

The Banking Royal Commission: Simplification to meet the intent of the law

The Banking Royal Commission Final Report is out, but what does it mean? In this article, Nicola Nygh and Sam Wheeler examine the proposal that Financial Services Legislation be simplified to ensure that the intent of the law is met.

On 4 February 2019, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Commission**) released its highly anticipated [Final Report](#).

Contrary to the frenzied media speculation prior to its release, the Final Report has not been as earth-shattering as expected. Indeed, Commissioner Hayne has not recommended structural changes such as the dismantling of vertically integrated financial services businesses and nor will there be any significant dismantling and restructure of the regulators.

Instead, the Commission recommended a nuanced set of changes, including to simplify the law, remove conflicts of interest, strengthen regulators, change culture and improve consumer protection. These changes nevertheless have important implications for the financial services industry.

Underlying principles: enforcing the intent of the law

Commissioner Hayne stressed the need to simplify financial services legislation so that the law's intent is met. The Commission identified the following norms, which it considered should form the basis of future legislation:

- obey the law;
- do not mislead or deceive;
- act fairly;
- provide services that are fit for purpose;
- deliver services with reasonable care and skill; and
- when acting for another, act in the best interests of that other.

As Commissioner Hayne noted in the Final Report, these norms of conduct are all reflected in existing law but are reflected piecemeal, and would benefit from greater clarity and simplification.

What does 'simplifying the law' entail?

The Final Report sets out two broad recommendations for simplifying the law.

First, Recommendation 7.3 proposes to eliminate exceptions and qualifications to norms of conduct found in financial services legislation.

Second, Recommendation 7.4 suggests that the law should expressly identify the norms of behaviour being pursued when detailed rules are made about particular subjects. This is most

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clearly exemplified by Recommendation 1.2, namely that mortgage brokers be required to act in the best interests of the intended borrowers.

The Australian Government in its response to the Final Report, agreed to eliminate exceptions and qualifications to the law, where possible. It also agreed to identify the norms of behaviour and principles that underpin the legislation.

Therefore, the task to simplify the law will begin in earnest but, as noted by the Commission, simplification of the law is a large – and likely lengthy – task.

Further implications

In addition, it is worth noting the sustained criticism that the Commission has levelled against ASIC and APRA for their perceived reluctance to enforce the law. In particular, Commissioner Hayne has accused ASIC of treating financial services entities that it regulates as 'clients'.

Combined with the Commission's recommendations for new powers and funding for the regulators, the financial services industry should expect that ASIC and APRA will be more aggressive in its enforcement and regulatory approach.

Compliance in principle – not just technically – with the law will be of paramount importance in this new regulatory environment.

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