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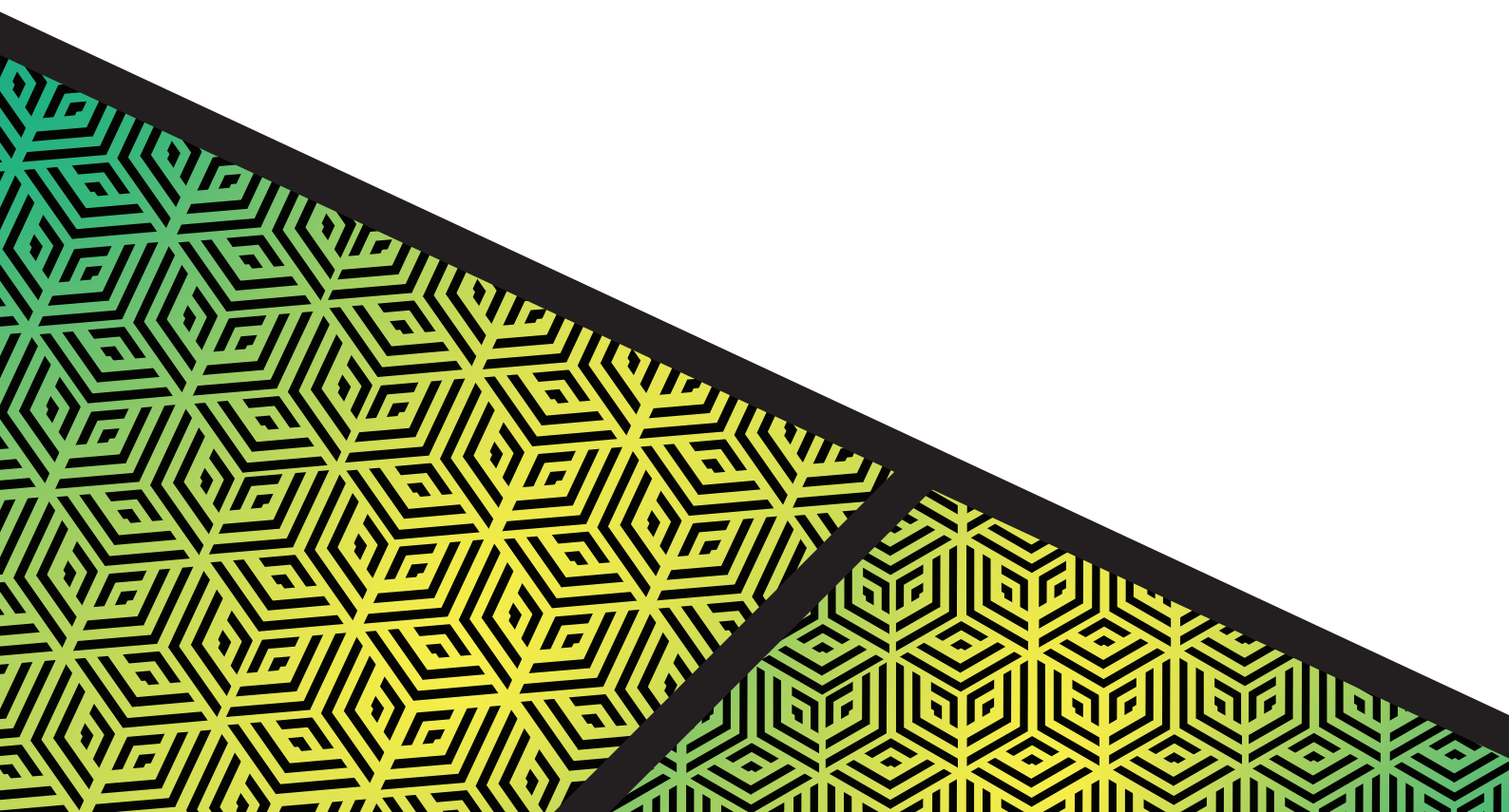
Australian Law Reform Commission

**BACKGROUND PAPER FSL12**

# **LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION**

**Reflecting on Reforms III –  
Submissions to Interim Report C**

September 2023



This discussion of the submissions received in response to Interim Report C is the 12th in a series of background papers 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. They discuss key principles and areas of research that underpin the development of recommendations.

The ALRC is required to publish the Final Report of the Inquiry by 30 November 2023. In the meantime, feedback on the background papers is welcome at any time by email to [financial.services@alrc.gov.au](mailto:financial.services@alrc.gov.au).

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

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

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## Introduction

1. Stakeholder feedback is crucial in assisting the ALRC to develop its recommendations for simplification of corporations and financial services legislation. In this Background Paper, the ALRC provides an overview of the feedback it has received, by way of formal submissions, on the proposals and question outlined in Interim Report C. This feedback will inform the development of recommendations for reform made in the ALRC's Final Report.
2. The purpose of this Background Paper is to provide a summary of feedback in response to Interim Report C as the ALRC finalises its recommendations and prepares its Final Report. It is the third and final background paper of its kind for this Inquiry, and follows the same format as Background Papers FSL6<sup>1</sup> and FSL10.<sup>2</sup>
3. Interim Report C was published on 22 June 2023, and submissions were invited until 26 July 2023. In total, the ALRC received 17 submissions from a range of stakeholders, including industry participants, industry representatives, consumer representatives, academics, and legal practitioners. A list of submissions and download links are included in **Appendix A**.<sup>3</sup>
4. The first section of this Background Paper gives an overview of the level of support expressed in submissions for each proposal in Interim Report C. The next section summarises the feedback in response to specific proposals and the question included in Interim Report C, including:
  - why submissions supported, or did not support, proposals; and
  - key issues raised regarding the design or implementation of the proposed reforms.
5. The final section briefly outlines feedback received in relation to the four recommendations included in Interim Report C.

