
Empowering Australian Financial Consumers through Plain English Legislative Drafting

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A B S T R A C T

This paper addresses the legislative morass that has been observed in Australia, in which legislation for the protection of financial consumers is impenetrable, confusing, incoherently organised, spread over multiple pieces of legislation, contradictory, excessively lengthy, and drafted in a manner that obfuscates meaning and is inaccessible to the average (or indeed, sophisticated) consumer. It discusses how such legislation is antithetical to the principles of the rule of law. It provides evidence from other jurisdictions of the effective use of *plain English* drafting, as well as the benefits of *stark language* use in drafting – an advance on *plain English*. Informed by linguistic analysis and techniques, it provides examples of how legislation can be re-written so as to be brief, accessible, useful and intelligible to consumers. Finally, it makes a recommendation for institutionalising these techniques for future legislative drafting.

Keywords: financial consumer protection; plain English drafting; stark language; rule of law; accessibility; Treating Customers Fairly; TCF; South African Conduct of Financial Institutions Bill; CoFI

I. Introduction

This paper stems from submissions made in 2022 to the Australian Law Reform Commission and the 2023 Federal Senate.¹ It outlines the challenges presented to Australian financial consumers in knowing, understanding, and enforcing their rights as consumers, due to the length, poor organisation and complexity of the legislation governing the provision of financial products and services in Australia. The paper argues in favour of a *plain English* approach to legislative drafting, by demonstrating that attempts at precision lead to

unnecessary – and indeed unworkable – complexity and, counter-intuitively, create more, not less, uncertainty in the law. Moreover, a *plain English* approach more faithfully enlivens a principles-based, outcomes-determined regulatory regime, in which norms of behaviour are enforced; whereas overly prescriptive, black-letter, rules-based – and less effective – legislative regimes are promoted by the current approach to drafting legislation in Australia. It will be argued that such overly prescriptive regimes are, in fact, antagonistic, not only to effective consumer protection, but also to

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¹ Schmulow with Dreyfus (2022) and Schmulow with Dreyfus (2023) served as working papers for this article.

the principles that underpin the rule of law.

Cognisant that a new legislative regime would be used by regulated entities, professional advisors and consumers, this article argues that supporting consumers in their use of the legislation, and supporting them to know and understand their rights, should be the primary consideration. The reasons for which include the following:

- the financial industry operates subject to a *social licence*. This is borne from the fact that in times of financial crises, taxpayers (through the Fiscus) underwrite financial industry liabilities (principally banks). Consequently, the financial industry ought to serve the society in which it operates, not the other way around;
- regulated entities are established and operated to serve their customers and potential customers;
- consumers suffer a power disparity – at times significant – when contracting with financial industry firms;
- consumers do not enjoy the resources available to financial industry firms – especially large ones – to avail themselves of professional advice when seeking to understand the law and uphold their rights;
- in Australia, financial industry firms have misused their power in this respect, and have abused consumers’ rights, and done so for an extended period of time, and at scale.²

Currently, financial service providers and the

provision of financial products and services are governed, primarily, by the *Corporations Act*³ and the *ASIC Act*.⁴ Within the *Corporations Act* is located Chapter 7, which deals with the financial industry.⁵ This is the principal legislation for the protection of financial consumers. Ch 7 alone runs to some 618 pages⁶ which, in turn is subsumed in some 3661 pages of the *Corporations Act*.⁷ Enacted in its first iteration in 1981, it has ballooned into a poorly organised, confusing, contradictory (in parts) tome, which the average consumer would have little or no capacity to understand or use.

The length of the Corporations Act... has increased by 178% since 1981. In preparing Background Papers for its hearings, this Commission found that an introductory overview of the law governing consumer credit in Australia required 86 pages of explanation; financial advice and sale of financial products required 114; and small business lending law that did not overlap with that governing consumer lending, required 41 pages to explain.⁸

... the number of words in the Act has almost increased by 50 per cent from 2001 to 2015 (from 483,902 in 2001 to 715,754 in the most recent 2015 printed version) ...⁹

... Chapter 7 of the Corporations Act, Financial Services and Markets is the longest Chapter of 380 [as it then was in 2015] pages and the regulations that provide more detail of the law for that chapter are an additional 304 pages.¹⁰

In addition to Ch 7 of the *Corporations Act*,¹¹ financial consumers’ protections and duties are spread out between (a further) 594 pages in the *ASIC Act*¹² and (a further) 763 pages in the *National Consumer Credit Protection Act (NCCP Act)*.¹³

² Culminating in the establishment, and the findings of, the 2018 Royal Commission of Inquiry into Misconduct in the Banking, Superannuation and Financial Services Industry.

³ *Corporations Act* (Cth), N^o. 50 of 2001.

⁴ *Australian Securities and Investments Commission Act* (Cth), N^o. 51 of 2001.

⁵ “Chapter 7 – Financial services and markets”.

⁶ The total number of pages increases on an almost annual basis. See <<https://www.legislation.gov.au/C2004A00818/2019-07-01/2019-07-01/text/1/pdf/5>>.

⁷ Again, the total length of the legislation continually increases. See <<https://www.legislation.gov.au/C2004A00818/2019-07-01/downloads>>.

⁸ Royal Commission into Misconduct in the Banking, Superannuation

and Financial Services Industry, (1 February, 2019), *Final Report*, Financial Services Royal Commission (Canberra, ACT), at 421. (Hereafter “FSRC Final Report”).

⁹ Commonwealth Government of Australia in its Treasury, (December 2015), “Fit for the future. A capability review of the Australian Securities and Investments Commission. A Report to Government”, at 132, available at: <<https://treasury.gov.au/sites/default/files/2019-03/ASIC-Capability-Review-Final-Report.pdf>>.

¹⁰ *Ibid.*, Chapter 5: External constraints that impede ability to execute, at 134, fn 175.

¹¹ *Op cit.*

¹² *Op cit.*

¹³ *National Consumer Credit Protection Act* (Cth), N^o. 134 of 2009.

This exacerbates the challenges consumers face in finding relevant provisions and, by implication, to knowing and understanding their rights and obligations.

