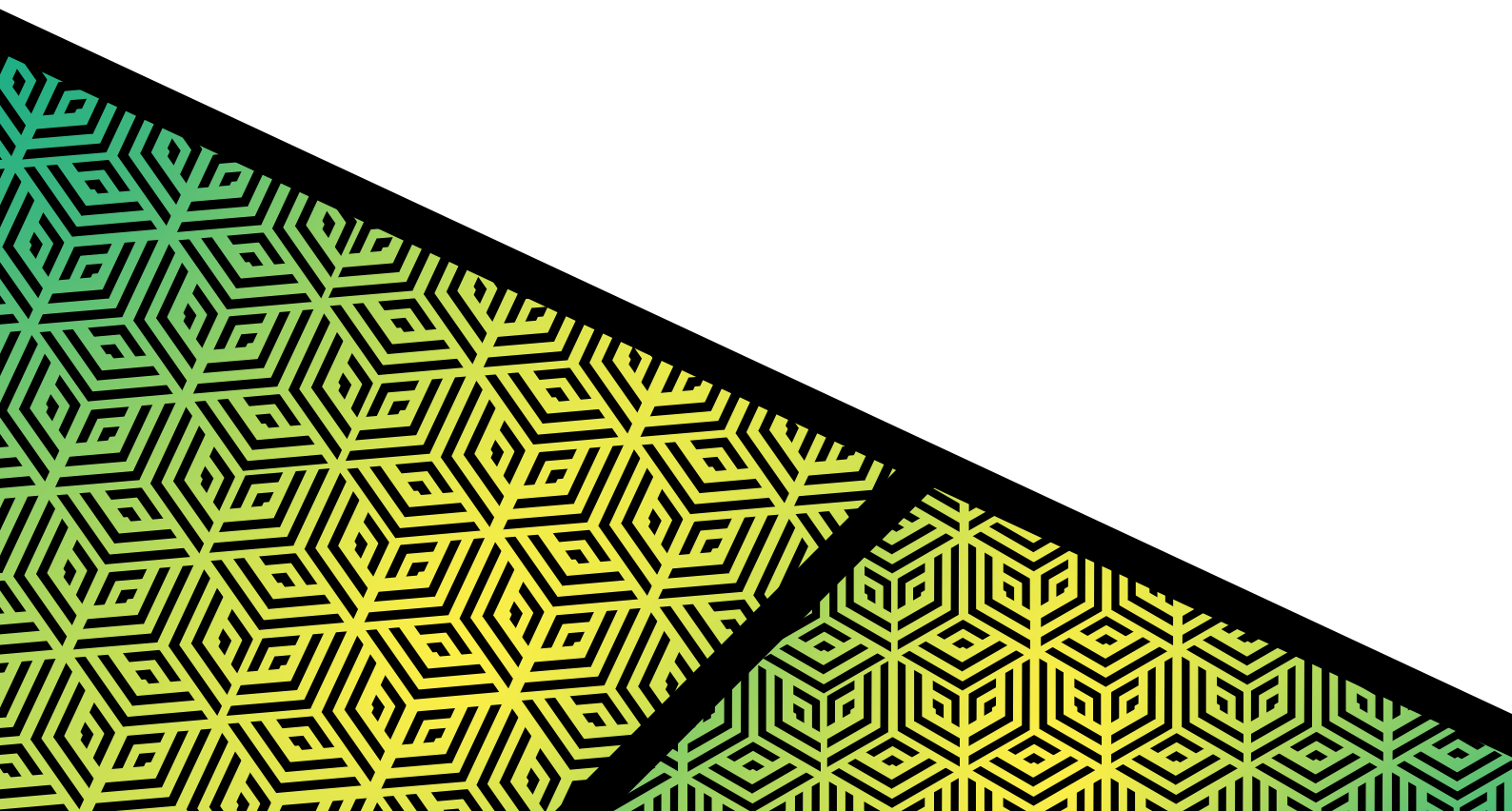
Australian Government
Australian Law Reform Commission

BACKGROUND PAPER FSL1

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Initial Stakeholder Views

June 2021



This summary of initial stakeholder views is the first in a series of background papers to be released by the Australian Law Reform Commission 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 three Interim Reports during the Inquiry, and these Reports will include specific questions and proposals for public comment. A formal call for submissions will be made on the release of each Interim Report. In the meantime, feedback on the background papers is welcome at any time by email to financial.services@alrc.gov.au.

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

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

Postal Address:

PO Box 12953,
George Street QLD 4003

Telephone: within Australia (07) 3248 1224

International: +61 7 3248 1224

Email: info@alrc.gov.au

Website: www.alrc.gov.au

CONTENTS

Introduction and Summary **1-1**

ALRC consultations **1-2**

Emerging consensus 1-2

Example provisions described positively 1-6

Example provisions described negatively 1-8

Categories and number of consultees to date 1-12

Submissions to the Financial Services Royal Commission **1-13**

Introduction 1-13

Question-based analysis 1-14

Other comments on complexity, prescription and simplification 1-18

Appendix 1: Quantitative Data 1-20

Appendix 2: Methodology 1-23

Introduction and Summary

1. The ALRC is committed to listening to the views of stakeholders. This Background Paper summarises the views expressed to the ALRC by stakeholders as at May 2021 on major themes relating to simplification of the legislative framework for corporations and financial services. The views of stakeholders on these and other themes will continue to be considered by the ALRC alongside its own research and analysis to inform the recommendations it ultimately develops.

2. The ALRC is publishing this summary of initial stakeholder views as a way of reflecting on the perspectives encountered over the first eight months of this three-year inquiry, and to keep stakeholders apprised of developments in the ALRC's thinking at this early stage of the inquiry.

3. The ALRC has proactively sought out the views of interested stakeholders on this Inquiry in a number of ways, including holding public webinars, arranging targeted consultations, and attending industry and professional events. The ALRC will call for formal submissions after the release of its first Interim Report on 30 November 2021.

