

Article Information

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It's raining consultations: What draft legislation has the government dropped in 2020?

Treasury have released a plethora draft legislation intended to implement the 22 recommendations from the Financial Services Royal Commission.

On 31 January 2020, Treasury released over 20 pieces of draft legislation for consultation which proposes to implement 22 recommendations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**). The draft legislation follows from the Federal government's Royal Commission Implementation Roadmap. All submissions to the recommended legislation have deadlines of 28 February 2020 and are likely to commence on 1 July 2020.

Below we provide a summary of each draft legislation. If you would like to discuss how these proposed Bills may affect your business, please get in touch with us.

Strengthening breach reporting

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: FSRC recs 1.6, 2.7, 2.8, 2.9 and 7.2 (Reference checking and information sharing, breach reporting and remediation)

This draft legislation aims to strengthen breach reporting by introducing new reference checking and information sharing obligations for Australian Financial Services License (**AFSL**) holders and Australian Credit License (**ACL**) holders. It also proposes to strengthen the breach reporting regime for financial services and credit licensees by introducing new requirements that need to be upheld for investigating and remediating misconduct and introduces new penalty provisions for non-compliance. There will be greater obligations to notify and compensate retail clients and consumers who have received personal advice or mortgage related credit assistance. There will also be reporting requirements for other licensees who give personal advice to retail clients or those who are mortgage brokers. ASIC will publish licensee-level information about reports of breaches of core obligations every financial year.

Enforceability of financial services industry codes

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 1.15 (Enforceable code provisions).

This proposed Bill intends to develop the currently existing framework existent in the Corporations Act 2001 (**Corporations Act**) and National Consumer Credit Protection Act 2009 (**NCCP**). The proposed development would allow ASIC to designate enforceable code provisions to approve financial sector industry codes. It also intends to introduce a framework which will establish mandatory codes of conduct for the financial services industry through regulations. Importantly, if a person breaches an enforceable code provision, a civil penalty of 300 penalty units will apply.

Ongoing fee arrangements and disclosure of lack of independence

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 2.1 (Ongoing fee arrangements).

This proposed Bill targets the issue of fee for no service arrangements.

It also:

- ensures financial services providers seek annual renewal for ongoing fee arrangements;
- requires fee recipients to disclose in writing the total fees charged;
- outlines services that will be provided during the following 12 month period; and
- obtain written consent that fees under an ongoing fee arrangement can be deducted from a client's account.

The draft legislation also implements the new record-keeping requirements.

Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 2.2 (Disclosure of lack of independence).

The draft legislation introduces a new requirement amending the Corporations Act requiring entities that are financial services licensees or authorised representatives providing personal advice to retail clients to disclose in writing if they are not independent and the reason they are not independent to the retail client.

Trustees of Registrable Superannuation Entities (RSE) should hold no other role or office

Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 3.1 (RSE licence conditions - no other duty).

This proposed legislation imposes an extra condition on RSE licences held by a body corporate trustee and intends to prohibit superannuation trustees from having duties other than those arising from their performance as trustee of a superannuation fund or providing personal advice. The new condition will prohibit trustees from having a duty to act in the interests of another person dependant on exceptions that would allow trustees to undertake their functions as RSE licensees.

Advice fees in superannuation

Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2020 Measures)) Bill 2020: fees (FSRC recs 3.2 and 3.3).

The proposed Bill intends to remove a superannuation trustee's capacity to charge advice fees from MySuper products and the trustee's ability to charge a member advice fees unless criteria are met, other than fees for intra-fund advice.

No hawking of financial products

Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2020 Measures)) Bill 2020: FSRC recs 3.4 and 4.1 (Hawking of financial products).

To address recommendations 3.4 and 4.1 regarding the hawking of financial products, the proposed legislation intends to strengthen existing hawking prohibitions contained in the Corporations Act by implementing a singular prohibition for the hawking of all financial products including both superannuation and insurance.