## Overview: Support for proposals

6. The degree of support expressed for specific proposals in Interim Report C is illustrated by **Figure 1** below. Stakeholders supported the majority of proposals, although as discussed further below, some submissions highlighted issues for the ALRC to consider and to clarify in further developing these proposals.

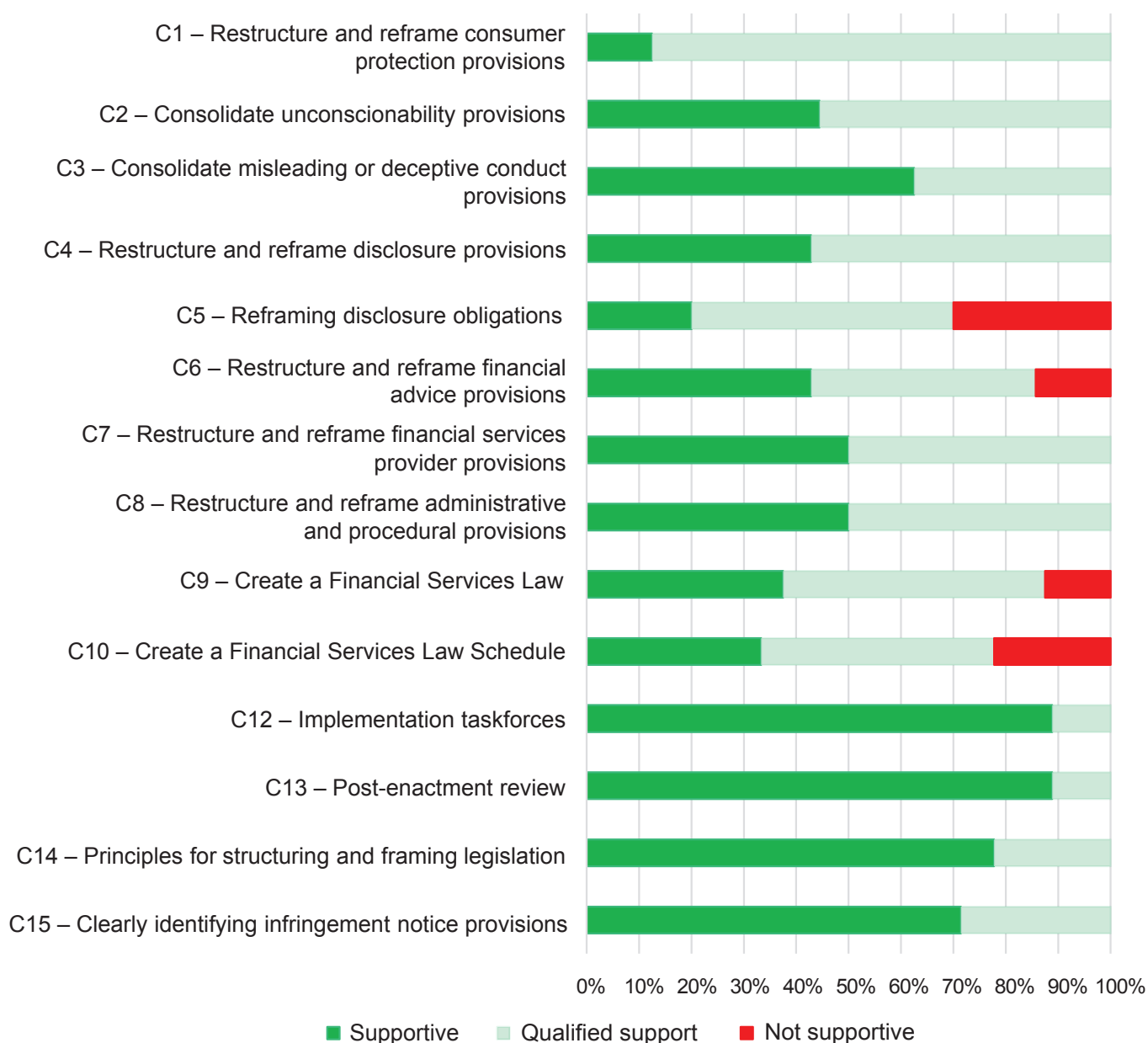
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1 Australian Law Reform Commission, 'Reflecting on Reforms — Submissions to Interim Report A' (Background Paper FSL6, May 2022).

2 Australian Law Reform Commission, 'Reflecting on Reforms II — Submissions to Interim Report B' (Background Paper FSL10, January 2023).

3 As 56 submissions were received in response to Interim Report A and 20 submissions in response to Interim Report B, the numbering allocated to submissions in response to Interim Report C begins at 77.