4. In addition, the ALRC has analysed submissions to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the 'Financial Services Royal Commission') that related to legislative complexity, to understand stakeholder views that have already been aired. In this way, the ALRC is seeking to maximise stakeholder input without overwhelming stakeholders with requests for formal submissions or discussions.

5. There has been a level of consensus amongst 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 recognise that some aspects of complexity are unnecessary and unhelpful. Many stakeholders have identified navigability of the law to be a key concern – it is too difficult to locate relevant parts of the law, and even experienced lawyers cannot always be confident that they are taking into account all relevant provisions and instruments on a particular issue without 'missing something'.

6. Some stakeholders have described the intricacy of key statutory definitions as 'impenetrable'. Many have urged that relevant provisions on a particular topic should be grouped together 'in one place' to the extent possible, rather than spread unpredictably across different levels of the legislative hierarchy. The ALRC has also been urged to consider carefully how principles and norms can be helpfully integrated and balanced with more detailed and prescriptive rules that are also often required. Observations such as these go to the heart of the topics raised in the inquiry Terms of Reference and are guiding the ALRC's approach to the Inquiry.

7. This Background Paper focuses on three principal sources of stakeholder views collated to date: ALRC consultations with stakeholders; comments submitted to ALRC public webinar events; and submissions made to the Financial Services Royal Commission.

8. The ALRC has noted greater resistance to the idea of legislative simplification in certain submissions to the Financial Services Royal Commission than in consultations

for this Inquiry. This variation may be largely due to different perceptions about what 'simplification' of the law might entail. For example, some stakeholders expressed concerns that simplification might in practice mean deregulation, and weakening protection for consumers. Others feared it might mean stripping the law back to principles alone, without a necessary level of detail or certainty to guide industry. Accordingly, it will be important for the ALRC to be transparent throughout the Inquiry about the guiding principles that inform what simplification means and how simplification might best be achieved.

ALRC consultations

Emerging consensus

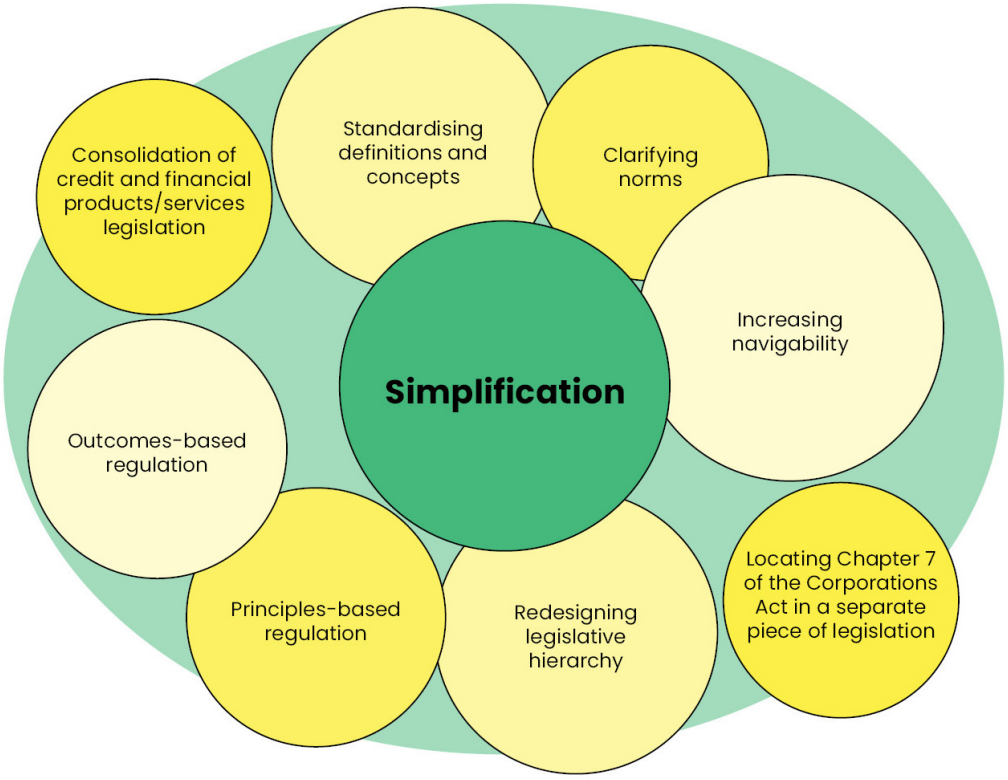
9. The table below contains a high-level outline of the consensus emerging from the consultations to date on major themes relevant to the Inquiry.

Theme	Comments/reservations	Related themes
Level of support - strong		
Increasing navigability	• Support for greater clarity and coherence in respect of legislative instruments in particular. • Support extends to the use of technology to aid navigability, the use of legislative outlines and other navigation tools.	Redesigning legislative hierarchy Standardising definitions and concepts
Simplification	• Need to articulate what 'simplification' means and test support with examples. • Simplification should not result in less consumer protection (deregulation) or less certainty.	Principles-based regulation
Standardising definitions and concepts	• Both within *Corporations Act* and across legislation (eg the prohibitions against misleading or deceptive conduct and unconscionable conduct). • Locating definitions in one place and sign-posting.	Increasing navigability Redesigning legislative hierarchy
Reinstatement of a body like the former Corporations and Markets Advisory Committee (CAMAC)	• Support for a broader remit (including overseeing the implementation of reform) and broader representation (multi-disciplinary).	
Locating Chapter 7 of the *Corporations Act* in a separate piece of legislation	• Given the objectives of Chapter 7, its location within legislation governing companies/securities is anomalous. • Support for incorporating Part 2 Division 2 of the *ASIC Act*.	Increasing navigability Standardising definitions and concepts

