or storing' of information the person knows to be 'false or misleading in a material particular or materially misleading'.

111. Failure to comply with this provision is also an offence.[140] Notably, s 1041F(3) deems certain conduct, as regulated by other legislation, to be 'dealing in a financial product' for the purposes of this section.

112. Section 1041F(1) applies broadly to 'persons', but it is limited in its application to inducing another person to deal in 'financial products' (as defined) in one of the ways specified in subsections (a)-(c). Significantly, there is a fault element in all of the specified circumstances — such as the person knowing, or being reckless as to, certain matters.

113. As a result of the above requirements, s 1041F(1) is in many respects limited in its scope of application.

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138 For further discussion of these concepts and their meanings, see: Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) ch 7.
139 *Corporations Act 2001* (Cth) s 1311(1).
140 Ibid.

Section 1041H of the Corporations Act

114. Section 1041H provides that '[a] person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive'. Subsection (2) outlines a number of circumstances that will amount to 'engaging in conduct, in relation to a financial product' — a list that is inclusive, rather than exhaustive. Subsection (3) expressly excludes conduct that contravenes certain other provisions (including relating to takeover, fundraising, CSF offer, and disclosure documents) from constituting a contravention of s 1041H.

115. Notably, failure to comply with this provision is *not* an offence, but it does enable a civil action for loss or damage arising from a contravention.[141] There is no fault requirement to establish a contravention.

116. As evidenced by the above requirements, s 1041H has a very broad scope of operation.

Conclusion on the Corporations Act provisions

117. Section 1041H has the broadest scope of operation out of the *Corporations Act*'s core misleading and deceptive conduct provisions. Given that scope, there are likely to be many circumstances in which conduct that contravenes s 1041E or s 1041F would also constitute a contravention of s 1041H. However, only ss 1041E and 1041F are offence provisions.

Section 12DA of the ASIC Act

118. Section 12DA provides that '[a] person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive'. Subsection (1A) provides a number of exclusions where conduct would otherwise contravene certain other provisions (including relating to takeover, fundraising, CSF offer, and disclosure documents).

119. Contravention of this provision does *not* constitute an offence. Nor does it attract a civil penalty. However, it does permit of a wide range of other relief (as detailed further below). There is no fault element.

120. This provision is the analogue of s 18 of the ACL. This provision is necessary because s 18 of the ACL does not apply to 'financial services'.[142] In applying to all persons, in trade or commerce, who are engaged in conduct in relation to 'financial services' as defined by the *ASIC Act*, s 12DA has a broad scope of operation.

Section 12DB of the ASIC Act

121. Section 12DB provides that '[a] person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services' make a 'false or misleading representation' in specified circumstances (such as that the services are of a particular standard, quality or value). The provision is extremely prescriptive in listing specified circumstances. Subsection (2) outlines a number of exclusions where the conduct contravenes certain other provisions.

141 Ibid ss 1041H (note 1), 1041I.
142 *Competition and Consumer Act 2010* (Cth) s 131A.

122. Contravention of this provision is an offence.[143] It does *not* attract a civil penalty, but it does permit of a wide range of other relief. It is a strict liability offence. Further, subsection (1A) provides that, in certain circumstances, a representation is 'taken to be misleading unless evidence is adduced to the contrary'.

123. Although this provision *prima facie* applies broadly 'in trade or commerce, in connection with the supply (or possible supply) or promotion of financial services', the prescriptive listing of circumstances in which the representation must be false or misleading may limit this provision's scope of application (because some conduct will inevitably fall outside the listed circumstances).

Section 12DC of the ASIC Act

124. Section 12DC provides that '[a] person must not, in trade or commerce, in connection with the supply, or the possible supply, of a financial product that consists of, or includes, an interest in land, or in connection with the promotion by any means of a financial product that consists of, or includes, an interest in land' engage in certain specified conduct, which may broadly be understood as being misleading or deceptive (such as representing that the person 'has a sponsorship, approval or affiliation it does not have').

125. This provision is an offence provision, and a civil penalty provision. It contains a number of prescriptive subsections, addressing matters such as the definition of 'interest, in relation to land', and when there may be an offence in circumstances involving physical force, undue harassment or coercion. It is a strict liability offence.

126. This provision only applies in a discrete set of circumstances, involving financial products that consist of or include an interest in land.

Section 12DF of the ASIC Act

127. Section 12DF provides that '[a] person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services'.

128. Contravention of this provision is an offence, and may also give rise to a civil penalty, amongst other relief. It is a strict liability offence.