**Figure 1: Support for Interim Report C proposals<sup>4</sup>**



## Feedback on proposals

### Consumer protection

7. Proposals C1–C3 concern the restructuring and reframing of provisions relating to consumer protections within financial services legislation. Proposal C2 relates specifically to consolidating provisions concerning unconscionability within the *Corporations Act 2001* (Cth) (*‘Corporations Act’*) and *Australian Securities and Investments Commission Act 2001* (Cth) (*‘ASIC Act’*). Proposal C3 relates specifically to consolidating provisions that prohibit misleading or deceptive conduct.

<sup>4</sup> The underlying data for Figure 1 appears in **Appendix B**. The data shows the number of submissions by level of support and the total number of submissions that expressed a view in relation to each Proposal.

**Proposal C1** The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to consumer protection, including by grouping and (where relevant) consolidating:

- a. Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth);
- b. Part 7.6 Div 11 of the *Corporations Act 2001* (Cth);
- c. sections 991A, 1041E, 1041F, and 1041H of the *Corporations Act 2001* (Cth);
- d. Part 7.8A of the *Corporations Act 2001* (Cth); and
- e. sections 1023P and 1023Q of the *Corporations Act 2001* (Cth).

**Proposal C2** Section 991A of the *Corporations Act 2001* (Cth) and s 12CA of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed, and s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to expressly provide that it encompasses unconscionability within the meaning of the unwritten law.

**Proposal C3** 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 replaced by a consolidated single proscription.

8. Submissions that addressed Proposal C1 were generally in favour of grouping and consolidating consumer protection provisions. Qualified support largely centred on detail as to how and exactly which provisions should be grouped and consolidated.<sup>5</sup> For example, the Financial Services Council and Associate Professor Nehme suggested that grouping consumer protections within one chapter may be difficult.<sup>6</sup> The Financial Services Council stated:

The FSC is not persuaded that a single chapter of a schedule to the Act serving as a single point of consideration for consumers is a realistic goal, given the difficulties in deciding what should go inside or outside this chapter, and the inevitability that some things consumers would expect to see there are in fact left out.<sup>7</sup>

9. Nehme argued that the proposed legislative chapter should focus on containing 'reactive' consumer protection provisions as 'putting a mishmash of reactive and proactive provisions may lead to confusion by users of the legislation'.<sup>8</sup> Other submissions also suggested alternative structures and locations for some provisions.<sup>9</sup>

10. Stakeholders were generally supportive of Proposal C2.<sup>10</sup> However, some cautioned that the proposal may cause uncertainty over the meaning of unconscionability and lead to subsequent litigation costs.<sup>11</sup> For example, Professor Horrigan highlighted the existing debate regarding the interaction between general law concepts of unconscionability and statutory unconscionability. Horrigan argued that preserving the status quo in this regard is important. Otherwise, costs will

5 See, eg, M Nehme, *Submission 81*; Financial Services Council, *Submission 87*; MinterEllison, *Submission 92*. The Australian Financial Complaints Authority also highlighted the importance of the consumer protection provisions in financial services legislation, underscoring the need for legislation to be transparent and facilitate awareness of the rights and obligations of both consumers and providers: Australian Financial Complaints Authority, *Submission 79*.

6 M Nehme, *Submission 81*; Financial Services Council, *Submission 87*.

7 Financial Services Council, *Submission 87*.

8 M Nehme, *Submission 81*.

9 See, eg, MinterEllison, *Submission 92*.

10 See, eg, M Nehme, *Submission 81*; Financial Services Council, *Submission 87*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*.

11 B Horrigan, *Submission 78*; Consumer Action Law Centre, Consumers' Federation of Australia, Financial Rights Legal Centre, *Submission 88*.

be incurred if there is doubt about the scope of ‘the meaning of unwritten law’ within s 12CB of the *ASIC Act* and litigation may arise as a result.<sup>12</sup> The joint submission by the Consumer Action Law Centre, Financial Rights Legal Centre, and Consumers’ Federation of Australia raised a similar concern that ‘despite efforts to expand the definition of unconscionable conduct over time, the courts have regularly read it down’.<sup>13</sup> In his submission, Horrigan made a number of suggestions that could be adopted in implementing Proposal C2 to help minimise the risks of inadvertent change to the existing law.<sup>14</sup>

11. The joint submission by the Consumer Action Law Centre, Financial Rights Legal Centre, and Consumers’ Federation of Australia also expressed concern that consolidation of unconscionability between the *Corporations Act* and *ASIC Act* without also consolidating the equivalent provision in the *Australian Consumer Law* (‘*ACL*’) would maintain or exacerbate complexity.<sup>15</sup> By contrast, Horrigan thought that consolidation of the *ACL* provisions for unconscionability should only be done after a broader review of the *ACL*.<sup>16</sup>

12. The majority of stakeholders were supportive of, or offered qualified support for, Proposal C3.<sup>17</sup> For example, MinterEllison stated ‘we support these proposals and agree that the prohibitions with the broadest application should be retained and amended as necessary’.<sup>18</sup> Qualified support for Proposal C3 was provided by the Australian Retail Credit Association and the joint submission by the Consumer Action Law Centre, Financial Rights Legal Centre, and Consumers’ Federation of Australia.<sup>19</sup> They highlighted that one reason why the provisions were kept separate was that provisions in the *ASIC Act* replicate the equivalent provisions within the *ACL*. These stakeholders were concerned that consolidation would remove some of the benefits of having provisions with different scopes. Accordingly, the Consumer Action Law Centre, Financial Rights Legal Centre, and Consumers’ Federation of Australia stated that Proposal C3 should only be implemented if the scope of the *ASIC Act* provisions are not reduced.<sup>20</sup> The intention of Proposal C3 is to replicate, and not reduce, the scope of existing consumer protections.

