

## Special Issue on the Australian Law Reform Commission Legislative Mapping Project

Simplifying the law is not a straightforward task. As Commissioner Hayne noted, the task can only begin after examining how the existing law fits together and identifying the policies given effect by the law's various provisions.<sup>1</sup>

The collection of articles in this special issue of the *Company and Securities Law Journal* has its genesis in a project undertaken by the Australian Law Reform Commission (ALRC) in 2020 to map key areas of financial services law in order to gain insights into the legislative schemes and obtain data about potential areas of simplification. As part of this project, the ALRC mapped the prospectus and product disclosure statement disclosure regimes for financial products and aspects of financial services licensing laws.<sup>2</sup>

The ALRC had previously identified the simplification of financial services legislation as one of five priority areas for law reform in its 'Future of Law Reform' project.<sup>3</sup> The importance of simplification was highlighted in the Financial Services Royal Commission Final Report of 2019. The Final Report recommended that, as far as possible, exceptions and qualifications to generally applicable norms of conduct be eliminated and that legislation identify expressly the fundamental norms of behaviour in respect of rules.<sup>4</sup> The legislative mapping project gave the ALRC insights into the complexity of financial services legislation, the extent to which the law is modified by legislative instruments and the challenges that this creates, particularly in relation to navigability.

In September 2020, the ALRC received Terms of Reference from the Attorney-General to review the legislative framework for corporations and financial services regulation. The preamble of the Terms of Reference noted 'the importance, within the context of existing policy settings, of having an adaptive, efficient and navigable legislative framework for corporations and financial services.'<sup>5</sup>

The five articles in this special issue draw on and analyse the data from the legislative mapping exercise. For this purpose, members of the ALRC collaborated with academics from Melbourne Law School, Sydney Law School, UNSW Law Faculty and the College of Business, Government and Law at Flinders University. In line with the above comments of Commissioner Hayne, each article starts by examining

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<sup>1</sup> Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, Volume 1 (2019), 496.

<sup>2</sup> For details of the ALRC's legislative mapping exercise, see <<https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/data-analysis/>>.

<sup>3</sup> This project was designed to engage the Australian community in a discussion about an appropriate program of work for the ALRC over the next five years. Australian Law Reform Commission, *The Future of Law Reform: A Suggested Program of Work 2020-25*, available at <https://www.alrc.gov.au/publication/the-future-of-law-reform-2020-25/>. For general information about the current ALRC review, see <https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/>.

<sup>4</sup> Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, Volume 1 (2019), Recommendations 7.3 and 7.4. In relation to Recommendation 7.4, the Final Report stated that '[b]y drawing explicit connections in the legislation between the particular rules that are made and the fundamental norms to which those rules give effect, the regulated community and the public more generally will better understand what the rules are directed to achieving'. Ibid, 44.

<sup>5</sup> Review of the Legislative Framework for Corporations and Financial Services Regulation Terms of Reference, available at <https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/terms-of-reference/>.

how legislation fits together in the area under discussion and then foreshadows ways in which legislation or its design might be simplified. Common themes explored by the articles include the need to achieve an appropriate balance between complexity and navigability and the importance of considering greater convergence while recognising that a degree of divergence will be unavoidable. In each area, the issues are located and examined within the relevant conceptual framework of principles and outcomes.

The first article by Godwin, Brand and Langford – ‘Legislative Design: Clarifying the Legislative Porridge’ – examines the context for the ALRC’s current review and engages with the ongoing debate about reducing complexity in legislative design, while enhancing comprehensibility and navigability. The article points to a range of strategies and reforms that might be employed to this end from both a conceptual and structural perspective.

The second article by Van Geelen – ‘Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law’ – explores the challenges created by the use and proliferation of delegated legislation in relation to financial services regulation with particular reference to the prospectus and product disclosure statement disclosure regimes under the *Corporations Act 2001* (Cth). The article identifies problems with the current use of delegated legislation in financial services regulation – including with respect to complexity, the rule of law, and regulatory capture – and suggests options for reform in terms of substantive limits, procedural safeguards and oversight mechanisms.

The third article by Tapley and Godwin – ‘Disclosure (Dis)content: Regulating Disclosure in Prospectuses and Product Disclosure Statements’ – analyses the evolution of disclosure regulation in Australia as it applies to securities and financial products. The article argues that although efforts have been made to facilitate good outcomes for consumers and investors through the adoption of the ‘clear, concise and effective’ standard, the end result has been a bifurcated regulatory framework that is complex, subject to an enormous volume of modifications and difficult to navigate. The article explores the possibility of a return to a more principles-based approach that is supported by initiatives that are designed to improve access to financial advice and the innovative use of technology.

The fourth article by Davies, Walpole and Pearson – ‘Three of the Tracks towards the Twin Peaks: Australia’s Licensing Regimes for Financial Services, Credit, and Superannuation’ – surveys three financial services licensing regimes: the Australian Financial Services Licence (AFSL); the Australian Credit Licence (ACL); and the Registrable Superannuation Entity (RSE). The article analyses the structure and content of these three regimes to determine whether there is scope to consolidate, rationalise, and harmonise them and concludes that there is scope for rationalisation of the AFSL and ACL regimes, but that the RSE licensing regime should continue to be separate.

The fifth and final article by Walpole, Donald and Langford – ‘Regulating for Loyalty in the Financial Services Industry’ – examines and compares the various duties of loyalty that are owed by the providers of financial advice, superannuation funds and mortgage broking services to their customers. The article notes that although the three statutory loyalty regimes are directed towards protecting the interests of the consumers of financial services and products, they differ in expression, structure and form. Care should therefore be taken in assuming that analogous provisions in the regimes will enjoy similar application.

These five articles will contribute to the literature concerning simplification of law and regulation and assist in generating further engagement and discourse among interested stakeholders, including policy-makers, regulators, professionals, academics and the broader public. Such engagement and

discourse will be particularly important as the ALRC proceeds with its review of the legislative framework for corporations and financial services regulation.

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