Ordinarily, legislative reforms focus heavily – if not exclusively – on substantive matters (such as, in the case of financial services: *what should legislation dealing with financial services cover?; should it be subsumed into other legislation, or stand-alone?; who should enforce it? et cetera*). Consequently, questions as to what style of language to use (or even what typeface to use), may seem relatively unimportant. However, this paper will argue that these issues are, in fact, potentially tremendously valuable and useful. They are the interface between the law, and the consumers to whom it applies. *Sweating these details* may, therefore, seem prosaic, but they are, nonetheless, deeply worthy of attention.

This paper will argue that it is possible to comprehensively legislate (and regulate) an industry as complex and sophisticated as the financial industry, and to do so in a manner that adheres to the principles of *plain English*. To that end, this paper proceeds from the assumption that:

- consumers should have a right to know and understand the law;
- that *more is not more* when it comes to legislative drafting. Indeed, there is evidence that more extensive provisions do not lead to more certainty in the law. They lead to less certainty;
- legislative provisions (especially in financial services) should not seek to cover every possible circumstance in detail, but should be brief, high-level, and principles based. In so

doing, the legislation should seek to enliven *outcomes*. This, it is argued, will provide for greater legal certainty. Put differently, *less is more*;

- by deploying techniques derived from the field of linguistics¹⁴ it will be possible to deconstruct excessively opaque, dense legislative provisions, and reconstruct them to be intelligible. Put differently, linguistics is a *Babel Fish*,¹⁵ capable of translating the unintelligible into English.
- For example, unnecessary complexity is added by: changing verbs into nouns (for example: disclose (a verb) becomes disclosure (a noun)), making meanings overly abstract; embedding clauses and phrases in other elements, making sentences overly long and complex; using overly technical terminology (jargon and legalese), that makes language impenetrable.
- Together these make provisions harder to understand, and so, invariably, we end up with legal jargon that may as well be *Klingon*.

As such, through the use of *plain English*, brevity, the avoidance of excessively detailed and prescriptive provisions, coherent organisation, mnemonics, and by seeking to enliven a legislative regime focused on promoting good outcomes, this paper will argue that it is possible to draft legislation that an 18-year-old consumer, with average English-language proficiency and understanding of financial services, will be able to understand.¹⁶

The ordinary person of ordinary intelligence and education [should] have a reasonable expectation of understanding ... legislation and of getting the answers to the questions he or she has. This is of critical importance.¹⁷

¹⁴ The writer acknowledges with gratitude the contribution made to this study, and the explanations and techniques provided, by Associate Professor Shoshana Dreyfus, in the Department of Linguistics, School of Humanities and Social Inquiry, in the University of Wollongong. She may be contacted at: <shoshana_dreyfus@uow.edu.au>.

¹⁵ The “Babel Fish” is a fictional creature described by Douglas Adams in his science-fiction parody: *The Hitchhiker's Guide to the Galaxy*. Inserted into the ear of a user, it translates any alien language into whatever language the user understands (Adams 1979).

¹⁶ See also: Government of the Commonwealth of Australia in its Australian Law Reform Commission, (October 2021), “Legislative Framework for Corporations and Financial Services Regulation. Complexity and Legislative Design”, Background Paper FSL2, § 132 at 2-30 <<https://www.alrc.gov.au/wp-content/uploads/2021/10/FSL2-Complexity-and-Legislative-Design.pdf>>.

¹⁷ Murphy, D., (July 1995), “Plain Language in a Legislative Drafting Office”, (Clarity 33, London), at 5, cited in Hunt (2002).

II. Justice and the Rule of Law

It is a fundamental principle of the rule of law that citizens be able to know their rights and obligations at law. For that to be possible they must be able to locate the relevant provisions in the legislation, and once they have located them, read them, and understand what they are reading.

... the law must be capable of being obeyed. A person conforms with the law to the extent that he does not break the law. But he obeys the law only if part of his reason for conforming is his knowledge of the law. Therefore, if the law is to be obeyed it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it.¹⁸

Currently, the law that relates to consumers' rights and duties (as consumers of financial products and services) is difficult to locate¹⁹ (spread as it is across multiple pieces of legislation: the *Corporations Act*²⁰, *ASIC Act*²¹, *NCCP Act*²², *Insurance Contracts Act*²³, *Life Insurance Act*²⁴, *Retirement Savings Accounts Act*²⁵, *Superannuation (Resolution of Complaints) Act*²⁶, and the *Superannuation Industry (Supervision) Act*²⁷).

Once located, reading the provisions with a view to understanding them requires sophisticated, specialised legal knowledge. This is deeply antagonistic to the principles of access to justice and the rule of law. As such, supporting financial consumers – in particular retail consumers – to be able to more easily locate and understand their rights, than is currently the case under Ch 7 of the

Corporations Act, would promote the principles of access to justice and the rule of law.

As a recent article by Crawford argues, there is “cause for concern” that the length and complexity of Commonwealth legislation, in particular, is contrary to rule of law values.²⁸

And further:²⁹

Lord Bingham's book reflects the importance of the condition of society in various respects to understand the condition of the fabric of the Rule of Law, such as the need for the law to be accessible in its coherence and writing...

On the question of accessibility, Isdale and Ash argue, especially in respect of consumer protection legislation, for the need for such legislation “speaks” – that is to say, the individuals whose protections are enlivened by the legislation, and whose obligations the legislation sets forth:

At the very least, those required to comply with and/or administer particular laws must be capable of ascertaining and comprehending them.³⁰

In arriving at this view the authors keep auspicious company:

The desideratum of clarity represents one of the most essential ingredients of legality. Yet it is obvious that obscure and incoherent legislation can make legality unattainable by anyone...³¹

If social control of this sort [ie through law] is to function, the rules must satisfy certain conditions: they

¹⁸ Raz, Joseph, (2005), “The Rule of Law and its Virtue”, edited by Bellamy, R. (Ed.), in *The Rule of Law and the Separation of Powers*, 1st ed., (Routledge), at 80

¹⁹ This is specifically acknowledged in the findings of the Australian Law Reform Commission Inquiry into Reforming Corporations and Financial Services Legislation (Australian Government in its Australian Law Reform Commission, (November 2023), *Confronting Complexity: Reforming Corporations and Financial Services Legislation, Final Report*, ALRC Report 141, at 111, available at: <<https://www.alrc.gov.au/wp-content/uploads/2024/01/ALRC-FSL-Final-Report-141.pdf>>).