13. The ALRC will further discuss the provisions subject to Proposals C1–C3 in the Final Report.

## Disclosure

14. Proposals C4 and C5 relate to restructuring and reframing provisions concerning disclosure for financial products and financial services.

**Proposal C4** The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions relating to disclosure for financial products and financial services, including by grouping and (where relevant) consolidating:

- a. Part 7.7 Divs 1, 2, 3A, 6, and 7;
- b. section 949B; and
- c. Part 7.9 Divs 1, 2, 3 (excluding ss 1017E, 1017F, and 1017G), 5A, 5B, and 5C.

12 B Horrigan, *Submission 78*.

13 Consumer Action Law Centre, Consumers’ Federation of Australia, Financial Rights Legal Centre, *Submission 88*.

14 B Horrigan, *Submission 78*.

15 Consumer Action Law Centre, Consumers’ Federation of Australia, Financial Rights Legal Centre, *Submission 88*.

16 B Horrigan, *Submission 78*.

17 See, eg, M Nehme, *Submission 81*; Financial Services Council, *Submission 87*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*; Law Council of Australia, *Submission 93*.

18 MinterEllison, *Submission 92*.

19 Australian Retail Credit Association, *Submission 83*; Consumer Action Law Centre, Consumers’ Federation of Australia, Financial Rights Legal Centre, *Submission 88*.

20 Consumer Action Law Centre, Consumers’ Federation of Australia, Financial Rights Legal Centre, *Submission 88*.

**Proposal C5** Disclosure regimes in Chapter 7 of the *Corporations Act 2001* (Cth) that require disclosure documents to ‘be worded and presented in a clear, concise and effective manner’ should be amended to require that disclosure documents also be worded and presented ‘in a way that promotes understanding of the information’.

15. Stakeholders generally supported Proposal C4, with concern centred upon the specific structure proposed.<sup>21</sup> For example, Nehme supported Proposal C4 for its potential to increase compliance because ‘having a Chapter on disclosure will also highlight the important role disclosure plays in protecting consumers’.<sup>22</sup>

16. In comparison, the Financial Services Council expressed concerns about excluding Chapter 6D of the *Corporations Act* as users would likely expect fundraising disclosure requirements to be located within group of legislative provisions proposed by the ALRC (see Proposals C9 and C10, discussed below).<sup>23</sup> Meanwhile, MinterEllison suggested that the proposed consolidated disclosure chapter could be structured more effectively. One suggestion in this regard was to separate disclosure requirements into a chapter for general financial services disclosure, and a chapter for product-related obligations.<sup>24</sup>

17. Submissions expressed mixed views in relation to Proposal C5. Some submissions expressed concern about the policy implications of incorporating reference to ‘consumer understanding’.<sup>25</sup> Additionally, some submissions were not confident that the proposed amendment would actually be an improvement, or if there were to be an improvement, it may be minimal.<sup>26</sup> A few submissions were also concerned that the word ‘understanding’ was too subjective and would create uncertainty until a test was developed to assess whether disclosure documents ‘promote understanding of the information’.<sup>27</sup> MinterEllison similarly highlighted the uncertainty of the obligation and preferred the ALRC’s Proposal A8 (which proposed an outcomes-based standard of disclosure for financial products).<sup>28</sup>

18. The ALRC will further discuss the restructuring and reframing of disclosure provisions in the Final Report.

## Financial advice

19. Proposal C6 relates to grouping and consolidating provisions concerning financial advice so as to improve their structure and framing.

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21 Australian Financial Complaints Authority, *Submission 79*; M Nehme, *Submission 81*; Financial Services Council, *Submission 87*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, Institute of Public Accountants, SMSF Association, *Submission 89*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*; Law Council of Australia, *Submission 93*.

22 M Nehme, *Submission 81*.

23 Financial Services Council, *Submission 87*.

24 MinterEllison, *Submission 92*.

25 Insurance Council of Australia, *Submission 86*; Financial Services Council, *Submission 87*; Consumer Action Law Centre, Consumers’ Federation of Australia, Financial Rights Legal Centre, *Submission 88*.

26 M Nehme, *Submission 81*; Consumer Action Law Centre, Consumers’ Federation of Australia, Financial Rights Legal Centre, *Submission 88*.

27 Association of Superannuation Funds of Australia, *Submission 84*; Financial Services Council, *Submission 87*.

28 MinterEllison, *Submission 92*. See generally Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [3.98]–[3.103]; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [9.123]–[9.140].



