

Extract from Interim Report Volume 1 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, page 290:

3 The future: Regulation

3.1 Change the law?

As noted elsewhere in this report, I begin from the premise that breaches of existing law are not prevented by passing some new law that says ‘Do not do that’. And given the existing breadth and complexity of the regulation of the financial services industry, adding any new layer of law or regulation will add a new layer of compliance cost and complexity. That should not be done unless there is a clearly identified advantage. It should be considered recognising that there is every chance that adding a new layer of law and regulation would serve only to distract attention from the very simple ideas that must inform the conduct of financial services entities:

- **Obey the law.**
- **Do not mislead or deceive.**
- **Be fair.**
- **Provide services that are fit for purpose.**
- **Deliver services with reasonable care and skill.**
- **When acting for another, act in the best interests of that other.**

These ideas are very simple. Their simplicity points firmly towards a need to simplify the existing law rather than add some new layer of regulation. But the more complicated the law, the easier it is to lose sight of them. The more complicated the law, the easier it is for compliance to be seen as asking ‘Can I do this?’ and answering that question by ticking boxes instead of asking ‘Should I do this? What is the right thing to do?’ And there is every reason to think that the conduct examined in this report has occurred when the only question asked is: ‘Can I?’.

The existing law has rightly been described, in at least some respects, as labyrinthine and overly detailed. In the blizzard of provisions, it is too easy to lose sight of those simple ideas that must inform the conduct of financial services entities.

It follows that the regulatory framework does not always assist the regulator to impose discipline on entities. Regulatory complexity increases pressure on the regulator’s resources and may allow entities to develop cultures and practices that are unfavourable to compliance.

Regulatory complexity affects the conduct of banks and other financial services entities. In particular, it affects how legal requirements are interpreted by and for front line staff. Mr David Cohen, Chief Risk Officer of CBA, observed that the accretion of new legal requirements:

‘has been an additive process and layer upon layer upon layer is introduced, is absorbed. Rules and policies are set around that new layer. And it is sometimes difficult to distil the very essence of the fundamental obligations out of all of that set of policies, procedures, processes, etc’ (Transcript, David Antony Keith Cohen, 30 May 2017, 2822).

In particular, as noted above, regulatory complexity may foster the development of a ‘box-ticking’ approach to compliance, in which entities develop and focus on internal procedures intended to fulfil various complicated legal obligations, not only at the expense of considering the circumstances in each matter on their merits but also at the expense of measuring what is proposed against those simple ideas that must inform the conduct of all entities in the financial services industry.