

Royal Commission Series | Insurance

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Commissioner Hayne focused on the life insurance and general insurance industries as this was consistent with the complaints made to the Commission. Whilst in some respects the insurance sector may have escaped some of the harshest criticism, it is clear there are to be significant changes on the way for the sector. This includes:

- the prohibition on ‘hawking’;
- reform to the disclosure and misrepresentation regime for policies;
- increased clout for the industry codes.

Summary of Certain Recommendations for Insurance

Category	Recommendation	Comments/Impact
Manner of sale and types of products sold: Hawking	Recommendation 4.1 – No hawking of insurance Consistently with Recommendation 3.4, which prohibits the hawking of superannuation products, hawking of insurance products should be prohibited.	<ul style="list-style-type: none"> • Hawking has been a particular problem in the insurance sector. The prohibition will relate to unsolicited offers and sales and a statutory definition of the concept is said to be desirable to remove doubt. • Sales models and in particular call center sales models which focus on outbound sales will clearly be impacted. Also, insurance sales models at the point of sale will require review. • Potential decrease or ‘phasing out’ of insurance policies traditionally sold through impacted sales models (such as funeral policies and gap insurance).
	Recommendation 4.2 – Removing the exemptions for funeral expenses policies The law should be amended to: <ul style="list-style-type: none"> • remove the exclusion of funeral expenses policies from the definition of ‘financial product’; and • put beyond doubt that the consumer protection provisions of the ASIC Act apply to funeral expenses policies. 	<ul style="list-style-type: none"> • Funeral insurance has come in for some particular attention and funeral expenses policies are in the future to be a financial product and subject to the obligations under the <i>Corporations Act</i>. In particular, if companies do not currently hold an AFSL, they will be required to be licensed under the reform. • The policies will also be subject to increased regulation under the consumer protection provisions.

		<ul style="list-style-type: none"> • Insurance policy terms will need to be reviewed and amended to reflect the new duty.
<p>Pre-contractual disclosure and representations</p>	<p>Recommendation 4.5 – Duty to take reasonable care not to make a misrepresentation to an insurer</p> <p>Part IV of the Insurance Contracts Act should be amended, for consumer insurance contracts, to replace the duty of disclosure with a duty to take reasonable care not to make a misrepresentation to an insurer (and to make any necessary consequential amendments to the remedial provisions contained in Division 3).</p>	<ul style="list-style-type: none"> • A significant Recommendation which should have an impact on the ability of insurers to avoid their obligations under policies • One issue may be the impact of any increased risk, or the need for increased due diligence here, for insurers. • Sales processes will also require review to ensure there is sufficient due diligence performed to manage any change in risk as a result of the revised duty.
	<p>Recommendation 4.6 – Avoidance of life insurance contracts</p> <p>Section 29(3) of the Insurance Contracts Act should be amended so that an insurer may only avoid a contract of life insurance on the basis of non-disclosure or misrepresentation if it can show that it would not have entered into a contract on any terms.</p>	<ul style="list-style-type: none"> • Insurers will need to consider the terms of their policies and whether there will be a significant increase in risk, and the process for assessment of risk.
<p>Unfair contract terms</p>	<p>Recommendation 4.7 – Application of unfair contract terms provisions to insurance contracts</p> <p>The unfair contract terms provisions now set out in the ASIC Act should apply to insurance contracts regulated by the Insurance Contracts Act. The provisions should be amended to provide a definition of the ‘main subject matter’ of an insurance contract as the terms of the contract that describe what is being insured.</p> <p>The duty of utmost good faith contained in section 13 of the Insurance Contracts Act should operate independently of the unfair contract terms provisions.</p>	<ul style="list-style-type: none"> • Consistent with the previous Recommendations the unfair contract terms are to apply like they do to other financial products and services • A result here is to level the playing field to some extent between insurers and insureds. • Insurance policy terms and other standard form documentation falling into the regime will require review and amendment form compliance with the regime.
<p>Claims handling</p>	<p>Recommendation 4.8 – Removal of claims handling exemption</p> <p>The handling and settlement of insurance claims, or potential insurance claims, should no longer be excluded from the definition of ‘financial service’.</p>	<ul style="list-style-type: none"> • Claims handling is to become a financial a service and as such will be subject to the general obligations of the <i>Corporations Act</i>. This appears to be a consistent move with other recommendations directed at ensuring all aspects of the insurance life cycle are captured under a regulatory regime. • Separate administration entities which are not currently licensed will need to hold an AFS license or merge with a licensee (with appropriate authorisations) so that they fall under an existing AFS license.