²⁰ Op cit.

²¹ Op cit.

²² Op cit.

²³ *Insurance Contracts Act* (Cth), N^o. 80 of 1984.

²⁴ *Life Insurance Act* (Cth), N^o. 4 of 1995.

²⁵ *Retirement Savings Accounts Act* (Cth), N^o. 61 of 1997.

²⁶ *Superannuation (Resolution of Complaints) Act* (Cth), N^o. 80 1993.

²⁷ *Superannuation Industry (Supervision) Act* (Cth), N^o. 78 of 1993.

²⁸ Isdale, William and Ash, Christopher, (12 May, 2021), “Legislative morass and the rule of law: a warning, and some possible solutions”, Australian Public Law blog, (citing: Crawford, Lisa B, (2020), “The rule of law in the age of statutes”, *Federal Law Review*, Vol. 48, N^o. 2, at 175) <<https://www.auspublaw.org/blog/2021/05/legislative-morass-and-the-rule-of-law-a-warning-and-some-possible-solutions?rq=Legislative%20morass%20and%20the%20rule%20of%20law%3A%20a%20warning%2C%20and%20some%20possible>>.

²⁹ Ibid., citing: Allsop CJ, (1 November, 2018), “The Rule of Law is not a Law of Rules”, Federal Court of Australia Annual Quayside Oration, Perth, available at: <<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20181101-2>>.

³⁰ Isdale and Ash, op cit.

³¹ Fuller, Lon L., (1965), *The Morality of Law: Revised Edition*, (Yale University Press), at 63.

must be intelligible and within the capacity of most to obey...³²

Isdale and Ash identify two deficiencies in the current regime, namely complexity and accessibility³³ Echoing the first concern (on the subject of financial regulation) is the view of Calomiris³⁴:

...an increasingly complex and uncoordinated regulatory system has created an uneven regulatory playing field that is accelerating consolidation for the wrong reasons.

The complexity of the current Australian legislative regime in financial services is widely acknowledged. Explanations often reference the inherent technicality of the subject matter.³⁵ But it is arguable as to whether this is correct: is the complexity and length³⁶ of the legislation indicative of the difficulty in addressing the subject matter? Or is it indicative of a failure to embrace clarity, accessibility and intelligibility (through, for example, a focus on principles and outcomes) in the drafting process?

The trouble lies with our method of drafting. The principal object of the draftsman is to achieve certainty – a laudable object in itself. But in pursuit of it, he loses sight of the equally important object – clarity. The draftsman – or draftswoman – has conceived certainty: but has brought forth obscurity; sometimes even absurdity.³⁷

And that, in turn, it is argued, is indicative of the ease with which drafters default to simply drafting ever more prescriptive provisions,³⁸ in order to remedy the flaws of so many other,

previous attempts.

Legislative schemes have commenced with principles at the fore only to have the full suite of prescriptions such as those described here grafted on over time.³⁹

[w]hy is Australia so particularly plagued with the problem of unnecessarily long and complex legislation? ... because of the use of prescriptive, rather than principled drafting techniques.⁴⁰

[a] philosophy which infuses much of our current legislation, ... appears to require an insistence on detail, an insistence which is carried to the point of complexity.⁴¹

In particular, the beguiling temptation to tie down in detail all conceivable matters should be resisted because to do so produces needlessly complex provisions and will in any event inevitably fail because tying everything down is an impossible goal. [The solution to which is] a shift ... towards more principled drafting...⁴²

Put differently, doubtless there is an argument to be made that technicality begets complexity. But does complexity beget certainty? In the case of Ch 7 of the *Corporations Act* the answer appears to be a resounding *no*.

Isdale and Ash put forth the argument that there must be a balance struck between principles and prescription, and further, that in our current regime the purpose – what Allsop terms the “human character of the narrative”⁴³ – and its moral purpose is lost.

A judge must construe a provision in an Act having regard to the Act as a whole.⁴⁴

³² Hart, H. L. A., (2012), *The Concept of Law*, edited by Joseph Raz and Penelope A. Bulloch, (Oxford University Press), at 207.

³³ Op. cit.

³⁴ Calomiris (2018), citing: Lux, M., and Greene, R., (February 2015), “The State and Fate of Community Banking”, Harvard Kennedy School of Government, <www.hks.harvard.edu/centers/mrcbg/publications/awp/awp37>.

³⁵ See for example the remarks of Black, Justice Ashley, (June 2016), “Unfinished business in corporations law reform,” BLS Corporations Workshop, at 2.

³⁶ See also: Background Paper FSL2, op cit., § 73 at 2-18.

³⁷ Denning, Alfred Thompson, (1979), *The discipline of law*, (London; Boston: Butterworths), at 9, cited in Isdale and Ash, op cit.

³⁸ See: Background Paper FSL2, op cit., at § 48 (b): “An aversion to

principles-based legislation”.

³⁹ FSRC Final Report, op cit., at 495.

⁴⁰ Address by Bathurst AC, The Hon T. F., Chief Justice of New South Wales, (31 July 2015), “50 Years of Commercial Law”, Commercial Law Association of Australia, Opening Address, § 18, cited in Isdale and Ash, op cit.

⁴¹ Mason, Sir Anthony, (1992), “Corporate Law: The Challenge of Complexity”, *Australian Journal of Corporate Law*, Vol. 2, N^o. 1, at 2, cited in Isdale and Ash, op cit.

⁴² Burrows, Andrew, (2018), *Thinking about statutes: interpretation, interaction, improvement*, (Cambridge University Press), at 94, cited in Isdale and Ash, op cit.

⁴³ Allsop, op cit., cited in Isdale and Ash, op cit.

