

FINANCIAL SERVICES LEGISLATION



Australian Government
Australian Law Reform Commission

Professor Elise Bant discusses the ALRC's inquiry on simplifying corporations and financial services regulation

Dr Andrew Godwin:

Hello and thanks for viewing this recorded interview. My name is Andrew Godwin and I'm Special Counsel assisting the Australian Law Reform Commission – the ALRC – in its inquiry into the simplification of corporations and financial services regulation in Australia.

I am pleased to be joined by one of our Advisory Board members, Professor Bant, to discuss the importance of the inquiry and to provide her insights on how the inquiry might achieve its objectives.

This inquiry was commenced following a referral from the Attorney-General in September 2020. Among other things, the Terms of Reference for the inquiry require the ALRC to report on how the corporations and financial services legislation and the regulatory framework more generally could be simplified and rationalised over its three year term.

The inquiry will examine and report on various issues, including how the legislative framework might be better designed and also how Chapter 7 of the Corporations Act, which deals with financial products and financial services, could be reframed or restructured to achieve greater clarity and coherence.

The ALRC establishes an Advisory Committee, or panel of experts, for each inquiry that it conducts. This inquiry is no different. And we're very fortunate to have an eminent panel of experts from the judiciary, legal practice, government and academia to advise the ALRC on issues relevant to the inquiry.

By way of introduction, Professor Bant is professor of private law and commercial regulation at the University of Western Australia Law School. Elise, thanks very much for joining us for this recorded interview and, of course, for being a member of our Advisory Committee.

Could you start, please, by telling us a bit about your current role and your work relating to the regulation of corporations and financial services?

Professor Elise Bant:

Thanks very much. Yes, I have come into this from the side, as it were, because I have been spending quite a long time over the last about eight years looking at serious commercial misconduct generally, and in particular misconduct involving misleading or deceptive conduct and unconscionable conduct.

My colleague Jeannie Paterson from Melbourne Law School and I have been working on an Australian Research Council funded Discovery project on rationalising the law of misleading conduct.

And as the name suggests, part of that was to think about legislative design, statutory strategies that could assist in simplifying what has become a proliferation of different prohibitions on misleading conduct.

We were also very interested in how misleading conduct fits with other forms of commercial regulation. So things like disclosure obligations and prohibitions on misleading conduct, but also fiduciary obligations and the like. So there's a fair amount of work there that, if you like, edges over into the financial services sphere. And the problems that we've noted in a broader context certainly also find expression in the financial services area.

Dr Godwin:

I expect that the work you've done in the areas you've outlined is really in some ways a microcosm of what we're looking at.

During the inquiry and over the three years in which will be pursuing the inquiry, how do you see your involvement in the inquiry as a member of the Advisory Committee complementing the work you've done to date?

Do you think it might broaden your focus in any way? Is it helpful, for example, to have a much broader picture of the landscape in order to examine the issues that you've been looking at to date?

Professor Bant:

Yes, we were particularly interested in some core problems, which certainly have found expression in the ALRC's deliberations.

So some of those core problems are the reiteration and proliferation of overlapping prohibitions, the use of exculpatory and exclusion clauses, inclusion clauses and so on. So these were the sorts of things that have been front and centre of the Commission's deliberations.

But the Commission has also, because it brings in insights from all over legal practice, developed some really novel and important insights, I think, into the use of, for example, gateway definition provisions as substantive ways of rendering operational (and also for closing the operation of) different substantive legal requirements.

Its work on delegated legislation has been fantastic. I've been very interested with Professor Paterson in the potential for delegated legislation to undermine and, in fact, contradict the expressive power of the leading statute. That is where you have a core prohibition, for example, which says you shall not accept conflicted remuneration as a mortgage broker.

And then the delegated legislation says, oh, and by the way, these core forms of conflicted remuneration are deemed not to be conflicted. That kind of use of delegated legislation, I think, is quite dangerous. But I was shocked to see how pervasive the use of delegated legislation has been.

So the ALRC's work has been revelatory to many of us and certainly very useful.

Dr Godwin:

You've touched on a number of points that have come up during the course of the inquiry to date - the use of definitions, the legislative hierarchy, in terms of where the law goes, at which level: at the primary level of the primary Act or whether it should go in delegated legislation. A number of issues have come up. And one, of course, is the different iterations

of the one prohibition, for example, or the one concept that we find not just throughout the Corporations Act, but in other relevant legislation as well.

And the Corporations Act is now experiencing its 20th anniversary, which is quite significant. But in terms of dealing with the complexity that exists in the legislation, what factors do you think contribute the most to that?

Professor Bant:

Well, I do think there are probably three things. The first one or two I've already mentioned really. The reiteration [and] proliferation of core prohibitions. Why we have so many prohibitions on misleading conduct, I just don't know. I understand that stakeholders are concerned about, for example, having a minor misrepresentation in a document or something and then getting hit with significant penalties as a result.