129. This provision is succinct and broadly worded in its core components. However, it is limited in its application to conduct that is liable to mislead the public about the nature, characteristics, suitability for purpose, or quantity of any 'financial services' (as defined).

Conclusion on the ASIC Act provisions

130. What the above analysis reveals is that s 12DA has the broadest scope of application out of the *ASIC Act* provisions, but it is neither an offence nor a civil penalty provision. While a range of other relief is available for a contravention, this imposes a limitation on the utility of the provision. Contravention of each of the other provisions, which are narrower in scope, is an offence, and a civil penalty may also be sought (except for s 12DB).

143 *Australian Securities and Investments Commission Act 2001* (Cth) s 12GB(1).

131. In comparison to the *Corporations Act* provisions above, which frequently invoke that Act's defined term of 'financial product', the *ASIC Act* provisions rely heavily on the defined term of a 'financial service'. However, a 'financial service' under the *ASIC Act* is defined to include a 'financial product', meaning it is unlikely that the *ASIC Act* provisions have any narrower scope.[144] Further, as discussed previously, the *ASIC Act* definitions for both 'financial product' and 'financial service' are defined more broadly than they are under the *Corporations Act*. As Klotz writes:

> For example, credit facilities, a wider range of insurance contracts, beneficial interests in superannuation funds and foreign exchange contracts are financial products as per s 12BAA(7) while the *Corporations Act 2001* expressly excludes credit facilities from the definition of financial product. Further, the non-cash payment definition in s 12BAA(6) of the *ASIC Act* is wider than in s 736D of the *Corporations Act 2001*. The s 12BAA(8) list of exclusions in the *ASIC Act* is also narrower than that contained in s 765A of the *Corporations Act 2001*.[145]

132. Each of the *ASIC Act* provisions is limited in its application to conduct 'in trade or commerce' — words that are absent from the *Corporations Act* provisions. However, each of the *Corporations Act* provisions apply only in relation to financial products or services as defined by that statute. Conduct in relation to such products and services is likely to be of a trading or commercial nature. Accordingly, the *ASIC Act* provisions are unlikely to have any narrower application than the *Corporations Act* provisions in practice. To the contrary, the *ASIC Act* provisions have a broader application (for the reasons discussed).

Remedies for contravention

133. In order to reach a considered view on redundancy, it is necessary to examine the available remedies for a contravention of the various provisions. These are summarised in Table 4.

Table 4 — remedies for contraventions of misleading or deceptive conduct provisions

Corporations Act provisions	
1041E	• civil action for loss or damage (s 1041I *Corporations Act*) • prosecution for offence (s 1311) *Importantly, contravention of this provision does not enable the imposition of a civil penalty.*
1041F	• *Same as 1041E.*
1041H	• *Same as 1041E, except that this is not an offence provision.*

144 *Australian Securities and Investments Commission Act 1989 (Cth)* s 12BAB(1AA).
145 Klotz (n 94) 456.

ASIC Act provisions	
12DA	• Declaration of contravention (s 12GBA) • Relinquishment of benefit order (s 12GBCC) • Injunction (s 12GD) • Action for damages (s 12GF) • Non-punitive order (s 12GLA) • Adverse publicity order (s 12GLB) • ASIC public warning notice (s 12 GLC) • Other orders the court considers appropriate (s 12GM) • Order prohibiting payment or transfer of money or other property (s 12GN) • Orders to redress loss or damage suffered by non-party consumers etc (s 12GNB) *Importantly, contravention of this provision is not an offence, and does not allow the imposition of a civil penalty.*
12DB	• *Same as 12DA*, but in addition: • Prosecution for an offence (s 12GB) • Order disqualifying a person from managing corporations (s 12GLD). • Payment of a civil penalty (s 12GBA(6)).
12DC	• *Same as for 12DB.*
12DF	• *Same as for 12DB.*

134. As Table 4 reveals, a particularly broad range of relief is available in relation to the *ASIC Act* provisions — what may be described as a 'remedial smorgasbord'.[146] The ability for a court to make any other order it considers appropriate (per s 12GM) is particularly expansive. Relief in relation to the *Corporations Act* provisions is more limited.

135. It is important to emphasise that the provisions with the broadest scope of general application — s 12DA *ASIC Act* and s 1041H *Corporations Act* — are not offence provisions, and do not give rise to civil pecuniary penalties. This limits the utility of these more principles-based provisions. Where prosecution for an offence, or the imposition of a civil penalty, is sought, the prosecuting authority or regulator must seek redress under one of the more specific provisions.