Theme	Comments/reservations	Related themes
Level of support - general		
Principles-based regulation	• Hesitancy about principles on their own – recognition that principles should be backed by clear policy and accompanied by rules/outcomes/guidance and indicative behaviours. • Recognition of the effectiveness of the Eggleston principles in the takeovers area.	Simplification
Redesigning legislative hierarchy	Support for: • use of consistent terminology across primary and secondary legislation and guidance documents • removing unnecessary detail from primary legislation (a minority supported moving more detail into primary legislation, although it was not clear how this might be implemented in practice) • reducing overlap and inconsistencies with secondary legislation • limiting the use of legislative instruments to modify the primary legislation • setting out detailed rules in a more consolidated and thematic way (by reference to subject areas and possibly by reference to sector/industry) • greater reliance on soft law/industry guidance/codes of conduct (although no consensus about what might be appropriate in this regard)	Increasing navigability
Consolidation of credit and financial products/services legislation	• There is no apparent policy or other reason for bifurcation (subject to clearing any constitutional/referral issues) and current system leads to duplication, inconsistency and complexity/confusion for industry. • Recognition that the benefits would need to justify the cost and other implications.	Increasing navigability Standardising definitions and concepts

Theme	Comments/reservations	Related themes
Level of support - mixed		
Outcomes-based regulation	• Hesitancy as to how to clarify, express and measure consumer outcomes.	Principles-based regulation
Clarifying norms	• Hesitancy as to how norms should be interpreted and embedded in legislation. • Support for the following: ○ expanding objects clauses as part of a principles-based approach; ○ incorporating Hayne norms into objects clauses; and ○ increasing the use of provisions that list matters that the courts must take into account when making certain determinations. • Hesitancy about fairness and its potential imprecision/indefinability but recognition that this is becoming more prominent in areas such as 'unfair trading' or 'unfair dealing'.	Principles-based regulation Standardising definitions and concepts

Figure 1: Visualisation of emerging themes



10. The themes raised by consultees continue to develop and evolve as we conduct ongoing consultations and undertake our own analysis.

Potential policy implications

11. The following is a list of some key policy and related issues identified by stakeholders during the course of ALRC consultations to date:

- The need for transparency of policy objectives in the architecture of the regulation and definition provisions;
- Appropriate rule-making powers for the Australian Securities and Investments Commission (ASIC);
- Vesting consumer protection in a separate agency (or a separate Division within ASIC);
- Rationalising disclosure regimes:
    - Note the relationship and potential overlap with the incoming Design and Distribution Obligations;
    - Continuous disclosure and civil liability regime (strict liability and lack of a defence – problems with ss 1308 and 1309 of the *Corporations Act*);
- Problems applying the retail client/wholesale client distinction (and sophisticated investor exception);
- Problems with the distinction between personal advice and general advice;
- The challenges of defining financial advice narrowly by reference to financial products and whether 'strategic advice' should be distinguished from, rather than regulated in the same way as, 'financial product advice';
- The potential benefits of individual licensing of financial advisers (rather than licensing entities);
- Concerns regarding prescriptive regulation of financial advisers generally and incompatibility with moves to achieve greater professionalisation of the industry;
- The need for harmonisation of state laws and Commonwealth laws in areas such as insurance.

Example provisions described positively

12. The following table outlines (non-exhaustively) some of the statutory provisions and concepts that one or more stakeholders have described positively, or as working well, in ALRC consultations to date:

Section or concept	Any relevant comments
Within Chapter 7 of Corporations Act	
Recent amendments such as Part 7.5A and 7.5B	• More reliance on undefined terms and ASIC Rules helpful. • Section 901J requirement for ASIC to consult in relation to Derivative Transaction Rules helpful.
The 'efficiently, honestly, fairly' standard	• Sensibly interpreted, and is an effective rules-based standard, yet still operates effectively at a principled level.
Financial product and financial service definitions	• The functional definitions are good; the exclusions are the problem. • The distinction between securities and other financial products is a useful gateway to the legislation.
PDS model	• Within disclosure, the PDS model works most effectively.
Market misconduct provisions	• Better systems for determining breaches, and strong judicial leadership (NSWCA) in clarifying the meaning of provisions.
Outside Chapter 7 of Corporations Act	
Chapter 6	• Uses blanket definitions with a suite of exceptions. Perhaps working well because of the role of the Takeovers Panel or because smaller group of operators in Ch 6 area. • Takeover Panel effective because it can make prompt rulings. • More principles-based. In addition, Takeovers Panel is an effective quasi regulator. • The principles are appropriately supported by more detailed rules, and ASIC has worked with practitioners and industry to fix errors. • There is a clearer consensus on what Ch 6 is trying to achieve.
Insolvency (Chapter 5)	• Insolvency practitioners' model – pulled out a number of provisions from the body and moved them to the schedule with renumbering.
Directors' duties (Chapter 2D)	• Principles-based.
Definition of managed investment scheme (Chapter 5C)	• Clearer concept with examples works well.
Buyback provisions (s 257B)	• The use of a table is effective.

Outside the Corporations Act	
Market Integrity Rules	• Consolidated ASX supervision regime.
PPS Act	• Definitions do not do substantive work.
FCA Handbook	• More understandable than ASIC regulatory guidance. • One-stop shop.
Unfair contract terms	• The standard of 'fairness' in the unfair contract terms space has been working effectively.
ASX listing rules	• ASX listing rules are clear.
Reverse mortgage information sheet	• Examples of a template useful for consistency in disclosure.
Reserve Bank's objectives	• Clearly expressed. Focuses and underpins their work.
Financial Services and Markets Act 2000 (UK)	• Relatively short and clear.
Securities Act 1990 (Ontario)	• Model of inclusion aims and principles in legislation – ss 1.1 and 2.1

Example provisions described negatively

13. The following table outlines (non-exhaustively) some of the statutory provisions and concepts that one or more stakeholders have described negatively, or as not working so well, in ALRC consultations to date:

Section or concept	Any relevant comments
Within Chapter 7 of Corporations Act	
Disclosure provisions	• A few consultees noted that there is less need for disclosure in light of DDO. • Impenetrable. • Need simplification. • Can be counter-productive. • None of the many disclosure regimes are helpful. • Should be more standardised. • Should rationalise financial fundraising and product disclosure regimes. • Disclosure is still based on FSR Act model, but legislation has otherwise shifted to more of a DDO model. • More principle-based disclosure regime is required. • Level of what is material is becoming more complicated. • Regime doesn't consider the capabilities of the person receiving disclosure. • People don't understand what is disclosed to them. • Does not work. Consider having standardised products, for which lesser disclosure would be required. Only have detailed disclosure for non-standard products. • Need to bring Chapter 6, 6D and 7 into alignment. • The inclusions in s 710 do not really work. • Section 946AA provides an exemption from the requirement to provide a Statement of Advice, but interacts in a complex, and potentially contradictory way with Reg 7.7.09A. • Unclear re fee disclosure in interaction between ASIC RG 179 and RG 175 and RG 97 in the context of licence variations for an issuer of a managed discretionary account. • Advisers can control disclosure risks if they are better trained/ certified.

Section or concept	Any relevant comments
Financial product definition	• Several consultees noted that it does not make sense to exclude credit. • A few consultees noted that the definition differs from Div 2 Pt 2 of *ASIC Act*. • A few consultees noted that the derivative definition is confusing. • Too complex. • Structure and breadth of definition (in particular, the 'managing a financial risk' element in s 763A(1)(c)) leads to uncertainty. • Functional definition too broad. • Should be streamlined across *ASIC Act*, *Corporations Act*, *NCCP Act*. • Lack of clarity in relation to what 'settled immediately' means for purposes of s 764A(1)(k). • Lack of clarity in relation to making non-cash payments (s 763D). • Many products are simultaneously investment and credit. • Unclear what type of product cryptocurrencies are. • The regulations re-write the definition of derivative. • Non-cash payment definition unclear; people shop around law firms to find the interpretation that suits them.
General/personal advice distinction	• Some consultees noted that the distinction is unclear and that the High Court should not be needed to clarify boundaries. • Distinction is not workable in practice in client interactions. • A lot gets caught up in the definition of 'general advice'. • General advice should be renamed 'product information'. Currently this definition is too difficult to apply. • Unclear re the limited advice programs in large superannuation companies and the advice given by call centres. • Inappropriate in an insurance context. • 'General advice' is a misleading label because it is not really advice.
Retail/wholesale client distinction	• A few consultees noted that the thresholds have not been updated since introduction in 2001. • Confusing (particularly because sometimes product-based and sometimes client-based) and difficult to apply in practice. • Issues with implementation. • Wealth threshold not effective. • Categories not fit for purpose. • Different definitions in *Insurance Contracts Act*.

Section or concept	Any relevant comments
Financial product advice definition	• A few consultees noted that they would like to see a shift away from the 'product' focus in the regulation of advice – eg to recognise strategic advice. • Definition is too broad. • Too complex. • Needs to be streamlined. • Should not include superannuation calculators – they are financial literacy tools.
'Efficiently, honestly, fairly' standard (s 912A)	• Needs clarification. • Civil penalty for breach is inappropriate. • 'Fairness' sitting alongside 'efficient' may mean different things to different people. This is problematic.
Financial service definition	• Concept of 'arranging' (to deal) is undefined (s 766C(2)). • Definition differs from Div 2 Pt 2 of *ASIC Act*. • Could be simplified.
Misleading and deceptive conduct	• Overlap across multiple statutes.
Basic deposit product definition (s 761A)	• Would benefit from simplification. • Too complex and uncertain.
Conflicted remuneration	• Definition in s 960A and s 963A is complicated to work through and generally unclear.
Breach reporting	• Too prescriptive • Changes made in December 2020 cannot be understood by anyone except lawyers and compliance experts
Dealing with client money provisions	• Lack of clarity with respect to definitional provisions setting out when Subdiv A of Div 2 of Part 7.8 applies. • Not effective.
Future of Financial Advice (FOFA) provisions	• Overly complex. • Confusing.
Conflict of interest provisions	• Too complex.
Criminal provisions inc s 1311	• High level of complexity in those provisions. In particular, complex interaction between s 1311 and *Criminal Code*.
Insider trading provisions	• Lack of definition in relation to the concept of 'readily observable matter': s 1042C(1)(a).
Financial services law definition (s 761A)	• Broad definition that can be difficult to interpret.

Section or concept	Any relevant comments
Market rules and derivative transaction rules	• Difficulties with having these outside the Act.
Anti-hawking provisions	• Very complex. Difficult to work out what to do to comply.
Outside Chapter 7 of Corporations Act	
Securities definition	• Several consultees noted that there are too many different definitions within the Act. • Definition is heavily modified according to context, which is confusing. Policy rationale for modifications is not clear. • A broad definition with part specific exclusions would avoid the need to modify the definition itself for each part.
Insolvency (Ch 5)	• Australian insolvency law is overly complex (described by one consultee as 'amongst the most complex and voluminous in the world). • Lack of coherence and consistency of definitions for similar fundamental concepts across personal bankruptcy and corporate insolvency laws. • Needs a root and branch review.
Continuous disclosure (Ch 6CA)	• Would be better if linked to s 1041H. • Why is there a defence available for prospectus disclosure breach but not continuous disclosure? • Due diligence defence for continuous disclosure breaches is necessary.
Managed investment scheme definition (Ch 5C)	• Unclear how distinct from 'financial product'.
Fundraising (Ch 6D)	• Problem with the consumer protections bleeding into sophisticated market.
Small Business Guide	• Should just be repealed.
Definitions of associate/close associate/closely related party	• Too many definitions of very similar but slightly different concepts. • Definition in s 12 is terrible and leads to uncertainty.
s 203D(2) and s 249D Corporations Act	• Inconsistent.
s 1308 and s 1309	• Problematic because criminal liability attaches to failure to take reasonable steps.
Insolvency practice schedule	• Too inflexible.