⁴⁴ Rares, Justice Steven, (24 May, 2014), “Competition, Fairness and the Courts”, Federal Court of Australia. A paper presented to the

III. Broad Legislative Principles Underpinned by Granular Regulations

There exists a perception that if the law is not working, then the solution is to draft, and enact, more of it. In particular, to become ever more granular in the legislation; to become more and more prescriptive; to try to cover every base, to block every loophole. This is a fool's errand. A prescriptive, black-letter law, rules-based approach creates problems, not solutions. This is especially so in financial services, because the financial industry is so difficult to regulate: it innovates too quickly, and the products and services it creates are intangible. That is to say, they are ideational – they are ideas – often expressed in the form of promises (the promise to repay depositors with interest; the promise to pay-out on an insurance policy if the customer suffers loss covered by the policy). As many ways as there are to *explain* a product or service, so are there as many ways to *define* a product or service. As a result, it is virtually impossible for prescriptive, black-letter, rules-based laws to keep pace.

A principles-based, outcomes-determined regulatory regime will need to be balanced – at times – with granular regulations. This balance finds itself both in the theory and the practice of principles-based legislation.

In theory, principles-based legislation ought to confine itself to *broad brushstrokes*. It is in the regulations that, where necessary, more specific details on how to comply are provided. But the operative phrase here is *where necessary*.

It is here that a useful comparison emerges between the approach of the Australian Securities and Investments Commission (ASIC) and its South African equivalent, the Financial Sector Conduct

Authority (FSCA). In the extensive interactions the writer has had with the FSCA over the past five years, he has been impressed by their willingness to resist the constant demands made upon them by the financial services industry for ever greater degrees of prescription, detail and granularity in the regulations which they publish. These regulations inform the principles expressed in the *Financial Sector Regulation Act*,⁴⁵ and the regulations published in support of the forthcoming *Conduct of Financial Institutions Act* (currently in Bill form).⁴⁶ (For a useful example, see s 6, The Draft Conduct Standards for Banks,⁴⁷ *infra*).

In this writer's anecdotal experience, the South African regulator is well-practiced in resisting industry pressure for ever more granularity in the regulatory guides and standards which they write. Senior office-bearers at the FSCA have expressed the view to this writer, and on many occasions, that when they encounter demands from members of the regulated population for them to provide more, prescriptive details in standards and regulatory guides, they do not simply comply. They evaluate whether regulatees can, in their view, operate under the current legislation and regulations, or whether the legislation and regulations are truly inadequate to address a particular issue.

One example they cite, where they did accede to industry demands for more detail, and where they were of the view that existing legislation and regulations did not provide sufficient direction – one that could not easily be answered by reference to over-arching legislative principles – was in respect of the manner in which interest rates should be advertised.

That said, the regulations issued by the FSCA provide more detail, but not excessive detail. Instead, regulations are drafted to support the overall project: a principles-based, outcomes-

Competition Law Conference, at § 15, available at: <<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20140524>>.

⁴⁵ *Financial Sector Regulation Act*, No. 9, 2017 (South Africa).

⁴⁶ <<https://www.fsca.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/Conduct%20of%20Financial%20Institutions%20>

[0Bill%202018.zip](#)> (Version: Draft, 2018).

⁴⁷ Draft Conduct Standard 3 of 2020 (Banks), issued in terms of the *Financial Sector Regulation Act*, 2017, Conduct Standard for Banks, <[https://www.fsca.co.za/Notices/FSCA%20Conduct%20Standard%203%20of%202020%20\(BANKS\)-Banks.zip](https://www.fsca.co.za/Notices/FSCA%20Conduct%20Standard%203%20of%202020%20(BANKS)-Banks.zip)>.

determined regime, with its foundation in norms of behaviour. Put differently, regulations add granularity only where strictly necessary. They are not permitted to become legislative prescription by the back door. An example of which is s 6 of the Banking Standard⁴⁸ issued by the FSCA, which deals with advertising. The Banking Standard, like a prudential standard issued by APRA (the Australian Prudential Regulation Authority), has force of law. It provides further details to banks on what they are required to do as market participants, and in order to respect consumer rights, and is issued to complement the *Conduct of Financial Institutions Bill* (CoFI Bill).⁴⁹

From start to finish it is also written in *plain English*, so that it may be accessible and intelligible to consumers whose rights are affected by this Standard. Section 6 of the Standard⁵⁰ is provided below:

6. Advertising

(1) A bank must ensure that its financial products and financial services are advertised to financial customers in a way that is clear, fair and not misleading.

(2) If a bank relies on another person to advertise a financial product or financial service on its behalf, the bank remains responsible for –

(a) the manner in which its financial product or financial service is advertised; and

(b) ensuring that the advertisement complies with this Conduct Standard.

(3) Advertising by a bank must –

(a) be factually correct;

(b) not contain any statement, promise or forecast which is fraudulent, untrue or misleading; and

(c) in the case of advertising targeting retail financial customers, use plain language.

(4) Where an advertisement includes a reference to interest payable by the bank to a financial customer, in respect of a financial product, the advertisement must comply with the disclosure requirement in section 7(4).⁵¹

(5) A bank may not offer or provide any financial product or financial service to a retail financial customer or potential retail financial customer on the basis that any transaction will be entered into automatically unless the financial customer explicitly declines the offer.

(6) Where a bank uses a telephone or mobile phone call, voice or text message or other electronic communication for any advertisement targeted at a retail financial customer or potential retail financial customer, it must inform the retail financial customer during that call or within a reasonable time after receiving the message, that the retail financial customer may demand that the bank not make use of any of these mediums to provide any further advertising to the retail financial customer.

(7) A bank or any person acting on its behalf must comply with a demand made by a retail financial customer in terms of subsection (6).

(8) A bank or any person acting on its behalf may not charge a retail financial customer a fee or allow a service provider to charge a retail financial customer any fee for making a demand in terms of subsection (6).

(9) A bank must have in place processes and procedures for the approval of advertisements and advertising methods by a person of appropriate seniority and expertise within the bank, which must form part of the governance arrangements required in section 3 above.

(10) Where a bank becomes aware that any advertising that relates to its business, financial products or financial services, whether published by the bank or any other person, is inconsistent with this Conduct Standard, the bank must –

(a) as soon as reasonably practicable correct or withdraw the advertising;

⁴⁸ Op cit.

⁴⁹ Op cit.

⁵⁰ Op cit.