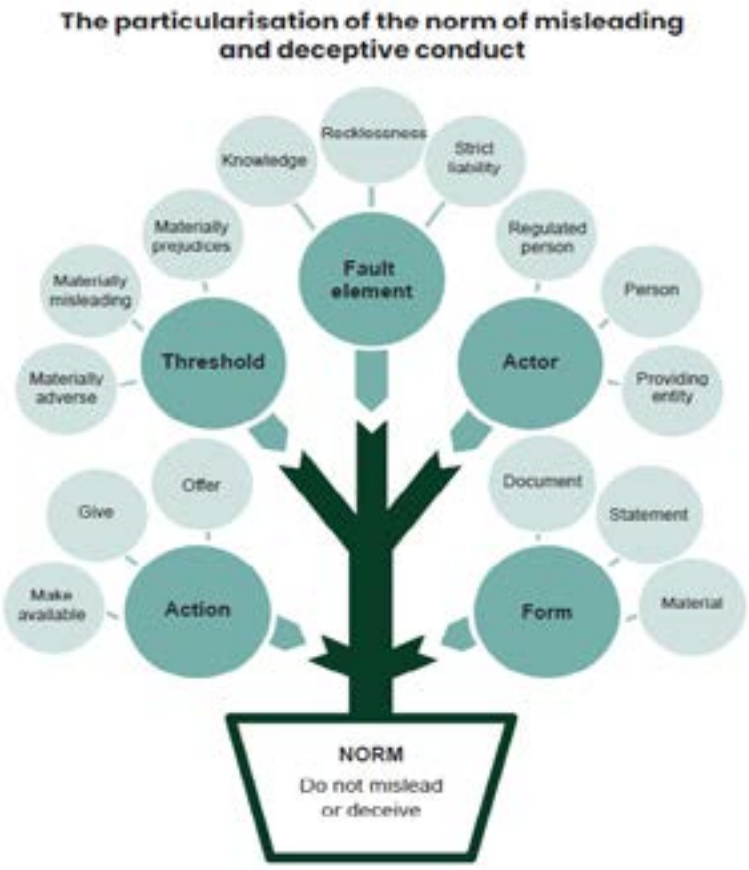
Conclusion on the statutory provisions

136. The analysis above reveals the tortuous and technical nature of the existing statutory provisions. They might as well be written in Latin. Consideration of which of these provisions may apply in any specific circumstance is no easy task. Careful attention must be paid to the unique scope and remedial consequences of each provision.

137. Despite being directed at very similar conduct, the above analysis also highlights the extent to which there has been particularisation and differentiation, particularly as concerns a number of key elements. Some of this particularisation is illustrated in Figure 1 below.

146 Bant and McCracken (n 123).

Figure 1 — particularisation of the norm of misleading and deceptive conduct



Why does this proliferation exist?

138. There appear to be three main explanations for the current proliferation of provisions:

- *First, there has been an aversion to principles-based drafting*. Parliament has considered it necessary to supplement general standards with detailed prescription. As Bant and Paterson write, a key cause of overlapping provisions has been a 'shift in practices of legislative design' — namely, away from a principles-based approach, and towards more prescriptive legislative drafting.[147] As they write:

> the current legislative penchant for highly prescriptive and detailed drafting, setting out in prolix detail every conceivable combination of consideration and application of the broader principles, has led to telephone directory-sized legislation of almost comical convolution that defies navigation, and no doubt increases the cost and complexity of litigation.[148]
>
> For example, in relation to some of the specific provisions in the *ASIC Act*, which accompany the more general s 12DA, Bant and Paterson suggest that it seems that one aim 'was to make more explicit the kinds of acts captured by the general norm'.[149]

147 Bant and Paterson (n 127) 178.
148 Ibid.
149 Bant and Paterson (n 121) 290.

- *Secondly, there has been a desire to attach certain remedial consequences in only certain circumstances*. As the above analysis has shown, Parliament has only attached criminal and civil penalty liability to some of the provisions — those that are more specific. The broadest, principles-based provisions in each of the *Corporations Act* (s 1041H) and *ASIC Act* (s 12DA), are neither offence nor civil penalty provisions. As Sabbagh, Bant and Paterson observe, there has been

  > a legislative desire to make explicit the consequences of misconduct in particular contexts, as well as to assuage stakeholder anxieties over a 'one size fits all' approach to contravention and penalty.[150]

- *Thirdly, proliferation is due to legislative inattention*. Rome wasn't built in a day, and nor was Australia's corporations and financial services legislation. Instead, that legislation has developed like the twisting allies of the External City itself, spreading over decades in an *ad hoc* manner. Due to legislative inattention, 'foundational requirements for imposing liability for misleading conduct often differ between statutes without apparent reason'.[151] As Bant and Paterson conclude, rather than having a strong foundation in principle or logic, it seems that some of the proliferation in this field is simply attributable to 'an explosion of ill-conceived and poorly framed legislation'.[152]

  Much of the proliferation and variation is simply unexplained, and potentially inexplicable. For example, as North writes, why the phrase 'in trade or commerce' is included in some provisions (in the *ASIC Act*) and not others (in the *Corporations Act*) is simply 'not known'.[153] It is possible that some differences never had any clear rationale at all.

