

# FINANCIAL SERVICES LEGISLATION INQUIRY

## Interview with Mark Steward

Advisory Committee member of the ALRC's Financial Services Legislation Inquiry

Thursday 7 July 2022

### TRANSCRIPT

00:00:01:20 - 00:00:33:18

Dr Andrew Godwin

Hello everyone 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 current Inquiry into how we might design a more adaptive, efficient and navigable legislative framework for corporations and financial services in Australia. We hope that a redesign of the framework will make it easier to understand and thereby easier to comply with.

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Dr Andrew Godwin

So I'm really happy to be joined today by one of our Advisory Committee members, Mr. Mark Steward, to discuss the Inquiry and to obtain his insights on issues that are relevant to the Inquiry. By way of background, the Inquiry was commenced following a referral from the Attorney-General in September 2020 and will issue its final report in November 2023.

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Dr Andrew Godwin

So the inquiry will run for a total of three years. Among other things, the Terms of Reference for the Inquiry require the ALRC to report on how the corporations and financial services legislation could be simplified and rationalised. As part of that, what we're doing is examining and reporting on various issues, including 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.

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Dr Andrew Godwin

We've already published our first Interim Report, which examined the design and use of definitions. We're currently working on the second Interim Report due on 30 September this year, 2022, which will focus on the hierarchy of law, or laws, namely what should go where, in terms of the laws and legislative instruments that govern this area, and also how legislative complexity might be appropriately managed over time.

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Dr Andrew Godwin

So the ALRC establishes an Advisory Committee or panel of experts for every Inquiry that it conducts. And this Inquiry is no different. And we're really fortunate to have an eminent panel of experts from the judiciary, legal practice, government regulators and academia to serve in this capacity. By way of introduction, Mark Steward is director of Enforcement and Market Oversight for the Financial Conduct Authority or FCA in the UK.



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Dr Andrew Godwin

Mark has over thirty years of experience in this area, including senior positions at the Hong Kong Securities and Futures Commission and before that at the Australian Securities and Investments Commission. Mark is therefore ideally placed to provide us with insights from both an international and comparative perspective, including by reference to the current work that Mark is doing at the FCA in the UK.

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Dr Andrew Godwin

So Mark, thanks very much for joining us for this interview and for being a member of our Advisory Committee. Could you start, please, by telling us a bit about your current role and also your work and experience to date in the area of corporations and financial services regulation.

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Mark Steward

Thanks, Andrew, and thank you first for inviting me to do this. I'm very pleased to be a member of the advisory panel for this piece of work by the Australian Law Reform Commission. It's been a while since I've had to go back and look at the Corporations Act. I haven't been back in Australia to work for about 15-16 years now, but it was a piece of legislation that I was very familiar with for a very long period of time.

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Mark Steward

So it's great to go back and look at it with some fresh eyes as well. My work here, as you say, I'm the Executive Director of Enforcement and Market Oversight at the FCA. The FCA has a role that is very similar to ASIC's in many ways, but it's a bit broader and in some respects a bit more limited as well.

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Mark Steward

So the FCA is the Financial Services Securities and Markets Regulator for the UK. We regulate the activities of about 51,000 firms. Unlike ASIC, we also have prudential supervisory responsibility for those firms. So even though the UK has adopted a Twin Peaks model, the Twin Peaks model differs from the Australian origination of Twin Peaks, in that we are a conduct regulator with some prudential responsibility and within our statutory remit we have financial stability responsibilities as well. Our work covers all the things that ASIC does, certainly all the things contained in Chapter 7 of the Corporations Act.

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Mark Steward

The one thing that we don't do that ASIC does, is we're not a corporate regulator. That may have some significance in terms of reach and what we're able to do and what ASIC is able to do. But we cover a broader financial services remit, I think, than ASIC with banking, insurance, anti-money laundering, payments services, claims management services as well as insider dealing, market manipulation of course as well.

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Mark Steward

And financial services competition law also. I've just listed a few things. The danger of the list is that you can leave something out, which is also a drafting error as well. In our enforcement work, we cover all those areas. So we have generally about 250 investigations on foot at any one time around about 600 subjects of those investigations as well as related criminal, civil, and regulatory litigation.