⁵¹ S 7(4) of the Banking Standard states: “Disclosure: Where a financial product provides for the payment of interest by the bank to the financial

customer, a bank must, in addition to and with equal prominence to any other disclosure regarding the interest rate concerned, appropriately describe the rate of interest concerned and also disclose to a financial customer the effective annual interest rate of the financial product.”

or

(b) take reasonable steps to ensure that it is corrected or withdrawn; and

(c) notify any persons who it knows have relied on the advertising.

(11) A bank must keep adequate records of all advertisements for a period of at least five years after publication.

(12) Subsections (1) to (11) apply equally to the advertising of any service or benefit provided or made available by a bank together with or in connection with any financial product or financial service, including a loyalty benefit.

Put differently, in a regime that imposes a positive duty upon regulatees, like that in South Africa, it becomes unnecessary to provide entities with minute, extremely granular detail in regulatory guides and standards, in order that regulatees may have certainty as to what actions may or may not constitute a breach. Instead, and when the legislation places them under a positive duty, entities will be directed to *do their best*, as opposed to *do the minimum*. Under such a regime, regulatees will seek to enliven the *spirit of the law* – as opposed to the *letter of the law* – by documenting the steps they have taken throughout the creation of a product or service life-cycle (longer and more extensive than the “customer-journey” approach), to put the interests of the customer first, at every juncture.

Using the example above of advertising, the questions that regulated entities will ask is not “are we allowed to do this?”. Instead, they will ask “should we do this?”. Put in context: “is this the appropriate way to advertise our products? Does it put the customer’s interests and welfare first? Could what we intend to do be done in a way that better serves our customers and their interests?” Concomitant with that approach will be an understanding that should the regulator observe a poor outcome, or the risk of a poor outcome, it may call upon the regulatee to justify its actions. At that

stage it will be necessary to show documentation to the regulator as to how these questions were answered, what alternatives were evaluated, how solutions were arrived at, and then demonstrate how the solutions were the product of credible assessments and credible evaluations of the risks posed to consumers.

Under the current, prescriptive regime deployed in Australia, regulated entities are encouraged to press ASIC for answers to the question “what are we not permitted to do?”. When those answers are provided there will be further pressure on the regulator to clarify ambiguity. Those clarifications will always give rise to further ambiguities in the face of circumstances not initially envisioned. That, in turn, will give rise to further requests for clarification by way of ever more details in the regulatory guides and standards, and so forth. This process is potentially never-ending, resulting in an overwhelming degree of prescription. That then gives rise to complaints about excessively detailed, lengthy regulations. A case of *damned if you don’t, damned when you do*.

To that end, and in the writer’s discussions with one of the Commissioners of ASIC,⁵² the view was expressed that “regulated entities complain when our regulations are not detailed enough, so we add more detail. Then they complain that the regulatory guides are too long”.

This culture within ASIC of attempting to satisfy regulated entities was identified in the FSRC Final Report as both existing and as deficient:

Financial services entities are not ASIC’s ‘clients’. ASIC does not perform its functions as a service to those entities.⁵³

The South African *Conduct of Financial Institutions Bill*⁵⁴ serves to refute these practices. It deals with complex issues of financial products and services, set against the need to protect consumers. But it does so in a manner which is intelligible and easily accessible.

⁵² Confidential discussion with [name redacted], August 2020, by telephone.

⁵³ FSRC Final Report, op cit., at 424.

⁵⁴ Op cit.

However, for a principles-based, outcomes-determined regime to function successfully, not only will it be necessary to express what the principles are that must be adhered to, and which outcomes must be avoided in the legislation. It will also be necessary for ASIC to change the tenor – that is to say the prescriptive nature – of its regulations. ASIC will also need to adopt an approach to regulated entities that does not seek to accommodate their every whim; especially because seeking ever more detail from the regulator inevitably becomes a compulsion: it enables the regulatee to divest itself of conduct risk. Rather, regulated entities should be appraised by ASIC of what is expected of them, in terms of their obligations to enliven principles of good conduct (through consultations – as the South African regulator has done), and then, thereafter, regulatees must *learn to cope on their own*.

... more words ... more scope for dispute about meaning... inconsistency and obscurity... greater the risk of uncertainty and error.⁵⁵

IV. Plain (stark) English

The current Australian legislative regime is drafted in a manner which is dense and is, save for a small number of instances, largely impenetrable and unnavigable to anyone other than a person with legal training. Indeed, even legally trained individuals may be not capable of untying this *Gordian Knot*.

... this legislative morass seems to be the same, it is difficult to discern why the public, their lawyers (if they can afford them) and the Courts must waste their time turning up and construing which of these statutes [*ASIC*

Act or *Corporations Act*] applies to the particular circumstance... Why is there a difference? Why does a court have to waste its time wading through this legislative porridge to work out which one or ones of these provisions apply even though it is likely that the end result will be the same?⁵⁶

Examples from other jurisdictions indicate that a comprehensive statute for the protection of financial consumers, and for the standards of market conduct to which providers must adhere, can be drafted in plain (or even stark) English. The South African *Conduct of Financial Institutions Bill* (CoFI) is one such example (and a key provision – the regulation of disclosure (s 31) – is included *infra*).

Legislation drafted in accordance with the principles of *plain English* (or, where appropriate, what Godwin describes as *stark language*,⁵⁷ that is to say, “language that is direct and unambiguous”⁵⁸ would be highly preferable, in that it would enable consumers to read the legislation, understand its provisions, and in so doing, their rights and obligations. That said, such a task is not achieved by simply *dumbing things down*:

The language of our legislation cannot be reduced to baby talk for consumption by the masses.⁵⁹

Doubtless, there are those who would argue that certainty in the law is paramount, and that the best – if not the only – way to achieve that is by striving for ever greater precision and detail.

Statutes impose rights and obligations and the public is entitled to expect those rights and obligations to be stated precisely.⁶⁰

Respectfully, this writer asserts the view that this is incorrect, particularly in respect of

⁵⁵ Goode, Roy, (1988), “The codification of commercial law”, *Monash University Law Review*, Vol. 14, No. 3, at 156.