<p>Status of industry codes</p>	<p>Recommendation 4.9 – Enforceable code provisions</p> <p>As referred to in Recommendation 1.15, the law should be amended to provide for enforceable provisions of industry codes and for the establishment and imposition of mandatory industry codes.</p> <p>In respect of the Life Insurance Code of Practice, the Insurance in Superannuation Voluntary Code and the General Insurance Code of Practice, the Financial Services Council, the Insurance Council of Australia and ASIC should take all necessary steps, by 30 June 2021, to have the provisions of those codes that govern the terms of the contract made or to be made between the insurer and the policyholder designated as ‘enforceable code provisions’.</p>	<ul style="list-style-type: none"> • A consistent theme of the Commission has been for the industry codes to be given more clout. The insurance industry codes are no exception. • In addition, the breach of an enforceable code provision is to be a breach of the law.
	<p>Recommendation 4.10 – Extension of the sanctions power</p> <p>The Financial Services Council and the Insurance Council of Australia should amend section 13.10 of the Life Insurance Code of Practice and section 13.11 of the General Insurance Code of Practice to empower (as the case requires) the Life Code Compliance Committee or the Code Governance Committee to impose sanctions on a subscriber that has breached the applicable Code.</p>	<ul style="list-style-type: none"> • This is consistent with the industry codes being given greater clout. It will be for the relevant Committee to impose the sanctions as the previous restrictions are to be removed.
<p>External dispute resolution</p>	<p>Recommendation 4.12 – Accountability regime</p> <p>Over time, provisions modelled on the BEAR should be extended to all APRA-regulated insurers, as referred to in Recommendation 6.8.</p>	<ul style="list-style-type: none"> • Another consistent theme has been for the BEAR regime to be further expanded into the other industries in the financial sector. The insurance industry is to be no exception. • The insurance sector will need to prepare for BEAR.
<p>Group life policies</p>	<p>Recommendation 4.13 – Universal terms review</p> <p>Treasury, in consultation with industry, should determine the practicability, and likely pricing effects, of legislating universal key definitions, terms and exclusions for default MySuper group life policies.</p>	<ul style="list-style-type: none"> • The pricing and risk impact which may result from this Recommendation will need to be considered. • Policy terms will need to be reviewed and amended to incorporate new definitions. • The reforms will provide more clarity for customers and regulators which could lead to an increase in claims and enforcement.
	<p>Recommendation 4.14 – Additional scrutiny for related party engagements</p> <p>APRA should amend Prudential Standard SPS 250 to require RSE licensees that engage a related party to provide group life insurance, or who enter into a contract, arrangement or understanding with a life insurer by which the insurer is given a priority or privilege in connection with the provision of life insurance, to</p>	<ul style="list-style-type: none"> • This is consistent with other Recommendations relating to protecting the interests of members. • One issue that remains to be seen, however, will be what changes to the terms of the insurance or its pricing will be

	<p>obtain and provide to APRA within a fixed time, independent certification that the arrangements and policies entered into are in the best interests of members and otherwise satisfy legal and regulatory requirements.</p>	<p>necessary to obtain the certification.</p> <ul style="list-style-type: none"> • The detail of this requirement will be important. For instance the definition of 'best interests of members' and how this would be evidenced has been met.
	<p>Recommendation 4.15 – Status attribution to be fair and reasonable</p> <p>APRA should amend Prudential Standard SPS 250 to require RSE licensees to be satisfied that the rules by which a particular status is attributed to a member in connection with insurance are fair and reasonable.</p>	<ul style="list-style-type: none"> • Whilst it is stated that there no need for further protection if the trustee complies with its obligations, the Recommendation has still been made as further protection for members. • Similar to recommendation 4.15 the detail will be important. In particular, the definition of 'fair and reasonable' and how this would be evidenced for each member.

What can you do now to prepare?

The insurance sector has some work to do here. This includes reviewing the manner of selling insurance products, the handling of disputes, the terms of policies, the changes that will be necessary to comply with all the Recommendations and, last but not least, the pricing impact.

There are a number of changes which impact insurance contract terms. Regulated-entities should consider seeking coordination of changes to policy terms to assist in managing potential compliance costs associated with multiple changes to insurance contracts.

Closing Comments

Commissioner Hayne sees the Recommendations as bringing the regulation of insurance into line with that of other financial products and to better level the playing field between insurers and insureds. Whilst there will be some differences of opinion on some aspects, overall it is difficult to fault the rationale here.

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