

## Royal Commission Series | Regulation and Enforcement

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There are a number of recommendations which focus on extending the powers and penalties associated with regulation and enforcement.

ASIC and APRA have also been the focus of recommendations targeted to enhance performance and oversight by the regulators themselves. In one of the more unique and bold recommendations of the Final Report, the Commissioner has recommended the Regulators are subject to their own accountability regime. The Recommendation to extend the BEAR to Regulators recognises that the Regulators too, must improve standards and must be accountable when they do not meet these standards. Some of the key categories of change recommended in the area of regulation and enforcement can be summarised as follows:

- Increased clout for industry codes
- Enforcement-led approach
- Reinforcement, adjustment and extended cooperation between ASIC and APRA;
- Oversight of Regulators

On 11 February 2019, APRA released its plans for responding to the Royal Commission recommendations. ASIC released its plans on 19 February 2019. ASIC has reinforced its previously adopted ‘why not litigate?’ enforcement stance (announced in October 2018) and announced the establishment of an Office of Enforcement within ASIC which will be in place by the end of 2019. A number of recommendations requiring APRA action are either commencing or underway.

It can therefore be expected that enforcement activity (which has already increased over the last 12 months (ASIC reported a 15% increase in enforcement investigations on foot since February 2018), enforcement activity will continue to rise and 2020 is shaping up to be a busy period for all. Included in the broader strategic changes which had already begun prior to the RC is also a new regulatory and supervisory approach such as ‘Close and Continuous Monitoring’ (CCM) and the adoption of RegTech and data analytics.

### Summary of Recommendations for Regulation and Enforcement

Category	Recommendations	Impact
Code enforceability	<p><b>Recommendation 1.15 – Enforceable code provisions</b></p> <p>The law should be amended to provide increased powers for ASIC to approve Codes and to provide for ‘enforceable code provisions’ where a contravention will constitute a breach of law.</p> <p><b>Recommendation 4.9 – Enforceable code provisions</b></p>	<ul style="list-style-type: none"> <li>• Breaches of ‘Enforceable Code Provisions’ will be reportable to ASIC/APRA if significant and/or material;</li> <li>• Contracts which do not comply with code provisions will constitute a breach of law</li> <li>• A breach of an industry Code could lead to multiple enforcement actions, sanctions and penalties by the</li> </ul>

	<p>Insurance industry Codes should provide for ‘enforceable code provisions’ and particularly those provisions in the which govern the terms of contract made or to be made between the insurer and the policyholder designated as ‘enforceable code provisions’</p> <p>4.10 – Relevant bodies overseeing compliance with Insurance industry Codes to be provided with the power to impose sanctions on subscribers who have breached the applicable Code.</p>	<p>applicable Code compliance bodies and also ASIC/APRA.</p> <ul style="list-style-type: none"> <li>• Obligations to report breaches to multiple regulators including code compliance bodies may apply for certain types of breaches.</li> </ul>
<p><b>Enforcement-led approach</b></p>	<p><b>Recommendation 6.2 – ASIC’s approach to enforcement</b></p> <p>ASIC should adopt an approach to enforcement that starts with the question of whether a court should determine the consequences of a contravention, ensures infringement notices are for administration errors only, recognises the importance of general and specific deterrence, separates enforcement staff from non-enforcement related contact</p>	<ul style="list-style-type: none"> <li>• Increased litigation initiated by ASIC for contraventions of the law.</li> <li>• More legal precedents established under common law on interpretation of the legal principles may emerge.</li> <li>• Decrease in infringement notices except for administration breaches and decrease in ‘negotiated outcomes’.</li> <li>• More robust enforceable undertakings which require regulated entities to admit to and acknowledge contraventions.</li> </ul>
<p><b>Reinforcement, adjustment and extended cooperation between ASIC and APRA</b></p>	<p><b>Recommendation 3.8 – Adjustment of APRA and ASICs roles</b></p> <p>The roles of APRA and ASIC will be adjusted for oversight of super to reflect R 6.3 (the general principles for co-regulation whereby APRA will regulate prudential obligations and ASIC conduct and disclosure).</p> <p><b>Recommendation 6.1 – Retain twin peaks</b></p> <p>Twin Peaks model of APRA and ASIC will be retained.</p> <p><b>Recommendation 6.3 – General principles for co-regulation</b></p> <p>General principles of regulation by APRA and ASIC to be applied to the superannuation industry whereby APRA should retain a focus on prudential obligations and ASIC should enforce conduct and disclosure obligations on RSE licensees.</p> <p><b>Recommendation 6.4 – ASIC as a conduct regulator</b></p>	<ul style="list-style-type: none"> <li>• Increased enforcement actions by ASIC/APRA over superannuation entities.</li> <li>• Changes to how regulated entities engage with ASIC on different matters, potentially less opportunity for ‘regulator engagement’ meetings and more focus on enforcement engagement.</li> <li>• Increased oversight and enforcement activity resulting from mandatory cooperation between APRA and ASIC.</li> </ul>