Section or concept	Any relevant comments
Outside the Corporations Act	
Credit definitions	• Several consultees commented on the existence of different definitions of credit for *NCCP Act* and *ASIC Act* and *Corporations Act*. • Inconsistency in exclusions from consumer credit definition in *NCCP Act* and *Privacy Act* resulting in potential mismatch in particular loans afforded protection under these Acts. • 'Credit assistance' definition also unclear. • New products are falling outside this concept.
Banking Act	• Unclear concepts of 'prudential standard' and 'prudential matters', eg in BEAR. • BEAR has multiple definitions for particular responsible persons, but often end up capturing the same individuals. Compliance complexity results.
Australian Consumer Law	• Confusing. • Inconsistencies with *ASIC Act* in terms of regulation of warranties and use of defined terms.
Small business definition	• Several consultees raised the inconsistent use of the small business definition across and within Acts as an issue.
Credit licensing	• Should be consolidated with AFS licensing.
Responsible lending	• Unclear concepts of 'reasonable inquiries' and 'reasonable steps'.
Unfair contract terms	• This regime undermines contractual certainty and makes it difficult to accurately price the risk.
Statutory unconscionability	• Uncomfortable relationship with general law concepts.

Categories and number of consultees to date

Legal practitioners	**49**
Academics	**38**
Industry bodies	**18**
Financial services providers	**9**
Judges	**6**
Consumer representatives	**3**
Regulators	**3**
Total	**131**

Submissions to the Financial Services Royal Commission

Introduction

14. Most submissions in response to the Interim Report of the Financial Services Royal Commission that addressed issues of legislative and regulatory complexity agreed that the law and regulatory regime are too complex. These include submissions from private individuals, consumer representatives, and industry bodies.

15. Comparing submissions from entities and individuals, there were more mixed views about simplification from entities than from individuals. Some of the entities' concerns included that legislative simplification could result in 'watering down' of consumer protections, or that it could create significant transitional costs for industry (which would be passed on to customers) in adjusting to the new regulatory regime. Some entities therefore urged for a cautious approach to be taken to any simplification process.

16. Amongst the submissions from entities, there was agreement between banking institutions, consumer groups, industry bodies, legal bodies, and a dispute resolution body that the financial services law should be simplified. However, on the question of whether the law is too complicated, the two banking institutions that made submissions expressed slightly different views, as well as the two unions that made submissions. Further qualitative analysis of these submissions can be found below.

17. The Interim Report of the Financial Services Royal Commission asked three specific questions relating to legislative complexity and some submissions responded directly to these questions. Other submissions raised issues of complexity without necessarily explicitly responding to the questions posed. This analysis separately considers the responses to the specific questions and the submissions which raised related issues more generally.

18. Overall, only a small proportion of Financial Services Royal Commission submissions addressed issues of legislative complexity, so it appears not to have been a primary focus of stakeholders in the context of the misconduct being addressed by the Financial Services Royal Commission.

19. The Final Report of the Financial Services Royal Commission included two recommendations that aimed to facilitate 'simplification so that the law's intent is met'.[1] Commissioner Hayne observed that the 'more complicated the law, the harder it is to see unifying and informing principles and purposes'.[2] Accordingly, Recommendations 7.3 and 7.4 called for, as far as possible: elimination of 'exceptions and qualifications to generally applicable norms of conduct'; and express identification of the fundamental norms of behaviour underpinning detailed legislative rules. However, Commissioner Hayne emphasised that the task of simplification would ultimately be much wider, requiring a detailed 'examination of how the existing law fits together and identification of the policies given effect by the law's various provisions', before decisions can be made about 'how those policies can be given better and simpler legislative effect'.[3]

1 See *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report: Volume 1, February 2019) 494–6.
2 Ibid 44.
3 Ibid 496.

Question-based analysis

20. The Interim Report of the Financial Services Royal Commission posed three questions relating to legislative complexity and simplification:

(1) Is the law governing financial services entities and their conduct too complicated?

(2) Should the financial services law be simplified?

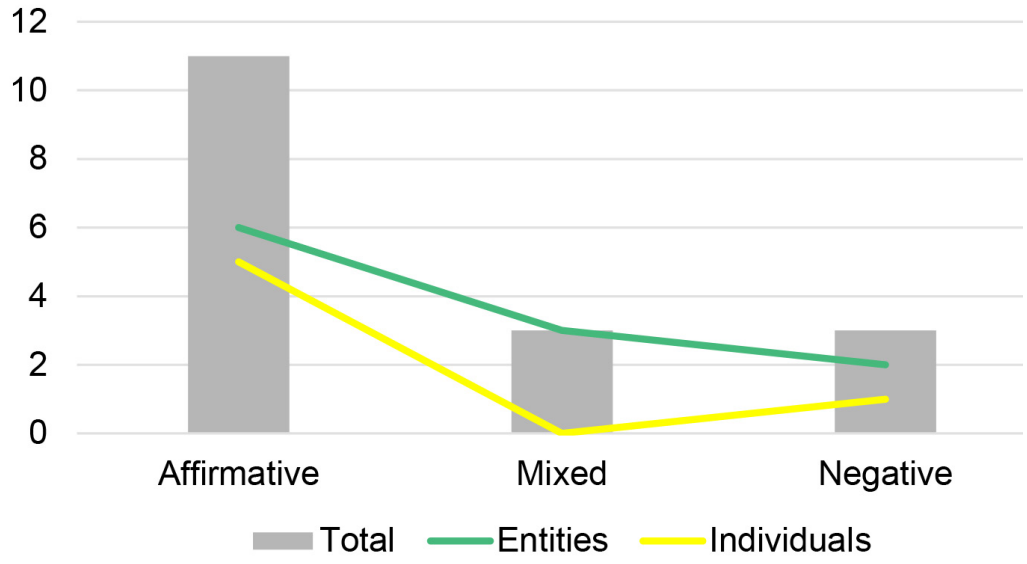
(3) Is the regulatory regime too complex? Should there be radical simplification of the regulatory regime?