**Proposal C6** The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions relating to financial advice, including by grouping and (where relevant) consolidating:

- a. sections 912EA and 912EB;
- b. Part 7.6 Divs 8A, 8B, and 8C;
- c. Part 7.6 Div 9 Subdivs B and C;
- d. Part 7.7 Div 3;
- e. section 949A;
- f. Part 7.7A Divs 2, 3, 4 (excluding s 963K), Div 5 Subdiv B, and Div 6; and
- g. sections 1012A and 1020AI.

20. Almost all submissions that addressed Proposal C6 supported or offered qualified support for the proposal.<sup>29</sup> Several stakeholders commented on the impact of complexity in the existing framework for financial advice,<sup>30</sup> with an individual stakeholder describing the existing regulatory environment as ‘complex and obtuse’.<sup>31</sup> The Law Council of Australia supported the proposal because it would be ‘sensible and logical’ for financial advice provisions ‘to be grouped together and consolidated where appropriate’.<sup>32</sup>

21. Qualified support centred on the precise scope and structure of a financial advice chapter. For example, some stakeholders queried whether the ALRC’s suggested grouping would enhance the navigability and intuitive flow of the legislation. The Financial Services Council suggested that it may be more intuitive for ss 912EA and 912EB of the *Corporations Act* to remain with other provisions that deal with reportable situations and breach reporting provisions, rather than being grouped with other financial advice provisions.<sup>33</sup> MinterEllison recommended that s 912EC (which concerns obligations relating to reportable situations in ss 912EA and 912EB) and s 963K (which relates to the prohibition on product issuers and sellers on giving conflicted remuneration) be included in the proposed financial advice chapter.<sup>34</sup>

## General regulatory obligations

22. Proposals C7 and C8 aim to group and consolidate provisions of general application relating to financial services providers and administrative or procedural matters concerning financial services licensees.

29 M Nehme, *Submission 81*; Australian Financial Markets Association, *Submission 85*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, Institute of Public Accountants, SMSF Association, *Submission 89*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*; Law Council of Australia, *Submission 93*.

30 A Wolfenden, *Submission 77*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, Institute of Public Accountants, SMSF Association, *Submission 89*.

31 A Wolfenden, *Submission 77*.

32 Law Council of Australia, *Submission 93*.

33 Financial Services Council, *Submission 87*.

34 MinterEllison, *Submission 92*.

**Proposal C7** The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to financial services providers, including by grouping and (where relevant) consolidating:

- a. Part 7.6 Divs 2, 3, and 10;
- b. section 963K;
- c. Part 7.7A Div 5 Subdiv A, and Div 6;
- d. Part 7.8 Divs 2, 3, 4, 4A, 5, 6, and 9; and
- e. sections 991B, 991E, 991F, 992A, and 992AA.

**Proposal C8** The *Corporations Act 2001* (Cth) should be amended to restructure and reframe provisions of general application relating to administrative or procedural matters concerning financial services licensees, including by grouping and (where relevant) consolidating Part 7.6 Divs 5, 6, and 8.

23. Submissions in response to Proposals C7 and C8 were generally supportive.<sup>35</sup> Nehme stated that these proposals would ‘lead to a simplification and clarification of the regime’.<sup>36</sup> The Financial Services Council had questions about the exact scope of the proposed chapters, and how the different scopes of the chapters would be communicated to users.<sup>37</sup> The legislation’s framing (such as the use of descriptive headings) and aids to interpretation (such as simplified outlines) may help users of the legislation in this respect.<sup>38</sup>

## A Financial Services Law Schedule

24. Proposals C9 and C10, and Question C11, relate to the ALRC’s proposed Financial Services Law Schedule (‘FSL Schedule’). Proposal C9 describes the range of existing provisions that should be restructured and reframed to form the Financial Services Law, and Proposal C10 suggests they be located in Sch 1 to the *Corporations Act*. Question C11 seeks stakeholder feedback on whether the restructuring and reframing proposed by the ALRC would help to achieve the objectives set out in the Terms of Reference.

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35 See, eg, M Nehme, *Submission 81*; Australian Financial Markets Association, *Submission 85*; Financial Services Council, *Submission 87*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, Institute of Public Accountants, SMSF Association, *Submission 89*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*; Law Council of Australia, *Submission 93*.

36 M Nehme, *Submission 81*.

37 Financial Services Council, *Submission 87*.

38 See generally Australian Law Reform Commission, *Interim Report C: Financial Services Legislation* (Report No 140, 2023) [9.88]–[9.95].

**Proposal C9** The *Corporations Act 2001* (Cth) should include a Financial Services Law comprising restructured and reframed provisions relating to the regulation of financial products and financial services, including:

- a. Part 7.1 Divs 1, 2, 3, 4, 5 and 7 of the *Corporations Act 2001* (Cth);
- b. Parts 7.6, 7.7, 7.7A, 7.8, 7.8A, 7.9, and 7.9A of the *Corporations Act 2001* (Cth);
- c. Part 7.10 of the *Corporations Act 2001* (Cth), excluding provisions that relate more closely to the regulation of financial markets;
- d. Part 7.10A of the *Corporations Act 2001* (Cth);
- e. Part 7.12 of the *Corporations Act 2001* (Cth), excluding provisions that relate more closely to the regulation of financial markets;
- f. Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth); and
- g. a list of terms defined for the purposes of the Financial Services Law.