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Mark Steward

A lot of our litigation is administrative, which reflects the different way in which the legislation here interacts with the judicial system, very differently to Australia. There is no constitutional impediment here on administrative decision-making imposing penalties as there is in Australia. So that produces a very different dynamic and the market oversight responsibility I have is largely the FCA's listing authority functions.

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Mark Steward

So the decision for companies to list on a regulated market here in the UK is governed by the FCA and that's the market oversight responsibility as well as primary market surveillance, secondary market surveillance, primary market transactions, administration of listing rules is also part of what I do here. And as you say, I mean, I started more than 30 years ago now in Melbourne during the years of the old cooperative scheme.

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Mark Steward

so prior to the Corporations Act, the Corporations Law as it was known originally and then continued with the Australian Securities Commission that then became ASIC during the nineties. And so I've been part of that expansion of the original corporate regulatory structure that moved into the financial services during the nineties and has progressed ever since. And expanded also the size and breadth and depth of the Corporations Act itself.

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Mark Steward

And as you mentioned, I was at ASIC for a very long time and did a lot of work in enforcement, in particular, but also more broadly at ASIC, before moving to Hong Kong, where I was a member of the Board of the Securities and Futures Commission in Hong Kong for nearly ten years before moving to the UK about six years ago.

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Mark Steward

And I've been in this post ever since.

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Dr Andrew Godwin

Thanks, Mark. You've given a really useful overview of the remit that financial services regulators have, whether in Australia or the UK, and it is very complex, the area that they're expected to regulate and administer. And I think there's been broad consensus, as you know in Australia that our current framework is overly prescriptive, overly complex, and that's really part of the reasons for the current Inquiry to look at ways in which it might be simplified, made easier to navigate, made easier to find the relevant law and therefore easier to comply with.

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Dr Andrew Godwin

And I think all of that's a noble aspiration. But of course we have to accept that there's a lot of complexity in this area, whether it be in relation to financial products or financial services, the area is increasingly complex, whether it be because of the impact of technology and innovation, or whether it just be the nature of the transactions and services that exist in this area.

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Dr Andrew Godwin

So we need to come to grips with the reality that this area of regulation is complex and perhaps inescapably so. But there are ways I think, at least we hope there are ways, because that's really what the ALRC is doing. There are ways in which we might be able to reduce the complexity or make it less complicated. And so I'd be interested to hear your views, Mark, about how you think legislative complexity might be best managed in terms of the design of legislation, how complexity might be kept to a minimum, and also, of course, what you might have in terms of this question of legislative hierarchy, what should go where, in terms of what should go in the primary legislation, much going delegated legislation and your experience generally in that regard?

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Mark Steward

So I mean, I had to laugh at the dialogue that's on the ALRC website, '[You're almost 20 Corporations Act](#)', which if anyone wants a laugh, have a look at it. It's very accurate and very funny as well. Celebrating in a sense the size of the Corporations Act as it now is and the growth of Chapter 7, I suppose in particular.

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Mark Steward

And you're right, complexity in legislation is a real problem. And if what is required by the legislation is too hard to understand or can only be understood by the high priests of the subject matter, then the intention and purpose of the law is bound to be frustrated, compliance will be harder and noncompliance and breaches through misunderstanding is going to be more prevalent.

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Mark Steward

Harm caused by unintended breaches can be just as great as the harm caused by intentional ones. And the legislation needs to comprehend that. The purpose of legislation is to create public good, not to create traps in which harm can continue. So it's a really significant challenge that the ALRC is trying to address with this project.

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Mark Steward

I think I agree that navigability is a really important means of addressing complexity because you can't oversimplify legislation either, because what we're dealing with is complex in itself. So navigability and comprehensibility of what the legislation is really requiring is, I think, a real key. Now, I can talk about the experience here in the UK where the framework I think is quite different to the one that exists in Australia.

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Mark Steward

So the UK model for financial services starts with overriding legislation that sets out the key statutory objectives that the regulator is meant to strive to achieve, as well as including the statutory powers that the regulator needs to be able to do those things from supervision to investigation to taking action. In the UK our statutory objectives are really presented as three overriding aims to protect consumers, to enhance financial stability and market integrity, and to promote effective competition.