21. Around 50 submissions (out of a total 902 public submissions) responded directly to each of these questions. Some submissions used identical wording as part of a campaign, and so were treated as one submission for the purposes of this analysis.

22. Whilst the questions posed appear similar on their face, the analysis below demonstrates that most entities and individuals agreed that the law is either too complicated or needs to be simplified, but differed in their views on whether radical simplification of the regulatory regime should be pursued.

23. The following section details some of the main conclusions from the analysis of question responses.

Figure 2. Is the law governing financial services entities and their conduct too complicated?



Number and types of responses in submissions to the Financial Services Royal Commission

24. Individuals were more likely than entities to be concerned about how complicated the law governing financial services entities is: five individuals answered this question affirmatively, whereas only one individual indicated that the law is not too complicated.

25. In contrast, entities had more divergent views: six entities indicated that the legislative regime is too complicated,[4] whereas three entities expressed mixed views and two entities submitted that the regime is not too complicated.[5] The entities that indicated that the law is too complicated were typically large institutions. For example, Westpac and AMP described financial services legislation as 'highly complex'[6] and 'technical'[7] respectively. The two entities that did not find the legislation too complicated were Financial Counselling Australia (an organisation which assists consumers facing financial difficulties) and the Financial Services Council (an industry representative body). Financial Counselling Australia expressed the view that regulation is needed to drive good consumer outcomes, and regulation in this space is necessarily complicated because financial products are themselves complex. The Financial Services Council also described financial services law as 'necessarily complicated and complex'. However, it submitted that the law is not *too* complicated because it 'proceeds by reference to relevant principles which can be applied in a variety of circumstances'.[8]

26. Some submissions warned that if changes to legislation are made, there may be 'some uncertainty until the application of the new laws has been tested and judicially considered'.[9] AMP noted that:

> Any radical simplification of the legislative and regulatory regime would need to maintain the balance between simplification and clarifying technical matters.[10]

4 See, eg, submissions in response to the Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry from Citizens Electoral Council, Westpac, AMP, Customer Owned Banking Association, Finance Sector Union, Centre for Law Markets and Regulation. Unless otherwise indicated, all subsequent references in the footnotes are to submissions made to the same Royal Commission. All of the public submissions can be found at https://financialservices.royalcommission.gov.au/Submissions/Pages/interim-report-submissions.html.

5 Community and Public Sector Union Submission; Commonwealth Bank Submission; Legal Aid Queensland Submission; Financial Counselling Australia Submission; Financial Services Council Submission.

6 Westpac Submission [36].

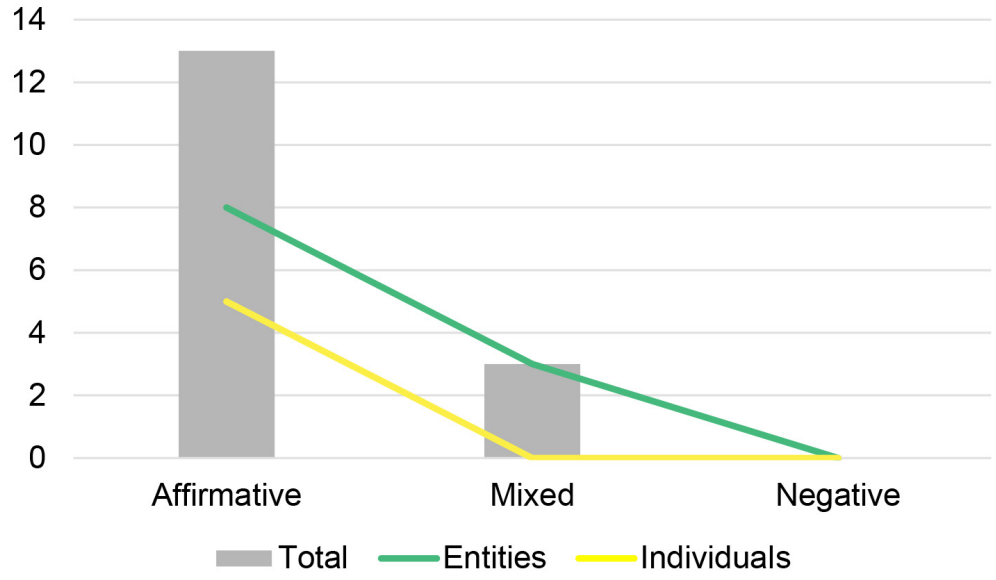
7 AMP Submission [31].

8 Financial Services Council Submission, 17–18.

9 Westpac Submission [36].

10 AMP Submission [31].

Figure 3. Should the financial services law be simplified?



Number and types of responses in submissions to the Financial Services Royal Commission

27. There was a strong consensus amongst entities and individuals that financial services law should be simplified. All of the individuals who made submissions on this question indicated that the law should be simplified.[11] In addition, over 75% of the entities that responded to this question indicated that the legislation should be simplified, with the other entities expressing mixed views on the question.