**Proposal C10** The Financial Services Law should be enacted as Sch 1 to the *Corporations Act 2001* (Cth).

25. Submissions were generally supportive of restructuring and reframing the existing legislation in a single location, with concerns largely focused on the use of a legislative schedule rather than a standalone Act.

26. Most of the submissions that commented on Proposal C9 were supportive or offered qualified support,<sup>39</sup> with only one submission not expressing support.<sup>40</sup> The Law Council of Australia commented that Proposal C9 would be ‘helpful’ so as to put this content into a more logical order.<sup>41</sup>

27. Submissions offering qualified support commented upon the structure and purpose of the proposed FSL Schedule. For example, the Australian Retail Credit Association suggested that it may be preferable to put provisions containing licensing obligations before provisions that apply only to licensees or particular products and services, and also suggested consolidating other licensing regimes within the Financial Services Law.<sup>42</sup> The Insurance Council of Australia commented that the proposed schedule should be the exclusive source of financial services law, and that users of the law should not have to refer to any additional materials such as regulations or ASIC legislative instruments.<sup>43</sup> The Financial Services Council raised concerns about the interaction between Proposal C9 and superannuation legislation, and commented that ‘it would be better not to overstate the comprehensiveness of the schedule’.<sup>44</sup>

28. The only submission that did not support Proposal C9 focused on the content of the proposed Financial Services Law. The Australian Financial Markets Association raised concerns about the proposed grouping of provisions and the inclusion in the schedule of generally

39 M Nehme, *Submission 81*; Australian Retail Credit Association, *Submission 83*; Insurance Council of Australia, *Submission 86*; Consumer Action Law Centre, Consumers’ Federation of Australia, Financial Rights Legal Centre, *Submission 88*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, Institute of Public Accountants, SMSF Association, *Submission 89*; Allens, *Submission 90*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*; Law Council of Australia, *Submission 93*.

40 Australian Financial Markets Association, *Submission 85*.

41 Law Council of Australia, *Submission 93*.

42 Australian Retail Credit Association, *Submission 83*.

43 Insurance Council of Australia, *Submission 86*.

44 Financial Services Council, *Submission 87*.

applicable provisions such as consumer protection provisions.<sup>45</sup> The Australian Financial Markets Association was also concerned that the proposed structure would not give appropriate weighting to the market integrity functions of Chapter 7 of the *Corporations Act*.<sup>46</sup>

29. Most submissions that commented on Proposal C10 were supportive or offered qualified support for including the Financial Services Law within a schedule.<sup>47</sup> For example, Allens commented that there was a ‘significant practical and normative upside’ to the proposed schedule and that the proposal, as distinct from the alternatives set out in Interim Report C, was ‘most likely to foster mental models of the law, and enhance its communicative power’.<sup>48</sup> In particular, Allens noted that ‘the creation of a prominent home for the Financial Services Law’ was likely to ‘establish a clearer legislative identity for the regulation of corporations and financial services, and to promote public consciousness of the legislative framework’.<sup>49</sup>

30. Several stakeholders expressed a preference for the Financial Services Law to be enacted as a standalone Act, but in light of existing constitutional constraints were supportive of the proposed schedule.<sup>50</sup> Nehme, however, commented that putting the Financial Services Law in a schedule rather than a standalone Act ‘may lead to a perception that financial services regulation is not deserving of a prominent place in our Australian laws’.<sup>51</sup> In Nehme’s view, ‘it is time to face any constitutional issues identified in [Interim Report C] and remedy them instead of trying to avoid such issues’.<sup>52</sup>

**Question C11** Would restructuring and reframing existing financial services legislation in the manner outlined in the illustrative Financial Services Law Schedule included in this Interim Report help to do any or all of the following:

- a. provide an effective framework for conveying how the law applies to consumers and regulated entities and sectors;
- b. make the law clearer, and more coherent and effective;
- c. give effect to the fundamental norms of behaviour being pursued by financial services regulation; and
- d. ensure that the intent of the law is met?

31. Most submissions that responded to Question C11 indicated that the restructuring and reframing of financial services legislation in the manner set out in Proposal C9 would help achieve the relevant objectives.<sup>53</sup> For example, MinterEllison, while expressing a reservation about the Financial Services Law being included in a schedule rather than a standalone Act, commented that ‘we do believe that the FSL Schedule proposal has merit and would help meet the objectives

45 Australian Financial Markets Association, *Submission 85*.

46 Ibid.

47 M Nehme, *Submission 81*; Insurance Council of Australia, *Submission 86*; Consumer Action Law Centre, Consumers’ Federation of Australia, Financial Rights Legal Centre, *Submission 88*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, Institute of Public Accountants, SMSF Association, *Submission 89*; Allens, *Submission 90*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*; Law Council of Australia, *Submission 93*.

48 Allens, *Submission 90*.

49 Ibid.

50 Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*.