Do the provisions essentially mean the same thing?

139. Although the application of each of the provisions discussed in this Part III are subject to numerous technical thresholds, courts have largely taken the same approach to characterising the core conduct prohibited by each. Although 'misleading or deceptive' is not defined in any of the relevant legislation, as North observes, courts have 'indicated that it has the same meaning across the statutory provisions'.[154] Similarly, Klotz concludes that 'the courts take the same approach in characterising conduct as misleading or deceptive'.[155]

140. Sabbagh, Bant and Paterson also observe that courts considering the 'myriad of provisions' addressing misleading or deceptive conduct have 'tended to emphasise their commonalities … corralling the disparate versions into a cohesive, purposeful approach'.[156] One practical illustration of this was given by Yates J recently in *ASIC v MLC Nominees Pty Ltd*:

> Although the [statutory language refers to] "misleading or deceptive conduct" and "false or misleading representations", the cases establish that there is no material difference between these expressions in terms of their legal application ...[157]

150 Sabbagh, Bant and Paterson (n 125) 166.
151 Bant and Paterson (n 127) 180.
152 Ibid 178.
153 North (n 129) 362. One possible explanation is that the *ASIC Act* provisions were first introduced at a time when there was not a constitutional referral of power from the States. The provisions may therefore have relied on the Commonwealth Constitution's power to make laws in relation to 'trading or financial corporations' (s 51(xx)). In comparison, the *Corporations Act* provisions were introduced after the States had referred the regulation of financial products and services to the Commonwealth, so there was no need to support the provisions pursuant to this constitutional head of power.
154 Ibid 345.
155 Klotz (n 94) 464.
156 Sabbagh, Bant and Paterson (n 125) 156.
157 *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* (2020) 147 ACSR 266, [47].

141. Because the provisions are directed at the same core conduct (albeit sometimes subject to different, and technical, threshold conditions), there will be many instances in which the same conduct will contravene more than one of the provisions. One practical illustration is the case of *Re Idylic Solutions*.[158] In that case, ASIC alleged contraventions of each of ss 1041E, 1041G, and 1041H of the *Corporations Act*, alongside ss 12DA, DB and DF of the *ASIC Act*. Justice Ward found that the same conduct constituted a contravention of each provision[159] — a practical illustration of the overlap that currently exists. Similarly, in the case of *ABN AMRO Bank*, the court concluded that the conduct was misleading in contravention of each of ss 1041E and 1041H of the *Corporations Act*, and s 12DA of the *ASIC Act*.[160]

142. Accordingly, although there is an interpretive presumption that different language is intended to indicate a different meaning, this presumption has largely not been reflected in the decisions of courts interpreting these provisions. Instead, courts have recognised that each of the provisions serve a very similar core purpose — of prohibiting misleading or deceptive conduct.[161]

143. Despite the substantial similarities between the provisions discussed in Part III of this Background Paper, it cannot be concluded that the differences between them are of no significance. Courts in the future could conclude that there are meaningful differences. As previous analysis showed, each provision is subject to different thresholds. A court construing those thresholds is required to give effect to the clear language of the provision. What difference they may make in practice, however, is not fully known. For example, North writes that:

> The particular circumstances that might contravene s 12DA of the *Australian Securities and Investments Commission Act* but not s 1041H of the *Corporations Act* or vice versa are not entirely certain … Nevertheless, there is significant overlap in the legal elements and applicability of the specified misleading or deceptive conduct provisions.[162]

144. The lack of certainty is caused, in part, by an absence of judicial consideration given to all the differences that might be argued to exist between the provisions. As Sabbagh, Bant and Paterson note, some misleading or deceptive conduct prohibitions 'have *never* attracted judicial consideration' at all.[163] Nonetheless, the substantial overlap that currently exists between the provisions discussed in this Part 'raises a question mark over the value of burdening our statute books with parallel and overlapping consumer protection regimes'.[164]