⁵⁶ Rares, J, *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)*, [2012] FCA 1028 at § 948, <<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2012/1028.html>> (21 September 2012). For a brief but excellent analysis, see Paterson, Jeannie and Bant, Elise, (5 June, 2019), “After Hayne: reflections on the banking royal commission”, *MLS News*, published by the University of Melbourne Law School, <<https://law.unimelb.edu.au/alumni/mls-news/issue-21-june-2019/after-hayne-reflections-on-the-banking-royal-commission>>.

⁵⁷ Godwin, Andrew, (2009), “The Lehman Minibonds Crisis in Hong Kong: Lessons for Plain Language Risk Disclosure”, *The University of New South Wales Law Journal*, Vol. 32, No. 2, at 547.

⁵⁸ *Ibid.*, at 579.

⁵⁹ Hunt, *op cit.*, at 44.

⁶⁰ Citing, Bates, T. St J.N., (1999), “Drafting for the User of Legislation”, published in R.C. Bergeron (ed.), (1999) *Essays on Legislative Drafting*, (Ottawa), at 78, in Hunt (2002).

principles-based and outcomes-determined legislation. Such legislation should remain high-level, and express broad principles, framed as a positive duty. Further, the view is expressed that plain/stark language *can* be achieved when drafting such provisions – language which is intelligible to the lay consumer. Indeed, this writer expresses the view that if plain/stark language is proving difficult to achieve then, to put it simply, drafters need to *try harder*.

The example below, found in s 31 of the South African *Conduct of Financial Institutions Bill*,⁶¹ is a good example of what can be achieved in pursuit of plain/stark language, even in the face of a potentially complex subject-matter:

31. (1) Before, during and after the conclusion of a contract for the provision of a financial product or a financial service, a financial institution must make a financial customer aware of all relevant facts that could reasonably be expected to influence the financial customer's decisions relating to the financial product or financial service, including, in relation to a retail financial customer—

- (a) benefits and risks in relation to the financial product or financial service;
- (b) all costs to the financial customer in relation to the supply of that product or service;
- (c) contractual obligations on the financial customer and the financial institution;
- (d) consequences for each party should there be a breach of contract; and
- (e) recourse options for the financial customer in the case of a dispute with the financial institution, or a related party or representative in relation to its supply of a financial product or financial service.

(2) A financial institution must make disclosures to financial customers that—

- (a) use language that is clear, plain and unambiguous, and is appropriate for the target

market;

- (b) are adequate, appropriate, timely, relevant and complete;
- (c) are factually correct and not misleading or deceptive;
- (d) promote understanding of the financial product or financial service being provided;
- (e) promote comparison across similar financial products or financial services; and
- (f) takes into account—
 - (i) the nature and complexity of the financial product or financial service concerned; and
 - (ii) the reasonably assumed level of knowledge, understanding and experience of financial customers at whom the disclosure is targeted.

(3) A financial institution must at all times ensure that any disclosure which relates to its business, activities, financial products or financial services, that another person publishes on behalf of the financial institution, or of which the financial institution is aware or ought to be aware, complies with this Chapter and conduct standards prescribed for the purposes of implementing this Chapter.

The South African legislation dealing with disclosure runs to one and a half pages, totals three sections and 316 words. The equivalent Australian legislation – just in the *Corporations Act* – runs to 115 pages and 23 sections, and totals almost 30,000 words.

At this point the distinctions between *plain English*⁶² and *stark language* should be addressed, as well as their relative advantages: *plain English* is defined as:

Plain English is clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted sentence construction. It is not baby talk, nor is it a simplified version of the English language. Writers of plain English let their audience concentrate

⁶¹[https://www.treasury.gov.za/public%20comments/2020%2010%2008%20CoFI%20Bill%20\(version%20published%20for%20comment\)](https://www.treasury.gov.za/public%20comments/2020%2010%2008%20CoFI%20Bill%20(version%20published%20for%20comment))

⁶²[%20\(slightly%20updated\).pdf](#). (Draft September 2020)
⁶² See also: Background Paper FSL2, op cit., at § 134.

on the message instead of being distracted by complicated language. They make sure that their audience understands the message easily.⁶³

And further:

It's not 'cat sat on the mat' or 'Janet and John' writing. Almost anything - from leaflets and letters to legal documents - can be written in plain English without being patronising or oversimplified.⁶⁴

It doesn't mean reducing the length of your message or changing its meaning. Most of the UK's biggest insurance companies produce policies that explain everything fully in plain English.

It's not about banning new words, killing off long words or promoting completely perfect grammar. Nor is it about letting grammar slip.

It is not an amateur's method of communication. Most forward-looking senior managers always write in plain English.

And finally, it is not as easy as we would like to think.⁶⁵

Set against this is Godwin's view⁶⁶ in support of *stark language*.

In other words, even though plain language enhances readability and is an important part of improving financial literacy, it does not guarantee understanding for people who do not have the relevant level of financial literacy.

And further:

Another weakness with the plain language approach is the use of the term 'plain language' and the implicit assumptions that it involves; namely, if something has been expressed in accordance with plain language principles, the meaning will be clear. In this writer's view, this has led to a situation where drafters are often more intent on implementing the steps and techniques recommended by the plain language experts than on reviewing the result to determine whether the objectives of plain language have in fact been achieved.⁶⁷

Put differently, *plain language/plain English*, while a commendable goal, and one which the writer supports, can be developed further, through the use of *stark language* – that is to say, plain language that focuses not just on being *plain*, but more importantly, on *conveying the message*. This is an even more commendable goal. The techniques deployed by linguists may be highly beneficial in achieving these ends.

Below is an example of a proposed *plain English* redraft of the provisions in the *Corporations Act* that deal with disclosure. Whilst this is a considerable advance from Australia's legislative drafters on the current, 115-page, 30,000-word regime, it is nonetheless – in this writer's view – a poor and inadequate attempt. It uses the word "reasonable" six times, instead of using the word "reasonable" once, and in such a way as to apply to the whole section. That means that if a sub-clause can be identified in which the word "reasonable" has *not* been used, then it will be interpreted to mean that that sub-clause need not be complied with in a manner that is "reasonable". Moreover, the requirements that the disclosure be intelligible to both the customer *and* their financial advisor is superfluous. If the disclosure is intelligible to the consumer, then, by implication, it will also be intelligible to their financial advisor – so why include that requirement? That needlessly complicates, lengthens and obscures the object and purport of the section.