28. Some submissions stated that legislation could be simplified by being made more principles-based. The Financial Services Council indicated that the fundamental principles applicable to the conduct and behaviour of financial services entities need to be expressed broadly so that the wide range of circumstances which could arise are covered.[12] It also noted that principles-based legislation has the advantage that 'relevant circumstances can be measured against a general yardstick'.[13] The Australian Financial Complaints Authority submitted that the 'fair treatment of customers [should be made] a standalone key principle'.[14] This submission was made on the basis of its view that 'detailed rules cannot constitute an all-embracing comprehensive code of regulation that covers all possible circumstances'.[15]

29. Whilst the Customer Owned Banking Association similarly expressed a preference for a principles-based approach,[16] it also acknowledged that there is a 'tension between regulated entities wanting certainty from regulators about how to interpret the law and too much prescription'.[17]

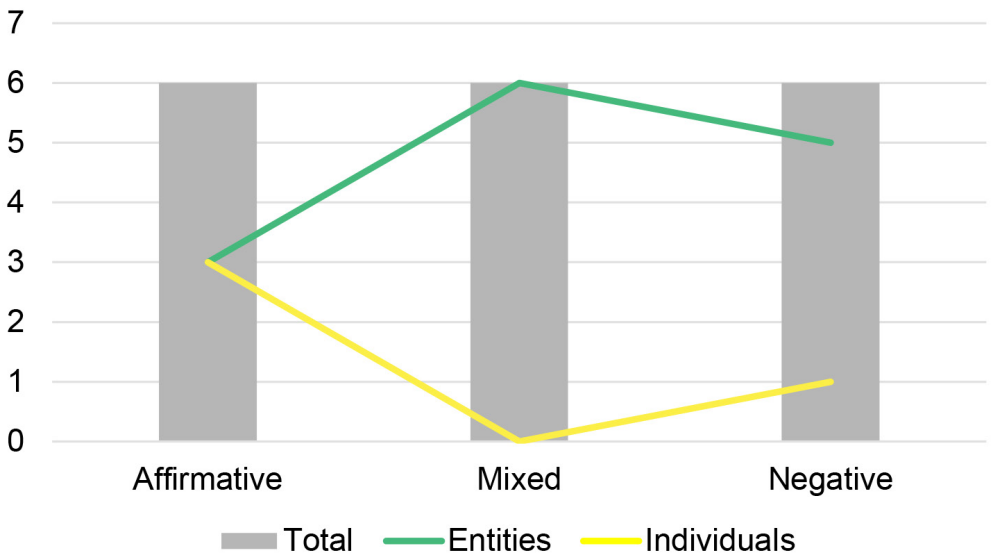
11 There were five submissions from individuals on this question.
12 Financial Services Council Submission, 23.
13 Ibid, 17.
14 AFCA Submission [65].
15 Ibid [58].
16 Customer Owned Banking Association Submission [51].
17 Ibid [58].

30. The Association of Superannuation Funds of Australia, who also expressed the view that the law should be simplified, noted that the principles underpinning the delivery of financial services are simple, but that 'numerous iterative changes over the years in combination with a lack of awareness/understanding of existing provisions' have produced a 'labyrinthine' regime.[18]

31. The entities that expressed mixed views mostly indicated that simplification of the law is required but that the entities would not support simplification if it means reducing consumer protections. For example, the Consumer Action Law Centre noted that

> any simplification should only be considered in the context of removing regulatory loopholes or duplication that creates unnecessary complexity in the law.[19]

Figure 4. Is the regulatory regime too complex? Should there be radical simplification of the regulatory regime?



Number and types of responses in submissions to the Financial Services Royal Commission

32. There was general consensus across the submissions that the legislation relating to financial services needs to be simplified. However, both entities and individuals had mixed views on whether there should be 'radical simplification' of the regulatory regime. Of the four individuals who responded to this question, three indicated that there should be radical simplification of the regulatory regime. In contrast, the majority of entities that responded to this question submitted that there should not be radical simplification of the regulatory regime. In particular, the Customer Owned Banking Association, Financial Counselling Australia, Financial Services Council, Legal Aid Queensland and ANZ all warned against radical simplification. Financial Counselling Australia submitted that

> it is hard to see how much of the specific, black letter law could be unwound without dire consequences. Our concern is that 'simplification' in this context could be code for watering down the law.[20]

18 Association of Superannuation Funds of Australia Submission, 2.
19 Consumer Action Law Centre Submission [187].
20 Financial Counselling Australia Submission [131].

33. The Customer Owned Banking Association indicated that radical simplification of the regulatory regime might be costly. In particular, it stated that the

> concept of radically simplifying the regulatory regime is attractive but also raises uncertainty and the possibility of significant transition costs … Any process with the objective of radically simplifying the regulatory regime should be cautious and thorough.[21]

34. Further, of the submissions that expressed mixed views on whether radical simplification of the regulatory regime was required, most expressed the view that radical simplification would go too far and result in increased costs for consumers. For example, the Australian Banking Association submitted that while radical simplification

> could, where appropriate, provide benefits for customers, regulators and the industry … Large scale reform would be complex, costly and time-consuming, and paradoxically, risk increasing the burden to all parties.[22]

35. Only a few bodies advocated for radical simplification. The Finance Sector Union, for example, submitted that there should be a 'radical overhaul' of the current regime but it warned against simplifying the law to a purely principles-based regime[23] because 'pure principles-based regulation which focuses on outcomes requires a regulator with far greater capacity and willingness to enforce the law than currently exists'.[24]

36. The Financial Planning Association also commented on the role of regulators. It remarked that complexity partly results from having multiple regulators which each have a 'different set of regulatory requirements'. [25] It noted that the multiplicity of regimes has a particular impact on small licensees who 'do not usually have the in-house expertise or economies of scale to meet the regulatory demands'.[26] In the context of simplification, it recommended that consideration

> be given to given to the extra complexity and cost associated with having multiple regulators, compared with the pros and cons of a monopolistic regulator for financial advice.[27]

Other comments on complexity, prescription and simplification

37. In addition to the submissions that responded to the Interim Report questions, a small number of other submissions discussed complexity, prescription, principles-based drafting, or legislative design. The majority of these submissions indicated that the financial services legislation is too complex, complicated or confusing. Only one submission stated that the financial services laws are not complicated.[28]

38. The Governance Institute of Australia stated that 'the addition of more layers of regulation rather than adopting the approach of taking a holistic view, has resulted in complexity and confusion for investors'.[29] The Australian Finance Industry Association