The problem of proliferation

145. The current proliferation of misleading or deceptive conduct provisions is of real concern.[165] As Bant and Patterson have observed, there is now significant 'convolution in the statutory sphere, with ongoing and arguably unnecessary replication and reformulation of the core prohibition'.[166] As Klotz has observed, the 'current legislation has created confusion, uncertainty and inconsistency'.[167]

146. Statutory proliferation and overlap in this field had led to some judicial exasperation. Notably, in the case of *Wingecarribee*, Rares J referred to the misleading or deceptive conduct provisions of the *Corporations Act* and *ASIC Act* as:

158 *Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* [2012] NSWSC 1276.
159 Ibid. See the Schedule of Declarations and Orders.
160 *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, [1006].
161 Klotz (n 94) 469. See also Bant and Paterson (n 121) 290.
162 North (n 129) 362.
163 Sabbagh, Bant and Paterson (n 125) 167.
164 Bant and McCracken (n 123) 118.
165 For discussion of the problem of overlapping offence provisions in corporations and financial services legislation, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.64]-[5.75].
166 Bant and Paterson (n 127) 167.
167 Klotz (n 94) 451.

> a plethora of pointlessly technical and befuddling statutory provisions scattered over many Acts in defined situations. The repealed, simple and comprehensive s 52 of the *Trade Practices Act 1974* (Cth) … has been done away with by a morass of dense, difficult to understand legislation.[168]

147. His Honour continued:

> Why does a court have to waste its time wading through this legislative porridge to work out which one or ones of these provisions apply even though it is likely that the end result will be the same? [169]

148. The current proliferation of provisions is undesirable for at least two key reasons:

- *First, it undermines the expressive power of the law*. The law is most likely to achieve compliance when the message it conveys is simple and clear. Unnecessary complexity in the law serves to cloud what it is that is being conveyed. When such clarity is lost, it is less likely that parties will know what is expected of them and will comply in a meaningful manner. The use of intricate threshold conditions distracts attention away from the core issue. As Klotz observed, following her review of the case law:

  > In some instances, the question of characterising conduct as misleading or deceptive seems to be of less significance or, at least, the same amount of time is spent characterising misleading or deceptive conduct as is spent interpreting the definitions [of 'financial product' and 'financial service']. [170]

  Similarly, in a case involving ASIC's pleading of numerous statutory provisions and arguments, Keane CJ observed that:

  > The presentation of a range of alternative arguments is not apt to aid comprehension or coherence of analysis and exposition; indeed, this approach may distract attention from the central issues. [171]

  Greater emphasis on core standards, can 'nudge courts towards more formal or more substantive styles of reasoning', promoting 'early engagement with the substantive content of the material regulated by the provision'.[172] Such an approach would be most consistent with, and best serve, the consumer protection and other purposes that the provisions are intended to achieve.
- *Secondly, it results in wasted time and resources.* Working out which statutory provisions are applicable in any specific circumstance, and which statutory provisions should be pleaded, is time-consuming and expensive for all parties involved. The law has become 'unmanageably complex' for all parties, but in particular for those entitled to the law's protection — the very parties these provisions were 'intended to benefit'.[173]

  As Bant and Paterson write:

  > the prohibitive costs of litigating what has become an almost unnavigable statutory landscape is likely to prove a strong deterrent to most corporate claimants, let alone private consumers. The consequence is that, paradoxically, the sheer volume and complexity of regulation results in regulatory failure.[174]

149. The issue remaining is whether the law could be reformed so that it can achieve its core objectives with less complexity. The following section argues that it can be, and outlines how that may be achieved.

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168 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1, 5 (summary).
169 Ibid 6, [948].
170 Klotz (n 94) 457–8.
171 *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 [16].
172 Paterson and Bant (n 128) 430.
173 Jeannie Marie Paterson and Elise Bant, 'In the Age of Statutes, Why Do We Still Turn to the Common Law Torts?: Lessons from the Statutory Prohibitions on Misleading Conduct in Australia' (2016) 23(2) *Torts Law Journal* 139, 153, 162.
174 Bant and Paterson (n 121) 291.

A possible path to simplification

150. There is a clear recognition in the academic literature that statutory proliferation in this area is a problem. The pathway to a simpler state of affairs is nevertheless likely to be contested. In the ALRC's view, a potentially attractive pathway out of the current quagmire is to repeal the misleading or deceptive conduct provisions in the *Corporations Act* and the *ASIC Act* other than s 12DA of the *ASIC Act*; to amend s 12DA to make it a civil penalty provision; and to introduce a new offence provision, which is largely identical to s 12DA, but which has an additional requirement that the conduct be dishonest, intentional, or reckless. The ALRC invites stakeholder feedback on whether this would be the best approach.

