



Unnecessary complexity in Australia's financial services laws

The complexity and prescriptiveness of Australian financial services laws imposes unnecessary costs to business, inhibits productivity and undermines innovation in the sector.

The intricacy of financial services laws makes it harder for businesses to meaningfully comply with the law, affecting businesses and consumers.

The Australian Law Reform Commission (ALRC) has been asked to inquire into the potential simplification and rationalisation of laws that regulate financial services in Australia. The Inquiry was referred to the ALRC by the Commonwealth Attorney-General in September and is part of the Government's response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services.

The ALRC has been developing a more adaptive, efficient and navigable framework for financial services regulation in Australia. The analysis so far has identified a number of issues with the complexity of the existing law that impacts businesses, consumers, regulators and the courts.

Australian financial services laws adopt an *overly prescriptive approach to regulation*

- This *creates risks of regulatory arbitrage, adds to compliance costs and reduces productivity.*
- This complexity results from demand from industry and regulators for increased certainty.
- The result is *false certainty* – too much prescription actually *obscures the clarity of the law*. A balance is required.

For example, the principles-based obligation that '[t]he provider must act in the best interests of the client in relation to the advice'¹ (16 words) is tied to a prescriptive 'safe harbour' defence² that is 261 words long.

Financial services regulation is overly complex and unwieldy, contained in various instruments

- It is difficult for players in the industry, regulators, practitioners and consumers to keep track of – and understand – the law as a whole.

For example, the ALRC's mapping of the product disclosure statement (PDS) regime for financial products under the *Corporations Act*³ revealed that the relevant part of the Act is affected by 83 different legislative instruments⁴, as well as a substantial number of regulations.

Complexity of definitions

- In the words of one judge, definitions in the financial services legislation are 'complex and prolix, if not labyrinthine'.
- Definitions are used in financial services regulation to 'switch on and off' different obligations that may apply to the industry.
- As a consequence, multiple layers of detailed exceptions and qualifications to definitions are scattered across different pieces of legislation. This makes it difficult when particular obligations apply – resulting in *unnecessary costs* for industry and government as well as *a lack of clarity*.

For example, classification of a customer as a 'retail client' affects the disclosure and conduct obligations owed by a financial services provider.⁵ Lengthy and numerous provisions in both the Corporations Act and the Corporations Regulations define a 'retail client', in addition to being subject to multiple exceptions.⁶

Inconsistent use of definitions

- Many of the key terms for switching obligations on/off are *defined inconsistently in different statutes*.

For example, the central definitions of 'financial product' and 'financial service' differ between the *ASIC Act*⁷ and the *Corporations Act*.⁸

An effect of this is that consumer credit is subject to obligations under the *ASIC Act*, but not the *Corporations Act*; instead, the *National Consumer Protection Act* applies.

Laws do not reflect fundamental norms

- The complexity and particularisation of the financial services laws obscures the norms of behaviour that the law seeks to uphold, as Commissioner Hayne identified in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industries.

For example, the regime prohibiting the giving of conflicted remuneration to financial advisers⁹ is contained within 25 distinct statutory provisions.

Financial Services Inquiry Overview: <https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/>

Financial Services Inquiry Terms of Reference: <https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/terms-of-reference/>

Financial Services Inquiry Advisory Committee: <https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/advisory-committee/>

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industries Final Report: <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>

Australian Securities and Investments Commission v Westpac Banking Corporation [2019] FCA 2147 (19 December 2019): http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/2147.html?context=1;query=%5b2019%5d%20FCA%202147;mask_path=

1 *Corporations Act 2001* (Cth) s 961B(1).

2 *Corporations Act 2001* (Cth) s 961B(2).

3 *Corporations Act 2001* (Cth) Pt 7.9.

4 *Corporations Act 2001* (Cth) s 1020F(1).

5 *Corporations Act 2001* (Cth) ss 961-961P; 1012A-1012C.

6 *Corporations Act 2001* (Cth) ss 761G, 761GA; *Corporations Regulations 2001* (Cth) Pt 7.1 Div 2.

7 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAA, 12BAB.

8 *Corporations Act 2001* (Cth) Pt 7.1 Div 3, 4.

9 *Corporations Act 2001* (Cth) Pt 7.7A Div 4, 5.