21 Customer Owned Banking Association Submission [59].
22 Australian Banking Association Submission, 5.
23 Finance Sector Union Submission, 41.
24 Ibid [238].
25 Financial Planning Association Submission, 19.
26 Ibid.
27 Ibid 20.
28 Anthony Zarro Submission, 2.
29 Governance Institute of Australia Submission, 6.

stated that the complexity of the regulatory environment is compounded by 'ASIC's process driven view of managing compliance obligations'.[30]

39. Other submissions that raised the issue of complexity in the financial service regime focused on a specific part of the regime. For example, Legal Aid NSW submitted that the regulation of unsolicited sales of financial products is confusing.[31]

40. Some submissions compared principles-based legislation with prescriptive legislation and indicated that prescription in legislation might be well-intended, but in practice, creates a culture that ignores the spirit of the law. For example, the Australian Institute of Company Directors submitted that it

> is almost always preferable to adopt an approach which is flexible and principles-based, similar to the ASX Corporate Governance Council Principles and Recommendations, so that boards can adapt governance practices to suit their organisation's circumstances and operating systems rather than adopting a 'tick the box' approach.[32]

41. The Chartered Accountants Australia and New Zealand supported the principles-based approach taken by the Financial Adviser Standards and Ethics Authority on the basis that principles 'encourage greater individual responsibility and accountability'.[33]

30 Australian Finance Industry Association Submission, Annexure 2.
31 Legal Aid NSW Submission, 24.
32 Australian Institute of Company Directors Submission, 14.
33 Chartered Accountants Australia and New Zealand Submission, 5.

Appendix 1: Quantitative Data

42. Total number of public submissions in response to the Interim Report of the Royal Commission on Misconduct in the Banking, Superannuation and Financial Services Industry: 902.

Question-based analysis

Is the law governing financial services entities and their conduct too complicated?

	Affirmative	Mixed	Negative	Total
Entity	6	3	2	11
Individual				
Campaign	45	0	0	45
Other	4	0	1	5
Total	55	3	3	61

Should the financial services law be simplified?

	Affirmative	Mixed	Negative	Total
Entity	8	3	0	11
Individual				
Campaign	40	0	0	40
Other	4	0	0	4
Total	52	3	0	55

Is the regulatory regime too complex? Should there be radical simplification of the regulatory regime?

	Affirmative	Mixed	Negative	Total
Entity	3	6	5	14
Individual				
Campaign	45	0	0	45
Other	2	0	1	3
Total	50	6	6	62

Word search-based analysis

Complex (Word Stem)

	Affirmative (Too Complex)	Mixed	Negative (Not Complex)	Total
Entity	2	0	0	2
Individual				
Campaign	11	0	0	11
Other	3	1	0	4
Total	16	1	0	17

Complicate (Word Stem)

	Affirmative (Too Complicated)	Mixed	Negative (Not Complicated)	Total
Entity	0	0	0	0
Individual				
Campaign	2	0	0	2
Other	2	0	1	3
Total	4	0	1	5

Confuse (Word Stem)

	Affirmative (Confusing)	Mixed	Negative (Not Confusing)	Total
Entity	4	0	0	4
Individual				
Campaign	2	0	0	2
Other	1	0	0	1
Total	7	0	0	7

Prescriptive (Word Stem)

	Affirmative (Pro Prescriptive)	Mixed	Negative (Anti Prescriptive)	Total
Entity	1	1	6	8
Individual				
Campaign	0	0	0	0
Other	1	0	3	4
Total	2	1	9	12

Principles-Based (Exact Phrase)

	Affirmative (Pro Principles-Based)	Mixed	Negative (Anti Principles-Based)	Total
Entity	3	0	1	4
Individual				
Campaign	0	0	0	0
Other	2	0	0	2
Total	5	0	1	6

Simplify (Word Stem)

	Affirmative (Should Simplify)	Mixed	Negative (Should Not Simplify)	Total
Entity	11	0	1	12
Individual				
Campaign	5	1	0	6
Other	3	0	0	3
Total	19	1	1	21

Appendix 2: Methodology

Question-based analysis

43. This analysis is based on the submissions of entities and individuals to the Financial Services Royal Commission which responded to questions posed by Commissioner Hayne in the Interim Report. The responses to three questions in particular were identified as relevant to the ALRC Financial Services Legislation Inquiry Terms of Reference:

(1) Is the law governing financial services entities and their conduct too complicated?[34]

(2) Is the regulatory regime too complex? Should there be radical simplification of the regulatory regime?[35]

(3) Should the financial services law be simplified?[36]

44. All of the submissions to the Interim Report were uploaded to NVivo software. As questions from the Interim Report were not individually numbered, submissions that responded to the above three questions were identified by searching across all of the submissions for the phrases 'too complicated', 'radical simplification' or 'law be simplified'. This approach identified submissions that excerpted the questions in full, or otherwise paraphrased or referenced phrases unique to the questions.

45. Once the relevant submissions were identified, the person responsible for authoring each submission was classified as either an entity or individual. Each submission from an entity was also labelled with its name.

46. The responses to the above three questions from each submissions were categorised in NVivo as being one of affirmative, mixed or negative.

Word search-based analysis

47. The remainder of the submissions that did not respond specifically to the questions posed by Commissioner Hayne in the Interim Report were then isolated and subjected to word queries in NVivo. The aim of these queries was to identify submissions that addressed issues of legislative design without explicitly referring to the relevant questions. The word queries used were: complex, complicate, confuse, prescriptive, principles-based, and simplify. With the exception of 'principles-based', the word stem function in NVivo was used for each of the terms to ensure that all of the words with variant endings were identified. The submissions identified through this process were then manually reviewed to determine whether the use of the search terms related to issues of legislative or regulatory design. Submissions identified as relevant were then categorised in NVivo in the same manner as explained above.

34 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report: Volume 1, September 2018) 299.
35 Ibid.
36 Ibid 346.