151. In the ALRC's view, simplification through greater reliance on s 12DA of the *ASIC Act* is possible because:

- It is the broadest, principle-based expression of the core requirement not to engage in misleading or deceptive conduct. It appears to capture all, or almost all, of the conduct caught by the other provisions. However, it is broader, because it does not contain the numerous technical thresholds or limitations to which the other provisions are subject.
- Relatedly, it operates in the broadest set of circumstances because the definition for 'financial service' as used in the provision and defined in the *ASIC Act,* is broader than the definitions of 'financial product' and 'financial service' applicable to the *Corporations Act* provisions.
- Finally, except for the fact that it is neither a civil penalty provision, nor an offence, s 12DA enables access to a broad range of statutory remedies — encompassing and exceeding those available for contravention of the *Corporations Act* provisions.

152. In suggesting that it would be desirable to return to the core, principles-based prohibition, the ALRC is in agreement with Paterson and Bant, who advocate for:

> a return to a clearer and cleaner legislative framework as well as a greater degree of confidence in the ability of a principles-based regime to respond to the fundamental harms addressed by the prohibition on misleading conduct.[175]

Making s 12DA a civil penalty provision

153. In the ALRC's view, enabling greater reliance on s 12DA of the *ASIC Act* also requires amendments to make it a civil penalty provision (by amending s 12GBA(6)). At present, only the more particular *ASIC Act* provisions (ss 12DB, 12DC and 12DF) allow for the imposition of a civil penalty.

154. As discussed above, it seems that a key reason for the current proliferation of provisions was a desire to attach certain remedial consequences — such as pecuniary penalties — to some provisions only; namely, the more specific provisions. This may be because the legislature considered it necessary to make it clear that harsher consequences (like civil penalties) would only be available in the circumstances of the more particular provisions, which may be considered to involve more blameworthy or worrisome conduct.

155. However, this is arguably unnecessary. Even if a court were given power to impose a civil penalty for a contravention of s 12DA of the *ASIC Act*, it would still have regard to the particular circumstances in deciding what penalty was appropriate. As Bant has observed:

> Courts have shown themselves eminently capable of distinguishing between different levels of culpability through the 'French factors' … There is no reason to think, for example, that a formal and minor error included in a prospectus would attract the same penalty (or even be the subject of regulator proceedings) as more serious contravening conduct. … [T]he French factors, as

175 Bant and Paterson (n 127) 167.

> developed over time, are entirely capable of responding to different contexts with proper nuance. It is simply unnecessary to repeat and reiterate, in various forms, the core prohibition (some with civil penalty, others without) in order to avoid this phantom menace.[176]

156. The 'French factors' are a series of non-exhaustive considerations that courts are required to have regard to in determining civil penalties.[177] They are nuanced and allow for greater penalties where the contravention is of a more significant scale, or more blameworthy (amongst other considerations). By making s 12DA of the *ASIC Act* a civil penalty provision, greater discretion would be granted to courts to determine an appropriate penalty based on the circumstances, including by having regard to the French factors.

Adding an offence provision

157. In the ALRC's view, simplification could also be facilitated through the enactment of an offence provision which is identical to s 12DA of the *ASIC Act*, except that it should also contain a requirement that the conduct be dishonest, intentional, or reckless. As discussed, some of the current proliferation is attributable to a desire by Parliament to assign criminal liability to only some of the more specific provisions — namely, ss 1041E and 1041F of the *Corporations Act*, and ss 12DB, 12DC and 12DF of the *ASIC Act*.

158. Currently, some of those provisions contain a requirement of dishonesty, intentionality, or recklessness before they will be contravened. For example, conduct is only an offence pursuant to s 1041E *Corporations Act* where the person makes a statement or disseminates information and 'does not care whether the statement is true or false' or 'knows, or ought reasonably to have known, that the statement or opinion is false in a material particular or is materially misleading'. However, ss 12DB, 12DC and 12DF of the *ASIC Act* do not contain any similar requirement in order for conduct to be an offence under one of those provisions.