51 M Nehme, *Submission 81*.

52 Ibid.

53 King Irving, *Submission 80*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, Institute of Public Accountants, SMSF Association, *Submission 89*; Allens, *Submission 90*; MinterEllison, *Submission 92*.

referred to in the question'.<sup>54</sup> Similarly, Allens, while noting that efficacy would need to be assessed after the reforms were implemented, commented that

the thematic grouping of provisions, the reduction of overlap, and the adoption of consistent structures exhibited by the illustrative FSL Schedule should, in the abstract, lead to a more effective financial services law.<sup>55</sup>

32. Nehme commented that the Financial Services Law would be more likely to achieve the objectives set out in Question C11 if it were enacted as a standalone Act, or as a chapter within the *Corporations Act*, rather than as a schedule.<sup>56</sup>

33. The ALRC will further discuss how financial services legislation may be restructured and reframed in the Final Report.

## Implementation

**Proposal C12** The Australian Government should establish a specifically resourced taskforce (or taskforces) dedicated to implementing reforms to financial services legislation.

**Proposal C13** As part of implementing Proposals C9 and C10, the *Corporations Act 2001* (Cth) should be amended to require that the Financial Services Law and delegated legislation made under it be periodically reviewed by an independent reviewer.

34. Most stakeholders supported Proposal C12 on creating specifically resourced taskforces to implement reforms to financial services legislation.<sup>57</sup> Similarly, there was strong support by submissions that discussed Proposal C13 relating to post-enactment review.<sup>58</sup>

35. Submissions that discussed Proposal C12 supported the inclusion of representatives from different sectors of the financial services industry within the taskforces.<sup>59</sup> More generally, the joint submission by the Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association Australia, Institute of Public Accountants and SMSF Association recognised that dedicated and specifically resourced taskforces made it more likely that the goals of reform may be achieved.<sup>60</sup>

36. By contrast, the Financial Services Council expressed reservations about Proposal C12 due to the potential initial and ongoing costs of the taskforces. Nevertheless, the Financial Services Council expressed interest in a taskforce that could review new legislation for compliance with the working principles set out in Proposal C14 to ensure drafting consistency.<sup>61</sup>

54 MinterEllison, *Submission 92*.

55 Allens, *Submission 90*.

56 M Nehme, *Submission 81*.

57 See, eg, *Ibid*; Association of Superannuation Funds of Australia, *Submission 84*; Australian Financial Markets Association, *Submission 85*; Insurance Council of Australia, *Submission 86*; Consumer Action Law Centre, Consumers' Federation of Australia, Financial Rights Legal Centre, *Submission 88*; Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, Institute of Public Accountants, SMSF Association, *Submission 89*; MinterEllison, *Submission 92*; Australian Banking Association, *Submission 91*; Law Council of Australia, *Submission 93*.

58 See, eg, M Nehme, *Submission 81*; Association of Superannuation Funds of Australia, *Submission 84*; Insurance Council of Australia, *Submission 86*; Consumer Action Law Centre, Consumers' Federation of Australia, Financial Rights Legal Centre, *Submission 88*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*. See also, a submission interested in post-legislative review to include bodies like AFCA to determine their effectiveness: Name withheld, *Submission 82*.

59 Insurance Council of Australia, *Submission 86*; Consumer Action Law Centre, Consumers' Federation of Australia, Financial Rights Legal Centre, *Submission 88*.

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

61 Financial Services Council, *Submission 87*.

37. In discussion of Proposal C13, the joint submission by the Consumer Action Law Centre, Financial Rights Legal Centre, and Consumers Federation of Australia expressed strong support for regular review and stated:

We support [Proposal C13] regardless of whether the FSL is combined as proposed. There are longstanding issues in all areas of law where provisions do not deliver the outcomes intended by legislation, and this is particularly the case in an area as complex as financial services. Regular independent reviews would provide a mechanism by which problems and gaps in the law could be identified and highlighted to the Government of the day so they can be addressed. We anticipate that the cost of the review process would be money well spent for the Government.<sup>62</sup>

38. Some stakeholders suggested that a reinstated Corporations and Markets Advisory Committee (commonly known as 'CAMAC'), or similar body, would be an appropriate institution to conduct such reviews.<sup>63</sup> More generally, the Financial Services Council raised concerns about the time and resources required to assess complex legislation.<sup>64</sup>

## Principles for structuring and framing legislation

**Proposal C14** The following working principles should be applied when structuring and framing corporations and financial services legislation:

- a. Provisions should be designed in a way that minimises duplication and overlap (**Consolidation**).
- b. Related provisions should be proximate to one another (**Grouping**).
- c. Provisions should have thematic and conceptual coherence (**Coherence**).
- d. The most significant provisions should precede less important provisions or more technical detail (**Prioritisation**).
- e. Legislation should be structured to ensure an intuitive flow that reflects the needs of potential users (**Intuitive flow**).
- f. The structure and framing of legislation should help users develop and maintain mental models that enhance navigability and comprehensibility (**Mental models**).
- g. Legislation should be as succinct as possible (**Succinctness**).