But that that kind of concern probably can be met through better education of stakeholders as to the penalty process, because the penalty process is highly subtle, it's nuanced, it takes into account graduations of fault. So it's unnecessary to have a string of 12 prohibitions on misleading conduct when really we want to capture the core form of misconduct and then to have clear understandings of what's involved when it comes to penalties and also regulator strategies and approaches to misconduct, which need not always end up in courts, of course.

So I think that proliferation is one of the things. The misuse of subsidiary legislation is another. The other one is carve outs and safe harbours and those sorts of things. Again, usually, I think responding to industry concerns about the desire for clarity. The concern that there will be a one-size-fits-all approach taken to overarching prohibitions, like prohibitions on misleading conduct or unconscionable conduct or whatever. But the problem with these is that you end up with massively complex bodies of interlocking and overlapping legislation.

And it really does no one any good at all. So the search for certainty by seeking to have bright line articulations of to whom particular forms of misconduct apply and who's excluded and so on, actually ends up undermining the whole purpose of having a clear, stable set of principles that can guide us.

Dr Godwin:

And I expect that the balance between certainty and clarity is often a difficult one to strike, because over the twenty years of the Corporations Act we've had, I guess, increasing detail, increasing amendments, revisions and one does wonder whether we have over-engineered it somewhat and whether we need to go back to basic principles to identify the key norms that motivate the law and compliance with the law. And I expect that complexity, as we see in the Corporations Act, does undermine the effectiveness of the law, or at least the extent to which it can be complied with in a meaningful way. Would you agree with that?

Professor Bant:

Oh, absolutely, I'd agree with that. We've just completed a review of the prohibitions on misleading conduct. And it's really stunning how many different forms of prohibition there are, dozens and dozens of them, all slightly differing in their terms and their remedial consequences in their area of operation and who's carved out of it and so on and so forth.

This is enormously complex. And what we've seen is courts have tended to simply revert to the core prohibition in interpreting all these different forms so that courts have ended up taking a pragmatic but problematic approach to the written word of the legislation, sort of

tending to ignore the differences in order to promote coherence. Which is desperately required for certainty, predictability in the rule of law more generally. But that is problematic. And very recently, we've seen some judges saying, "Well, no, actually, we have to take seriously the difference in language between these statutes. It seems that this statute is meant to work slightly differently" and so on. Well, that, of course, is quite right and justifiable as an interpretive approach. But as a matter of legal practice and as a matter of efficient and just regulation it's not going to end in a happy place.

So we do desperately need the work of the ALRC to promote some simplification, some rational, justified, principled approach to finding a way through the thicket of legislation we currently enjoy.

Dr Godwin:

Well, of course, greater coherence, greater navigability, simplification, rationalisation – these are all objectives that the ALRC has as part of its inquiry. Looking ahead towards the end of the inquiry, what do you hope the inquiry achieves? If you were to identify some of the headline objectives or goals of the inquiry, what would that be?

Professor Bant:

Well, I think I would really hope to see a wholesale change in government strategy to what looks like successful lawmaking. I think there has been a tendency to say, "Look, we've passed 20 pieces of legislation since we took government on financial services. We can assess the success of our government's leadership here through the number of new bits of law that we have." And I think that, you know, if just we can understand that sometimes less is more in this context as well as in others, that would be fantastic.

But it will require, it requires the sort of detailed, theoretical and practical examples and insights that the ALRC is collating to convince ships of state to change direction, because I think the lure of the quick fix is otherwise almost irresistible.

I think we also have to educate stakeholders as well. I mean this is the business of the carve outs, the endless carve outs and the endless sandboxes and safe spaces and tick-a-box compliance.

These are directly responding to stakeholder's desire for safety. And this is sort of an illusory sort of desire. If we keep proliferating the complexity of the legislation that we have in response to those sorts of demands.

So what I'm hoping for is some sort of cultural and attitudinal changes amongst those that are really some of those most responsible for our current state of the statute books.

Dr Godwin:

I think your comment that less is more is a good one for us to keep in mind as we move forward with the process of simplifying and rationalising the legislation and the legislative framework for corporations and financial services in Australia. Elise, thanks very much for sharing your insights with us.

Professor Bant:

It's my pleasure.

Dr Godwin:

We look forward to continuing to work with you and the other members of the Advisory Committee as we pursue the objectives of this inquiry.

And thanks to all of you for viewing this interview. Please visit the ALRC website, alrc.gov.au, for further information about the inquiry and also the relevant publications. You're also invited to join the ALRC mailing list, and you can do this by subscribing from our website homepage. And of course, we'd also be delighted if you were to join us on Twitter and LinkedIn. Thanks very much.

Professor Bant:

Thank you.

Recording available: <https://www.alrc.gov.au/news/prof-bant-discusses-alrc-inquiry/>