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Mark Steward

So those things kind of override everything else. And then within the legislation, we have delegated rule-making powers that allow us then to give effect to the content of what is required in regulation to achieve those things. So our rules start with 11 general principles. And these general principles of conduct, comprising the obligation to act honestly, to act with due diligence, to treat customers fairly, to manage conflicts of interest, etc., these general principles apply to all the firms we regulate and they capture the general outcomes that we think firms should be complying with at every stage in which they are trying to comply with the rules that we set.

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Mark Steward

So in that sense, the regime is very much focused on outcomes rather than processes, I think that's quite a significant difference. These general principles are then supported by more prescriptive requirements in the rulebook, and it's very difficult to get away from some prescription because the industry wants clarity, wants certainty. At the same time, the general prescriptive rules need to be understood within the matrix of the 11 general principles.

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Mark Steward

And then supplementing those rules, we have guidance that we publish. The guidance is really important because it sets out in narrative form how we think about firms should operate in practice to comply with those rules. And whilst the guidance isn't mandatory, the rules are mandatory, the general principles are mandatory. The guidance is not mandatory. It's designed to be helpful.

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Mark Steward

But of course, if a firm complies with what's set out in the guidance that creates a safe harbour, which is really important, great incentive, to follow the guidance. All of this is published in what's called the FCA Handbook. And the Handbook is an online guide to all of the rules that firms are required to follow.

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Mark Steward

And it has effective online tools for navigation and they are really important. So you've got something that's a combination of, in a sense, legislation imposed by the regulator as a legislator, together with non-legislative tools like guidance and search tools for navigation within a hierarchy of black letter, statutory law, general principles, and then some bespoke rules and guidance to help comply.

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Mark Steward

Now, all of that creates something that can be described in the way I've just described it. It doesn't avoid complexity and it certainly doesn't avoid length. And, you know, we often joke that if we were to publish, or print out, what's in the Handbook, we would have something that would stand well over six feet high. So it's an enormous piece of work. It is lengthy, it is complex, but it can be navigated. And you don't need to be a high priest to navigate it.

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Dr Andrew Godwin

Yeah, that's really interesting. You mentioned, Mark that compliance with the regulatory guidance may provide a safe harbour of sorts. Is that in terms of the discretion that the regulator has as to whether to pursue certain enforcement actions, whether to deem a breach, for example, a technical breach to be a problem that requires enforcement? Or is it actually, if you like, written into the system itself?

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Mark Steward

No, it's certainly the former and I think, you know, sometimes it creates debates with the industry about whether we're being sufficiently prescriptive in the guidance so that that safe harbour is clearer and more clearly earmarked. But yeah, that's the model to create some aid, to promote compliance because the purpose of the Handbook, the purpose of the legislation is to increase the chances that the overall impact produces a public good as opposed to an enforcement trap or some sort of unintended consequence or harm that is then paid for by the consumers and investors who need the market to work well.

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Dr Andrew Godwin

Indeed. I think one of the challenges we've encountered in Australia is that we don't really have a clear legislative hierarchy. We've got a lot of detail in the primary legislation, detail that might create complexity because of the offences that are attached to the breach of those rules and also just the complexity that comes out of not knowing where to go to find the relevant rules and not knowing therefore how to comply with the rules in a way that is meaningful.

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Dr Andrew Godwin

And one of the things, as you know, Mark, that came out of the Financial Services Royal Commission was the need to be clear about the fundamental norms underpinning the legislative framework so that it's clear what is the intent behind the legislation and how therefore can people comply in a meaningful way with the framework. And so I think in Australia one of the challenges is that we do have a lot of principles mixed with rules, highly prescriptive rules and detail at the level of the primary legislation.

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Dr Andrew Godwin

But at the same time, as you know, from having work at ASIC previously, we also have a lot of notional amendments or modifications, exemptions. We have class relief, an individual relief issued by ASIC, and although that's all very important, nonetheless, it does tend to increase the complexity because we find that there's, if you like, a parallel regime that may not necessarily reflect what's written in the primary legislation.