159. A policy question arises as to the availability of criminal prosecution for engaging in misleading or deceptive conduct. The ALRC suggests that a principled approach to the imposition of criminal liability would see it being imposed only when the conduct was particularly blameworthy because it was dishonest, intentional, or reckless. That is reflected in the misleading or deceptive conduct offence provisions in the *Corporations Act* already. It is not reflected in the *ASIC Act* provisions on the same topic, but the desirability of that approach is open to question. As observed in the ALRC's Summary Report for its Inquiry into *Corporate Criminal Responsibility*:

> Many Commonwealth corporate offences do not reflect any underlying concept of criminality. Many offences are duplicative of equivalent civil penalty provisions. Criminal offence provisions should only apply to the most egregious corporate misconduct. All other misconduct should be subject to civil penalties instead.[178]

160. As the ALRC concluded in that Inquiry, a criminal offence in respect of the conduct of a corporation (such as a financial services provider) should only be created when: the denunciation and condemnation of the conduct constituting the offence is warranted, the stigma that attaches to a criminal offence is appropriate, a civil penalty would be insufficient, criminalisation is justified by the level of potential harm that may occur as a consequence of the conduct, or it is otherwise in the public interest.[179] In relation to misleading or deceptive conduct provisions, criminalisation may be particularly warranted where the conduct is dishonest, intentional, or reckless — but in all other circumstances, the availability of a civil penalty (under s 12DA) is arguably sufficient.

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176 E Bant, *Submission 8*.
177 *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076; *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 [254].
178 Australian Law Reform Commission, *Summary Report: Corporate Criminal Responsibility* (Report No 136, 2020) 8.
179 Ibid 26.

Stakeholder feedback

161. In Interim Report A, the ALRC's suggested simplification of misleading or deceptive conduct provisions was outlined in Proposal A23:

> **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.

162. Submissions in response to Proposal A23 were supportive.[180] For example, the law firm Allens observed that, in their experience, 'the proliferation of similar provisions unnecessarily complicates the conduct of litigation in this area'.[181]

163. Bant also indicated her 'very strong support' for the Proposal. In particular, she considered that there should be a 'return to the form of the core prohibition contained originally in s 52 *Trade Practices Act'* which she considers is 'well understood and readily applicable across the range of financial service and product areas'.[182]

164. However, some stakeholders noted the difficulties that may attend consolidation. For example, the New South Wales Bar Association expressed the view 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.[183] Howell and Brown also observed that there are currently 'different consequences for non-compliance' between the provisions, indicating that 'consolidation of the various false or misleading prohibitions … may not be a straightforward exercise'.[184] The ALRC has attempted provide an outline of one potential pathway to consolidation in this Background Paper, but hopes that stakeholders will draw its attention to any other issues that require consideration.

Objections to simplification

165. There are a number of general risks that may accompany simplification. In the ALRC's view, the risks are, broadly speaking, the same risks that accompany simplification of the unconscionability provisions, as outlined earlier in this Paper. Those risks are addressed briefly again below.

166. The risks accompanying simplification must be weighed against the risk of doing nothing. As has been argued, the existing state of affairs comes with significant detriments that cannot be ignored. In the ALRC's view, each of the risks raised below can be appropriately addressed, and are outweighed by the risk of doing nothing.

The risk that something would be lost

167. The ALRC's suggested reform is likely to capture all, or substantially all, of the same conduct that is caught by the other, more specific provisions. The ALRC considers that its proposed reforms

180 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*; 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*.

181 Allens, *Submission 54* 18.

182 E Bant, *Submission 8*.

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

184 N Howell and C Brown, *Submission 47* 10–11. See also, Kit Legal, *Submission 50*.

should be accompanied by an Explanatory Memorandum which makes it clear that Parliament intends s 12DA to cover all conduct proscribed by the existing misleading or deceptive conduct provisions discussed in this Background Paper.

168. As the ALRC has also suggested, s 12DA may be amended so as to make it a civil penalty provision. Further, the ALRC suggests that it be complemented with another provision which makes it an offence to engage in the same conduct, where that conduct is dishonest, intentional, or reckless. In the ALRC's view, these measures would address the key risk that something would be lost — namely the availability of these remedial consequences, designed to deter and punish such conduct.

169. The ALRC invites the views of stakeholders on whether any additional or different measures are necessary to avoid the risk that anything may be lost as a result of the consolidation proposed in this Background Paper. Further, it invites feedback on whether the 'dishonest, intentional, or reckless' formulation is the most appropriate state of mind requirement for a criminal misleading or deceptive conduct provision.

The risk of ignoring the broader context

170. Misleading or deceptive conduct provisions are rife throughout the law, not merely in Commonwealth law relating to corporations and financial services. Further, the ALRC is aware that its suggested changes to s 12DA of the *ASIC Act* might invite consideration of whether the same changes should be made to s 18 of the ACL.