Next, a re-draft of the proposed, amended section is provided, written in *stark language*, to be intelligible to the consumer, and that places upon the provider a *positive* duty to do whatever is necessary to address the needs of a consumer in the designated target market.

⁶³ Plain Language Action and Information Network, United States Government, accessed: 5 March, 2022, available at: <<https://www.plainlanguage.gov/about/definitions/short-definition/>>.

⁶⁴ See also: Background Paper FSL2, op cit., at § 133.

⁶⁵ All five quoted paragraphs from: Plain English Campaign (2022),

<<http://www.plainenglish.co.uk/how-to-write-in-plain-english.html>>, accessed: 5 March, 2022.

⁶⁶ Godwin, op cit., at 552.

⁶⁷ Godwin, op cit., at 553.

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(3) A disclosure document for a financial product must include:

(a) all information, about each matter that the document is required by this Act or the financial services rules to set out or deal with, that:

(i) a reasonable person to whom the document is required to be given would reasonably require in order to decide whether to acquire the financial product; and

(b) all information, about any other matters that the document deals with, that:

(i) such a person would reasonably require in order to so decide; or

(ii) a professional adviser to such a person would reasonably require in order to so advise the person; and

(c) all other information that might reasonably be expected to have a material influence on such a person in so deciding.

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When a provider gives someone a disclosure document, the document must include everything that the customer will need to be told. What customers need to be told is listed in this Act and in the financial services rules. But those are the minimum. A provider should make it useful for the customer it is selling the product to. So, if a provider needs to include more than the minimum, then it should do so. A provider will need to put itself in the position of its customer to determine what information they would reasonably need to make good, sensible decisions.

V. Other Measures that can Enhance Understanding and Accessibility

From here the adoption of other measures in support of accessibility could be deployed – measures so

⁶⁸ ALRC Report 141, op cit., § 5.6 at 111; § 5.9 at 112; Recommendation 31 at 113; § 5.15-5.17 at 113-114.

⁶⁹ Isdale, William and Ash, Christopher, (30 November, 2021), “Undue complexity in Australia’s corporations and financial services legislation”, ALRC News, <<https://www.alrc.gov.au/news/undue-complexity/>>.

⁷⁰ ALRC Report 141, op cit., § 5.7, at 111.

⁷¹ Derrington, The Hon Justice Sarah C., (11 November, 2021), “The Changing Face of Law Reform in Australia: Commentary on the ALRC’s Inquiry Into Insolvency, its Contribution to the Current Legal

prosaic in nature that ordinarily they would not bear mentioning – but regrettably in this case they are. They include the use of definitions and their location, the use of delegated legislation, and modifications which cannot easily be located.

- Definitions should be consistent.⁶⁸ Inconsistency leads to confusion, and makes it more difficult for consumers to know their rights and obligations.

...a striking feature of the Act is how inconsistent it is in the design and deployment of defined terms. There are over 1,000 unique defined terms in the Act, and over 570 of those are defined more than once, providing different meanings for different parts of the Act. The term ‘property’ alone is defined seventeen times. The term ‘securities’ bears five different meanings.⁶⁹

- Definitions should be located in one place, for the same reasons.⁷⁰
- Modifications of schedules of regulations to the Act made by ASIC which are difficult to locate have the effect of making the law inaccessible, or worse, unknowable.

...legislation underpinning Australian corporate law, such as the *Corporations Act*, is regularly modified, amended and applied, and this contributes to the overall complexity of the system. There is also a large mass of ‘secret’ law, contained in legislative instruments made by bodies like ASIC, which unsophisticated users of the legislation struggle to find.⁷¹

The disorganised and impenetrable nature of, primarily, the *Corporations Act*, has been identified as a culprit in the findings of the Royal Commission of Inquiry into Misconduct in the Banking, Superannuation and Financial Services Industry (hereafter FSRC).⁷²

Framework and the Need for a New Review Given the Passage of Over 30 Years”, Federal Court of Australia, ARITA Expert Series: Insolvency – Session 1, § 28, <<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20211111>>.

⁷² See also: Government of the Commonwealth of Australia in its Australian Law Reform Commission, (October 2021), “Legislative Framework for Corporations and Financial Services Regulation. Improving the Navigability of Legislation”, Background Paper FSL3, § 2 at 3-1, available at: <<https://www.alrc.gov.au/wp->

Beyond these steps, the task of simplification grows harder and will take much longer. But it is harder, and will take longer, because the law is now spread over so many different Acts and is as complex as it is. That is, the very size of the task shows why it must be tackled.⁷³

Consumers will be supported in their efforts to find the relevant provisions in the legislation⁷⁴ if the legislation is drafted in a manner which takes account of presentation, structure, hierarchy and navigability.⁷⁵ That may include not only language (*stark language*) but also use of white space, font size, density of text, organisation of provisions and numbering.

The five canons of rhetorics, as identified by the philosopher Cicero... are still important in plain language work... arrangement relates to structure and organisation, and the effective sequencing of information in a text's structure according to the purpose of the text; style relates to expression (including word choice), sentence construction and length, and tone; delivery originally related principally to the verbal presentation of discourse, but in recent times it also relates to design issues such as typography, layout and other visual elements...⁷⁶

In respect of numbering sections within legislation, it is argued that regard be had to mnemonics. So, for example, if Australian financial services legislation is to be framed around the six norms of behaviour, recommended by Commissioner Hayne in the FSRC Final Report, or around the six pillars of the Treating Customers Fairly regime,⁷⁷ then it may support consumers to locate those six core principles of conduct, if they

were to be provided in section six of a new piece of legislation. Doing so would provide an easy-to-remember mnemonic: *my six core rights in s 6*, or *my six for six rights*.⁷⁸

As far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter.⁷⁹

Doubtless, within a short space of time, a simple web search through Google, phrased as “what are my 6 for 6 rights?” would present results pointing to the relevant place in the legislation.