	<p>Roles of APRA and ASIC clarified and expanded such that ASIC regulates conduct in the financial services industry that may cause harm to consumers including misconduct by an RSE licensee or director of a civil penalty provision under the SIS Act or otherwise.</p> <p><b>Recommendation 6.5 – APRA to retain functions</b></p> <p>APRA retains current functions.</p> <p><b>Recommendation 6.9 – Statutory obligation to co-operate</b></p> <p>Statutory obligation to co-operate to be implemented for co-operation between APRA and ASIC.</p> <p><b>Recommendation 6.10 – Co-operation memorandum</b></p> <p>Co-operation memorandum between ASIC and APRA to be amended to reflect statutory obligations and reviewed biennially.</p>	
<p><b>Oversight and Governance of Regulators</b></p>	<p><b>Recommendation 6.11 – Formalising meeting procedure</b></p> <p>Statutory provisions to be developed formalising Commissioner meetings.</p> <p><b>Recommendation 6.12 – Application of the BEAR to regulators</b></p> <p>An accountability regime similar to the BEAR to apply to APRA and ASIC.</p> <p><b>Recommendation 6.13 – Regular capability reviews</b></p> <p>Regular capability reviews of APRA and ASIC performance at least every 4 years.</p> <p><b>Recommendation 6.14 – A new oversight authority</b></p> <p>A new oversight authority to be established.</p>	<ul style="list-style-type: none"> <li>• Regulator engagement will change.</li> <li>• Less ability to achieve negotiated outcomes.</li> <li>• Increased oversight of APRA and ASIC leading to tougher enforcement.</li> </ul>

## What can you do now to prepare?

With enhanced powers and resources and ongoing oversight banking, superannuation and financial services entities can expect there will be a substantial increase in enforcement action by ASIC and APRA. For ASIC, there is likely to be a mixture of past and current conduct and noncompliance that will be the subject of

enforcement and for APRA, it is more than likely enforcement activity will be in the areas which are within its remit under the BEAR as well as increased regulation on failure to meet prudential obligations.

As noted above, the regulators are expanding their RegTech and data analytics capability and one of the most valuable actions an organisation can do now is to explore its own use of RegTech and data analytics capability to ensure they are monitoring and supervising their own activities and to ensure they are proactively identifying and addressing issues, before the Regulator comes knocking.

### **Closing Comments**

While institutions cannot change their compliance failings of the past, they can act swiftly to self-identify systemic compliance issues/noncompliance and take steps to rectify the issues and remediate customers before the regulators take action. While this will not prevent enforcement action from being taken, proactive steps to self-identify issues and “clean out the cobwebs” will assist in potentially mitigating the severity of any enforcement activity and the costs associated with rectifying and remediating issues if they are dealt with earlier.

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We view the Royal Commission recommendations as an opportunity for industries to strengthen their compliance frameworks and apply independent practices to their respective businesses.

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