39. All submissions that discussed Proposal C14 supported or offered qualified support for the working principles outlined above.<sup>65</sup> For example, the Association of Superannuation Funds of Australia stated that their 'members strongly agree with and support this proposal'.<sup>66</sup>

40. Allens, while supportive of the working principles generally, suggested that an adjusted framework could be more useful for assessing the merits and successes of any reform to financial services legislation.<sup>67</sup> They suggested that the framework should

establish a taxonomy that better distinguishes between, on the one hand, the principles for, and the objectives of, the structuring and framing of legislation, and, on the other, the methods ultimately employed in the furtherance of those principles and objectives.<sup>68</sup>

62 Consumer Action Law Centre, Consumers' Federation of Australia, Financial Rights Legal Centre, *Submission 88*.

63 M Nehme, *Submission 81*; Australian Financial Markets Association, *Submission 85*.

64 Financial Services Council, *Submission 87*.

65 M Nehme, *Submission 81*; Association of Superannuation Funds of Australia, *Submission 84*; Australian Financial Markets Association, *Submission 85*; Financial Services Council, *Submission 87*; Allens, *Submission 90*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*; Law Council of Australia, *Submission 93*.

66 Association of Superannuation Funds of Australia, *Submission 84*.

67 Allens, *Submission 90*.

68 Ibid.

41. The ALRC will consider this suggestion further when developing the Final Report.

## Penalty provisions

42. Proposal C15 provides that infringement notice provisions in corporations and financial services legislation should be identifiable on the face of the provision.

**Proposal C15** Infringement notice provisions in corporations and financial services legislation should be identifiable on the face of the provision.

43. All submissions that commented on Proposal C15 provided support or qualified support.<sup>69</sup> The Law Council of Australia commented that it would ‘provide users with increased clarity as to the consequences of breaching the relevant provisions in the legislation’.<sup>70</sup>

## Feedback on recommendations

44. Interim Report C also contained a number of recommendations relating to penalty provisions. Recommendations 20 and 22 related to the framing of penalty provisions. Recommendation 21 related to the definition of ‘civil penalty’. Recommendation 23 concerned the fault element in offence provisions that do not create an offence of strict or absolute liability.

45. Almost all submissions that commented on the recommendations offered support or qualified support.<sup>71</sup> Nehme indicated that Recommendations 20, 21, and 22 were all ‘sound’.<sup>72</sup>

46. The Australian Banking Association indicated that it supported the recommendations, subject to appropriate opportunities for review and consultation on future draft legislation.<sup>73</sup> In relation to Recommendation 21 (which recommends including the words ‘civil penalty’ and ‘criminal penalty’ at the foot of relevant provisions), the Association of Superannuation Funds of Australia recommended that a similar approach be taken for sub-divisions setting out ‘reportable situations’.<sup>74</sup>

47. The Financial Services Council provided an additional suggestion in relation to Recommendations 20 and 22, indicating that the legislation ‘should state when a breach of the provisions is not deemed to be significant under s912D(4)(e) of the Act (and is therefore not automatically reportable to ASIC)’.<sup>75</sup>

69 M Nehme, *Submission 81*; Australian Financial Markets Association, *Submission 85*; Financial Services Council, *Submission 87*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*; Law Council of Australia, *Submission 93*.

70 Law Council of Australia, *Submission 93*.

71 M Nehme, *Submission 81*; Association of Superannuation Funds of Australia, *Submission 84*; Australian Banking Association, *Submission 91*; MinterEllison, *Submission 92*; Law Council of Australia, *Submission 93*.

72 M Nehme, *Submission 81*.

73 Australian Banking Association, *Submission 91*.

74 Association of Superannuation Funds of Australia, *Submission 84*.

75 Financial Services Council, *Submission 87* (emphasis in original).

## Appendix A: List of submissions

77. [A Wolfenden](#)
78. [B Horigan](#)
79. [Australian Financial Complaints Authority](#)
80. [King Irving](#)
81. [M Nehme](#)
82. [Name withheld](#)
83. [Australian Retail Credit Association](#)
84. [Association of Superannuation Funds of Australia](#)
85. [Australian Financial Markets Association](#)
86. [Insurance Council of Australia](#)
87. [Financial Services Council](#)
88. [Consumer Action Law Centre, Financial Rights Legal Centre, and Consumers' Federation of Australia](#)
89. [Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association Australia, Institute of Public Accountants, and SMSF Association](#)
90. [Allens](#)
91. [Australian Banking Association](#)
92. [MinterEllison](#)
93. [Law Council of Australia](#)



## Appendix B: Support level data

	Supportive	Qualified support	Not supportive	Total
<b>C1 – Restructure and reframe consumer protection provisions</b>	1	7	0	8
<b>C2 – Consolidate unconscionability provisions</b>	4	5	0	9
<b>C3 – Consolidate misleading or deceptive conduct provisions</b>	5	3	0	8
<b>C4 – Restructure and reframe disclosure provisions</b>	3	4	0	7
<b>C5 – Reframing disclosure obligations</b>	2	5	3	10
<b>C6 – Restructure and reframe financial advice provisions</b>	3	3	1	7
<b>C7 – Restructure and reframe financial services provider provisions</b>	3	3	0	6
<b>C8 – Restructure and reframe administrative and procedural provisions</b>	3	3	0	6
<b>C9 – Create a Financial Services Law</b>	3	4	1	8
<b>C10 – Create a Financial Services Law Schedule</b>	3	4	2	9
<b>C12 – Implementation taskforces</b>	8	1	0	9
<b>C13 – Post-enactment review</b>	8	1	0	9
<b>C14 – Principles for structuring and framing legislation</b>	7	2	0	9
<b>C15 – Clearly identifying infringement notice provisions</b>	5	2	0	9