

5 April 2023

Australian Law Reform Commission
PO Box 12953
QUEENSLAND 4003

By email: financial.services@alrc.gov.au

Dear Sir/Madam,

Background Paper FSL9: All Roads Lead to Rome

1. The Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) takes this opportunity to provide feedback on the Amended Proposals contained in Background Paper FSL9 issued by the Australian Law Reform Commission (**ALRC**).¹
2. The Committee considers that the topics covered by this Background Paper are among the more important of the reform initiatives being considered by the ALRC in its current review of financial services law and, therefore, deserve particularly close attention and scrutiny.
3. The Business Law Section's Financial Services Committee has also participated in preparing this submission and agrees with the views expressed by the Committee.

Agreement with the policy rationale

4. The Committee agrees strongly with the ALRC's view reflected in the Background Paper that the current proliferation of legislative provisions in the areas of unconscionability and misleading or deceptive conduct contributes to unnecessary complexity in the law and causes increases in compliance and other costs.
5. The Committee considers the policy rationale for simplification to be compelling.

Support for the Amended Proposals

6. The Committee agrees with Amended Proposal A22 and Amended Proposal A23 as outlined and explained in the Background Paper. The Committee also agrees with the suggestion that these Amended Proposals replace Proposal A22 and Proposal A23 set out in Interim Report A as a basis for further discussion in Interim Report C.

¹ Background Paper FSL9 "*Legislative Framework for Corporations and Financial Services Reform. All roads lead to Rome: unconscionable and misleading or deceptive conduct in financial services law*" December 2022.

7. The Committee makes the following additional suggestions that the ALRC may wish to consider in connection with Amended Proposal 23 (misleading or deceptive conduct).
8. The Financial Services Committee particularly endorses the comments made by the ALRC with respect to section 991A of the Corporations Act, noting that parties that do not hold an Australian Financial Services Licence (**AFSL**) may also engage in unconscionable conduct—for example, parties that may hold an Australian Market Licence or be appointed as an authorised representative by the holder of an AFSL.

Simplification of additional general provisions

9. The Committee considers that the general offences contained in sections 1308B, 1308 and 1309 of the *Corporations Act 2001* (Cth) create similar complexity and overlap to sections 1041E, 1041F and 1041H of the Corporations Act and sections 12DB, 12DC and 12DF of the *Australian Securities and Investments Commission Act 2001* (Cth) (referred to in Amended Proposal A23(b)), and should be subject to simplification in the same way as those sections. These general provisions reflect a similarly confused history and legislative regime that again should point to ‘all roads leading to Rome.’²
10. The Committee recommends that Amended Proposal A23 extend to these additional general provisions.

Integration with specific provisions

11. The Committee considers that there is a strong policy basis to integrate the general provisions more expressly with specific provisions dealing with misleading or deceptive conduct in the context of specific disclosure documents and securities law conduct, including in the areas of prospectuses and other securities offering documents,³ product disclosure documents,⁴ takeover disclosure documents,⁵ continuous disclosure,⁶ and financial reporting.⁷
12. To use the ALRC aphorism, the direct roads for specific disclosure documents should also be clearly signposted and mapped in pointing ‘the way to Rome.’ In particular, the areas of overlap and policy differences with the general provisions should be clearly articulated so as to remove complexity and explain how overlap should be resolved.⁸ Ideally, there should be greater policy and drafting consistency among the specific provisions to the extent that they involve similar policy settings.

² If the ALRC has not had the misfortune of attempting to trace the byzantine history of these further general provisions and how they fit with each other we note the genesis of section 1308 from section 375 of the Uniform *Companies Act 1961* and section 1309 from section 375A of the *Companies (Amendment) Act 1971* NSW. Compare in that regard the overlapping history of section 1041E from section 73 of the *Securities Industry Act 1970* NSW and section 1041F from (very originally) section 84 of the *Larceny Act 1861* England. The history of section 1041H and 12DF and its genesis in section 995 of the 1990 Corporations Law from section 52 of the *Trade Practices Act 1974* is of course much better known.