The placement of core provisions taking account of mnemonics would facilitate informing consumers of this development. By some estimates, in excess of 99 per cent of the Australian population over the age of 14 have bank accounts.⁸⁰ Banks in turn are required to keep contact details for their customers which would include mobile phone numbers and/or email addresses. That alone would enable a virtually cost-free method by which to contact consumers to inform them of revisions, or enhancements to, rights upon which they can lay claim. If, in addition to those methods, other virtually cost-free methods were deployed by which to inform consumers of their rights (banners at the top of web pages or smartphone apps, notices printed at the bottom of paper statements and other forms of correspondence), then within a short space of time (a week?), potentially the majority of financial consumers in Australia would be informed

content/uploads/2021/10/FSL3-Navigability-of-Legislation.pdf>.

⁷³ FSRC Final Report, op cit., at 493.

⁷⁴ See also: Background Paper FSL3, *ibid.*, § 6/7 at 3-1.

⁷⁵ See also: Background Paper FSL2, op cit., § 70 at 2-17.

⁷⁶ Cornelius, Eleanor, (2015), “Defining ‘plain language’ in contemporary South Africa”, *Stellenbosch Papers in Linguistics*, Vol. 44, at 2, <<https://www.ajol.info/index.php/spl/article/view/133796>>.

⁷⁷ See: Schmulow, Andrew, (March 2022), “Treating Customers Fairly (TCF) in the South African Banking Industry: Laying the Groundwork for Twin Peaks”, *African Journal of International and Comparative Law*, Vol. 30, No. 1, pp: 25-38; Financial Services Board, Republic of South Africa, (31 March, 2011), “Treating Customers Fairly. The Roadmap”, in *Financial Services Board Policy Document*, pp 1-42, <https://www.fpi.co.za/documents/Advocay/FSB_TCF_Roadmap_Final_March_2011.pdf>.

⁷⁸ See also: Background Paper FSL2, op cit., § 130ff at 2-30ff; Background Paper FSL3, op cit., § 83 at 3-21, citing Thring: “suggested stating the law first and then how the law was to be administered”. Deployment of a mnemonic aids to render a phrase iconic. Examples abound, such as “slip, slop, slap”. That phrase has not only deeply penetrated the Australian community’s collective consciousness, its underlying meaning (combatting the carcinogenic effects of sunlight), is also well understood. This article argues that “my six for six rights” could, similarly, become iconic, and aid financial consumers to remember where to find their fundamental rights, as well as aid them to understand that their rights rest on six, core norms.

⁷⁹ FSRC Final Report, op cit., at 42.

⁸⁰ Citing World Bank data: Anon., (2022), “Australia: Percent people with bank accounts”, TheGlobalEconomy.com, accessed 12 March 2022<https://www.theglobaleconomy.com/Australia/percent_people_bank_accounts/>.

of their rights, applicable to them as financial consumers. This would lead to better informed consumers and provide a more informed and robust basis upon which consumers can engage with, and be served by, financial services firms.

That in turn would empower consumers and, arguably, support them in future to mitigate the harm visited upon them by the kinds of sustained and wide-spread industry misconduct observed in Australia from 2000 onwards.

VI. Conclusion

This article proceeds from the assumption that people should have the right to know what the law says, what it means, and how to use it, in order to protect themselves. This is especially so in financial services – an industry that was exposed by the FSRC as rife with misconduct, and which has caused serious, extensive, and lasting harm to as many as 54 per cent⁸¹ of the adult population of Australia.

New legislation (the purpose of which ought to be to protect consumers, and to prevent a re-occurrence of the fraud, theft, deception, misconduct and malfeasance that the FSRC brought to light), should proceed from the acknowledgement that consumers should be front and centre in every decision on how that legislation should be framed.

Creating legislation that can only be read and understood by lawyers will only serve to disempower consumers, and invite a re-occurrence of the venality and wickedness that gave rise to the FSRC. The antidote to which is consumers who can locate their rights, and once located, can read and understand what those rights are.

In order to support consumers to know and understand their rights, the legislation should be

accessible. That is to say, an average adult, of average intelligence, and with an average level of education, should be able to read the legislation and understand it. For that to be so, the legislation should be drafted in *plain English*, or indeed, in *stark language*.

With a careful approach to drafting, informed by linguistics, it is eminently possible to draft complex legislation so that consumers – including an average consumer, of average intelligence, average education, and an average level of financial literacy – can know and understand their rights, and be empowered. That includes legislation applicable to an industry as sophisticated as the financial industry, and which innovates as quickly as the financial industry does.

Reference has been made in this article to the *South African Conduct of Financial Institutions Bill (CoFI)*⁸². This piece of legislation was painstakingly drafted, over a period of six years, by the South African National Treasury, with support from Promontory Consulting, and brought together an international committee of experts.⁸³ The result is a comprehensive piece of legislation that governs market conduct and consumer protection in a G20 economy, with a highly developed, first-world, large and sophisticated financial industry, serving the needs of some 55 million consumers, subject to a Twin Peaks regulatory architecture, like that used in Australia. It is notable for the following reasons:

- It is less than 100 pages in length.
- Is written from start to finish in *plain English*.
- Is presented in large typeface, with plenty of white space, and for good measure uses Arial typeface – the easiest typeface for the human eye to read.

However, when it comes to *plain English* drafting, what Australians are subjected to is about

⁸¹ Breidbach, C., Culnane, C., Godwin, A., Murawski, C & Sear, C., (August 2019), “FinFuture: The Future of Personal Finance in Australia”, The University of Melbourne, p 4, available at: https://www.unimelb.edu.au/data/assets/pdf_file/0004/3145612/FinFuture_White_Paper.pdf.

⁸² Op cit.

⁸³ The writer served on the South African National Treasury’s Independent Committee of Experts from 2017 to 2019.

as accessible and readable as a multiple car-crash is to comfortable, enjoyable commuting. We can do better. And we should do better. We owe this to Australian consumers.

This writer recommends the establishment of a Committee of Experts for Accessibility and Drafting Sanity (CEADS). That Committee will be tasked with ensuring that financial services conduct legislation will be readable and accessible – and useful – to the people to whom it applies.

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