

How the Royal Commission impacts the superannuation industry

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"The central principle surrounding regulation arrangements are, and must remain, in the best interests of members." Commissioner Hayne, February 2019.

The final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry contains a vast list of 76 recommendations across three volumes. The findings include the impact these recommendations will have upon the superannuation industry, especially for trustees, superannuation funds and investment managers. While the report recognises the importance of tightening the regulation and supervision of the superannuation industry, key legislation has been in existence for a long time. Clarity of the roles of ASIC and APRA as regulators is presented in the report.

A new oversight authority is proposed, independent of the government, which will assess the effectiveness of ASIC and APRA in discharging their functions and meeting their statutory obligations. Without limiting APRA's existing powers under the SIS Act, it is proposed that ASIC will be given the power to enforce all provisions in the SIS Act that give rise to a cause of action against an RSE licensee or director for harmful conduct against consumers.

Clarity has been provided in the superannuation industry, APRA is the prudential regulator and responsible for system and fund performance while ASIC will be responsible for conduct and disclosure. These regulators should be enforcing penalty provisions or other provisions relating to harmful conduct against consumers.

Other core recommendations follow:

Trustees of Registrable Superannuation Entities (RSE) will be prohibited from "assuming obligations other than those arising from, or in the course of, its performance of the duties of a trustee of a superannuation fund".

This recommendation for trustees to have no other role or office addresses the risks associated with dual regulated entities. The Royal Commission indicated that conflicts of interests arise between superannuation members and members of managed investment schemes where an entity acts as a trustee for both the superannuation fund and the managed investment scheme. Effective regulation will require increased disclosure to consumers, APRA and ASIC. However, the report did not seem to question other areas of conflict, such as the issue of share ownership of trustees.

MySuper accounts will no longer be allowed to deduct advice fees other than for intra-fund advice.

Attempts have been made in the past to tighten the provisions that prohibit trustees of a superannuation fund from performing acts which may reasonably be understood to have a purpose of having the recipients nominate a fund as their default fund. The Royal Commission's recommendation to restrict the deduction of advice fees is a further step in the process.

Any breach of the trustee or director's covenants or obligations in the SIS Act should be enforceable by action for a civil penalty.

Thus far, there have not been many court cases against trustees for breaching these covenants, which are an essential part of the SIS Act. According to Commissioner Hayne, the underlying norms of conduct are already embedded into the existing law but the need to abide by these laws should be enforced by APRA.

Hawking of superannuation products will be prohibited, except to those who are not retail clients and except for offers made under an eligible employee share scheme.

Although this prohibition is already in place within the existing regulations, it will still impact the superannuation industry to prevent unsolicited approaches to individuals or potential members.

The Commissioner made four critical observations in the report about the various instances where entities conduct has broken the law:

- The connection between conduct and reward;
- The asymmetry of power and information between financial services entities and their customers;
- The effect of conflicts between duty and interest; and
- Holding entities to account.

The Federal government is responsible for the laws and regulations regarding financial institutions. The release of the final report received emphatic support from both of Australia's major political parties for almost all of its 76 recommendations. The recommendations will probably not proceed into legislation until after the next federal election some time this year. Even then, it will only occur after industry consultation in the second half of this year.

Ultimately, the effectiveness of the Royal Commission in reforming the financial services sector will be implemented through to 2022. Recommendations will only bring about marginal change to the regulations. The report serves as a wake-up call to superannuation members and trustees while clarifying the role of the two regulators. According to Commissioner Hayne, "improvements in one area will reinforce

improvements in others; inaction in one area will undermine progress in others". This will be advantageous for members and consumers.