³ Part 6D.3, Corporations Act.

⁴ Part 7.9, Corporations Act.

⁵ Part 6A.6, Corporations Act.

⁶ Part 6CA, Corporations Act.

⁷ Part 2M.7, Corporations Act.

⁸ See for example the important resolution of overlap in section 1041H(3) of the Corporations Act.

13. The Committee recommends that Amended Proposal 23 expressly deal with this policy issue.
14. In addition, it is noteworthy that some other disclosure documents that may be functionally equivalent to specific disclosure documents (a notable example is a scheme of arrangement explanatory memorandum⁹ in the context of a change of control transaction) do not have a specific liability regime. This appears to the Committee to reflect a gap in regulatory design.

Encourage care and diligence

15. The Committee is of the view that liability for misleading or deceptive conduct should strongly encourage those responsible for preparing and issuing disclosure decisions to exercise care and diligence in the conduct they engage in and reward those who take such care and diligence.
16. In the context of civil penalty contraventions as referenced in Amended Proposal A23(c), that is likely to be facilitated through section 1317S of the Corporations Act.¹⁰
17. In the context of civil compensation, the Committee strongly supports the availability of due diligence defences.¹¹ It believes the policy basis for the availability of these defences should apply for civil compensation in both the general and specific prohibitions on misleading or deceptive conduct.
18. The Committee recommends that Amended Proposal 23 expressly address the importance of the due diligence defence and its policy rationale.

Accessories, directors and others

19. The Committee considers that the role of accessories in contributing to misleading conduct should be recognised as an important policy issue.
20. In general terms, the Committee supports the imposition of potential accessory liability based on established legal principles of participation and knowledge.¹² Of course, an accessory may also be found to engage in misleading or deceptive conduct as a principal party.¹³
21. For certain keystone disclosure obligations, the Committee supports the imposition of specific potential director liability, subject to appropriate culpability and defence settings.¹⁴
22. The Committee considers it would be helpful for Amended Proposal 23 to recognise the policy issues surrounding accessory liability.

⁹ Part 5.1, Corporations Act.

¹⁰ Although we would have a preference for a clearer judicial direction in that regard.

¹¹ See for example the regulatory design of sections 731 to 733 of the Corporations Act as well as references to reasonable steps in other relevant provisions.

¹² See *Giorgianni v Queen* (1985) 156 CLR 473, *Yorke v Lucas* (1985) 158 CLR 661, etc.

¹³ As illustrated in case law such as *ASIC v Narain* [2008] FCAFC 120.

¹⁴ For example in the areas of prospectuses and financial reporting.

Regulator powers

23. The Financial Services Committee recommends that care be taken to ensure that, if particular provisions are to be repealed, a thorough check is done of other legislation to pick up all cross-references to those provisions, and to make appropriate amendments to other relevant legislation.
24. The Financial Services Committee is particularly concerned to ensure that arrangements between the Australian Securities and Investments Commission (**ASIC**) and the Australian Competition and Consumer Commission (**ACCC**) which allow for cross-referral of matters for investigation and enforcement between the regulators are not adversely impacted by the changes. For example, the ACCC has referred some powers to ASIC with respect to taking action relating to misconduct involving cryptocurrencies. Any referral made under legislation that existed at the time the referral took place should not be invalidated by the subsequent repeal of the relevant provision.

Further feedback

25. If the ALRC would like further elaboration of any of the matters referenced above, the Committee would be pleased to provide it.

Conclusion and further contact

26. Please contact the chair of the Committee, Robert Sultan, at robert.sultan@nortonrosefulbright.com or the chair of the Financial Services Committee, Pip Bell, at pbell@pmclegal-australia.com, if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

Philip Argy
Chairman
Business Law Section