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Dr Andrew Godwin

And so people who want to find their way, work their way, through the framework, whether they be high priests or otherwise, they need to spend a lot of time moving from the primary legislation to the regulations to the other legislative instruments, to work out whether there have been any exemptions, to work out to what extent the primary legislation has been notionally amended by the regulator.

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Dr Andrew Godwin

And so we're looking now at whether there's scope to perhaps be cleaner in terms of the delegation of legislative power and how we might create a much cleaner and more usable legislative hierarchy. So I think the UK in that regard is being quite an inspiration to us despite the height of the rules if you were to print them out. And I think in today's world where we have access to technology, we should be using technology to enable effective navigability.

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Dr Andrew Godwin

And so it's less a question of volume, as such, it's more a question of how easy is it to find the relevant rules and to comply with them? So I'm interested, Mark, to know whether you have any other thoughts about how Australia might learn from the experience in the UK and other jurisdictions in terms of achieving a more coherent and adaptive legislative framework, in particular one that's easier to navigate.

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Mark Steward

So I think the FCA Handbook is probably worth looking at in that context because of its structure, its design, its look and the way in which it does use online tools for navigation and to also help shape the users' needs. What that means is you're looking at something that is a combination of legislation and a lot more. It's legislation plus.

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Mark Steward

So things like search tools are very comprehensive single-source glossary that's hyperlinked in what you see online as well as the guidance. All these things, it's not legislation yet they are really important aids to navigation, comprehensibility and all of that is designed to promote compliance with the regulatory standards and achieve the outcomes the legislation is intended to achieve.

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Mark Steward

So it's a mixture of legislation and non-legislation tools, the mixture of black letter law, principles and some prescription in the rulebook that produces the range or spectrum of aid assistance that produces outcomes rather than just simply legislates processes or activities. And it's often problematic when legislation is really only setting out processes, or setting out activities, or prohibiting activities that it becomes really quite complex to understand what the overall intention is.

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Mark Steward

If the intention can be expressed as a purpose, as an outcome, as we can see in the FCA Handbook, arguably, at least, it avoids some of the traps that complexity, necessary complexity, can lead to. By the same token, I wouldn't like to present the UK example as a perfect solution because we know that we have challenges ourselves with simply the length and breadth of the rulebook itself.

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Mark Steward

And even with the navigation tools that we have, something that, if printed, would stand over six feet tall is a real challenge for anyone. And it's probably not a model to follow in that sense, because we have guidance on guidance. You know, there's the fact that it can be produced more easily and more quickly because the regulator is producing it, as opposed to parliament, can mean that it proliferates.

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Mark Steward

And that's a risk. There are lots of aspects of the Australian regime that I think are really useful as well. I think the fact that ASIC sits on a chassis of the old corporate regulatory framework, as a corporate regulator, and the financial services regime is bolted on to that is a significant advantage because it reduces the risk of cliff edge perimeter issues arising in financial services.

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Mark Steward

If a company is being used to do something in Australia regardless of whether it's doing something that fits within the definition of a financial product in Chapter 7, ASIC will have some purchase over it, whereas we will not necessarily have that here in the UK and I think that's a really valuable thing for Australia to have.

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Mark Steward

But yeah, I certainly think in response to your question Andrew that the ideas that have been put into the FCA Handbook are definitely worth looking at.

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Dr Andrew Godwin

Thanks very much, Mark. You've given us some really interesting insights into the position in the UK and also I think some of the challenges that arise irrespective of the system that's in place. It is a highly complex area and the question is not so much reducing complexity altogether as much as just knowing how we can reduce it and to achieve a coherent navigable framework.

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Dr Andrew Godwin

And so that's all been really useful in terms of giving us food for thought as we move forward with our Inquiry. So thanks very much for your time today and thanks to everyone for viewing this interview. What I'd like to do is just to let everyone know that we have a website as you'd expect: [alrc.gov.au](http://alrc.gov.au).

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Dr Andrew Godwin

You can find on the website a lot of really useful information about the current Inquiry and also the publications that we've issued to date. And these include not just the Interim Report, the first Interim Report that I mentioned, but also a number of Background Papers that look at different facets of the system and focus on various issues that are relevant to the Inquiry.

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Dr Andrew Godwin

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