171. The ALRC considers that there is a powerful need — and significant support — for simplification of misleading or deceptive conduct provisions in other contexts, including in the ACL. However, the scope, number and significance of those provisions means that it is not desirable to suggest a view here as to how simplification in those other contexts should best proceed. In the ALRC's view, it is *prima facie* desirable that its proposed reforms be replicated in the ACL, to ensure symmetry with those statutory provisions. That will enable the continuing cross-fertilisation of jurisprudence between these different provisions. However, the ALRC considers that a more fulsome review of the ACL for this purpose is needed.[185]

The risk of creating uncertainty

172. Finally, the ALRC acknowledges that, as with any legislative change, there is a risk of creating uncertainty when implementing reforms. However, this risk is reduced because of the proposed reliance on a provision that has an established and extensive jurisprudence — namely, s 12DA of the *ASIC Act*, accompanied by the analogous s 18 of the ACL (and its predecessor, s 52 of the *Trade Practices Act*).

173. The ALRC welcomes the views of stakeholders on whether any other measures are desirable to reduce the risk of uncertainty arising from its amended Proposal A23. It also invites feedback on other potential ways to achieve simplification.

Conclusion on the misleading or deceptive conduct provisions

174. This Part III has argued that the existing proliferation of misleading and deceptive conduct provisions in Commonwealth corporations and financial services law gives rise to significant complexity, to the detriment of all stakeholders. That complexity is unnecessary because s 12DA of the *ASIC Act* already captures all, or substantially all, of the same conduct captured by the more specific provisions. Further, the different remedial consequences provided by some of the

185 Such a review might inclusion consideration of whether a prohibition on 'unfair conduct' is desirable. See Nicholas Felstead, 'Beyond Unconscionability: Exploring the Case for a New Prohibition on Unfair Conduct' (2022) 45(1) *University of New South Wales Law Journal* 285.

other provisions can be made available in the context of s 12DA by making the additional changes outlined below.

175. In conclusion, the ALRC suggests that an attractive reform pathway for the misleading or deceptive conduct provisions discussed is to repeal all provisions other than s 12DA of the *ASIC Act*; to amend s 12DA to make it a civil penalty provision; and to introduce a new offence provision, which is identical to s 12DA, but which has an additional requirement that the conduct be dishonest, intentional, or reckless. The amended Proposal A23 is outlined below (with changes compared to the original in italics).

Amended Proposal A23

(a) 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.

(b) *To realise this objective, ss 1041E, 1041F, 1041H Corporations Act 2001 (Cth) and ss 12DB, 12DC and 12DF of the Australian Securities and Investments Commission Act 2001 (Cth) should be repealed.*

(c) *To facilitate reliance on the remaining s 12DA of the Australian Securities and Investments Commission Act 2001 (Cth), s 12DA should be amended to enable the imposition of civil pecuniary penalties when it is contravened (through its designation as a civil penalty provision in s 12GBA(6) of the Australian Securities and Investments Commission Act 2001 (Cth).*

(d) *The Australian Securities and Investments Commission Act 2001 (Cth) should be amended to add a new offence provision, in identical form to s 12DA of that Act, except that it should apply only in relation to conduct that is dishonest, intentional, or reckless.*

176. As indicated earlier in this Paper, the ALRC seeks feedback from interested stakeholders on this amended Proposal and other ideas outlined in this Paper. These issues will also be discussed in the ALRC's Interim Report C, with an opportunity for stakeholders to provide submissions at that time.

Conclusion

177. One theory about why the Roman Empire declined is that it simply became too large and scattered to be successfully governed.[186] Similarly, the current proliferation of provisions concerning misleading, deceptive or unconscionable conduct in corporations and financial services legislation is too diffuse to efficiently administer. The current state of the law imposes an undue burden on regulated entities, consumers, lawyers, regulators, and the courts.

178. As the Financial Services Royal Commission observed, even apart from the aforementioned burdens, an unintended result of having provisions which deal with 'every kind of case imaginable' is that the underlying purposes of the law may be misunderstood:

186 *Mary Beard's Ultimate Rome: Empire Without Limit - Episode 4* (BBC television, 2016).

> So many wires are strung between the fence posts that they inevitably overlap, intersect and leave gaps. And, instead of entities meeting the *intent* of the law, they meet the terms in which it is expressed.[187]

179. Although simplifying the current law may appear to be a Herculean task, the problem is likely to increase in size if it is not tackled now. In the ALRC's view, simplification can be achieved through the consolidation and amendment of the provisions discussed in this Background Paper. If implemented, such consolidation would promote efficient passage through the key legislative 'highways' (the core provisions which would remain), and thereby more effectively implement the underlying policy intentions of the existing law. While the statutory provisions discussed in this Paper may all 'lead to Rome', through consolidation and amendment they can get there by way of a less arduous journey.

187 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (n 8) 496.