Superannuation regulator roles

Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2020 Measures)) Bill 2020: FSRC recs 3.8, 6.3, 6.4 and 6.5 (ASIC regulation of superannuation).

The draft legislation intends to adjust the APRA and ASIC roles in regards to superannuation so that APRA will be the prudential regulator and ASIC, the conduct and disclosure regulator. It also intends to give ASIC joint responsibility for enforceable provisions in the Superannuation Industry (Supervision) Act 1993 which has consumer protection at its core. To ensure ASIC has access to the required powers and enforcement tools, the ambit of the AFSL regime in superannuation will be extended.

Restricting use of the term 'Insurance' and 'Insurer'

Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2020 Measures)) Bill 2020 (Use of terms "insurance" and "insurer").

This proposed Bill aims to restrict firms using the terms "insurance" and "insurer" to only those that use them in a legitimate manner. It also introduces 50 penalty units for individuals or 500 penalty units for a body corporate who do not comply with this new regulation.

Deferred sales model for add-on insurance

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 4.3 (Deferred sales model for add-on insurance).

The draft legislation intends to introduce an industry-wide deferred sales model for the sale of all add-on insurance products, excluding policies of comprehensive motor insurance. This is to promote consumers making informed purchasing decisions for add-on insurance markets by introducing a deferral period, which will allow them to consider the insurance offered and also other insurance products. This draft Bill is significant as it ties in with ASIC's proposal to utilise their product intervention power to reform the sale of add-on financial products by car yards.^[1]

The proposed regulations are to be implemented through:

- prescribing when the consumer is taken to have entered into a commitment to obtain certain principal products or services; and
- amending the Corporations (Fees) Regulations 2001 to prescribe a fee which ASIC will be able to charge a person who applies to ASIC for an exemption from the deferred sales model.

The proposed Bill will also make non-compliance an offence.

Cap on vehicle dealer commissions

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 4.4 (Caps on commissions).

The draft legislation is aimed at capping the amount of add-on insurance commissions which can be paid to motor vehicle dealers in regards to add-on risk products including tyre and rim insurance, mechanical breakdown insurance and consumer credit insurance.

Through this legislation ASIC will also be conferred the power to cap commissions on insurance-like products including warranties sold by car dealers.

Duty to take reasonable care not to make a misrepresentation to an insurer

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 4.5 (duty of disclosure to insurer)

The draft Bill intends to impose on insureds a duty to take the reasonable care necessary to not make misrepresentations to the insurer when entering, varying, extending or renewing a consumer insurance. This is intended to replace the existing duty of disclosure found in Part IV of the Insurance Contracts Act 1984. These intended changes will ensure consumers' obligations for disclosure do not allow insurers to unduly reject the payment of legitimate claims.

Limiting avoidance of life insurance contracts

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 4.6 (Avoidance of life insurance contracts)

The proposed legislation would amend the Insurance Contracts Act 1984 to strengthen consumer protection by limiting the circumstances in which an insurer can avoid a life insurance contract due to non-fraudulent misrepresentation or non-fraudulent failure. This would prevent life insurers from inappropriately cancelling or avoiding a contract where they would otherwise still be required to provide insurance.

Financial Regulator Assessment Authority

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 6.14 (Financial Regulator Assessment Authority) and *Financial Regulator Assessment Authority* Bill 2020

The proposed Bill intends to establish a new authority, the Financial Regulator Assessment Authority. This new Authority will be formed to monitor APRA and ASIC to ensure they are effectively functioning. Both regulatory bodies are also required to cooperate with the Authority so they can fully exercise their powers.

Implementation of ASIC Enforcement Review Taskforce – Directions Power

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 7.2 (ASIC directions)

The draft legislation will implement the ASIC Enforcement Review Taskforce to ensure ASIC has the ability to direct financial services licensees and credit licensees to prohibit possible breaches of financial services law or credit legislation.

[1] CP 324, '[Consultation Paper 324 – Product intervention: The sale of add-on financial products through caryard intermediaries](#)'.