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Final Report Overview and Implications

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Rec. number	Recommendation and Government Response	Issues and implications
Banking		
Consumer Lending: Direct Lending		
1.1	There should be no amendment to the NCCP Act to assess unsuitability. **Government** agrees (and did not acknowledge a case for change if the ASIC v Westpac case reveals any deficiency.	However, the Commissioner acknowledges that ASIC has unresolved court proceedings against Westpac and that if those proceedings reveal some "deficiency" in the law's inquiry and verification requirements for a consumer's financial situation, the law should be amended as soon as reasonably practicable. It is reasonable to anticipate that if ASIC is unsuccessful, ASIC will assert that such a deficiency exists.
Consumer lending: Intermediated home lending		
1.2	The law should be changed to require mortgage brokers for home lending to act in the best interests of the borrower and for contravention to attract a civil penalty. **Government** agrees.	While brokers, by virtue of being agents of the borrower already have fiduciary duties under principles of agency and the NCCP Act requires that they (or the licensee they represent) have adequate arrangements to ensure clients are not disadvantaged by any conflict of interest, this recommendation would overlay these with a statutory "best interest duty" equivalent to that imposed on financial product advisers under chapter 7 of the Corporations Act, contravention of which would attract a civil penalty.
1.3	Mortgage broker remuneration should be paid by the borrower, not the lender. 2-3 years should be allowed for gradual implementation with priority given to abolishing trail commission for new business. **Government** agrees - From 1 July 2020:	The Commissioner characterises brokers as advisers and commissions as conflicted remuneration. The Commissioner says borrowers should pay a transparent price to brokers for the broking service rather that lenders paying commissions based on the value of a distribution channel. When capitalised with a home loan, the Commissioner suggests serviceability calculations would be unaffected. The Commissioner doubted arguments that brokers contribute to

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	• trail commission will be prohibited for new loans; • value of upfront commissions must be linked to the amount drawn-down, not the loan amount. • campaign and volume-based commissions will be banned.	competition. The Report adds in the 2-3 year implementation period, trail commissions should be outlawed in 12-18 months. To maintain a level playing field between direct and intermediated lending, the Commissioner proposes, drawing on an example in the Netherlands, that banks charge a fee to direct borrowers to recover distribution costs for direct distribution, being a charge that would not be payable when dealing with a broker.
1.4	Mortgage broker remuneration should be monitored by Treasury led working group. **Government** agrees. The Council of Financial Regulators and the ACCC will be asked to review in 3 years the impact of the broker commission changes.	This is to ensure fees set by banks are no more than the additional cost to the bank of its direct channels, as distinct from broker channels.
1.5	After a transition period, mortgage brokers should be regulated as entities providing financial product advice. **Government** agrees.	Again, this reflects the Commissioner's characterisation of brokers as advisers rather that alternative or lower cost channels for accessing finance. The Commissioner anticipates this will require statements of advice to be given and would give rise to educational requirements (the Commissioner does not acknowledge the responsible lending disclosure documents (such as a credit proposal document) and training requirements under the NCCP Act).
1.6	ACL holders should be subject to information-sharing and reporting obligations for misconduct by brokers and must take steps to detect misconduct through reasonable inquiries. **Government** agrees	Consistent with recommendations for financial advisers, the Commissioners proposes corresponding measures for brokers.
1.7	The point-of-sale (POS) exemption should be abolished. **Government** agrees.	The POS exemption in reg 23 of the NCCP Regulations allows car dealers and other retailers to introduce customers to financiers and prepare finance applications to finance customer purchases without the need to hold an ACL or be a credit representative of a credit provider. A separate exemption in reg 23A is available for retailers who arrange finance through a co-branded card such as a David Jones American Express Card and this would not be affected by the

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		recommendation. The abolition would likely result in credit providers having to appoint car dealers and other retailers as credit representatives. As credit representatives, they will need to provide their own credit guides and be members of the Australian Financial Complaints Authority. The Commissioner does not acknowledge that these dealers and retailers are already "representatives" of ACL holders and, as a result, the ACL holders are already accountable for them with responsibility to ensure compliance with credit legislation, participation in training and management of conflicts.
Access to banking services		
1.8	The ABA's Banking Code should provide that banks: • work with customers in remote areas and are not adept in using English to identify a suitable way for accessing banking; • follow AUSTRAC guidance for verifying identity of persons of Aboriginal and Torres Straight heritage; • not allow informal overdrafts on basic accounts without express customer agreement; and • not charge dishonour fees on basic accounts. **Government** agrees.	The Banking Code already contains some measures, albeit more limited in scope, for assisting vulnerable customers who seek assistance. This recommendation concerning access is expressed in more active terms and applies to different but overlapping classes of customers.
Lending to small and medium enterprises		
1.9	NCCP Act should not be extended to apply to small business lending. **Government** agrees.	The Commissioner acknowledges existing protections for small business customers such as the ASIC Act and the Banking Code of Practice and accepted submissions that extending responsible lending obligations to small business finance would likely increase the cost of such finance.

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1.10	The ABA should amend the definition of 'small business' to cover businesses with less than 100 full time employees applying for a loan less than $5 million. **Government** agrees.	The Commissioner's recommendation relates only to customers applying for loans yet the Banking Code of Practice concerns all banking services. The recommendation treats the number of employees of the customer's business (or the customer's group) as the sole characteristic to determine whether the customer is a small business. Under the recommendation, the amount of the relevant loan is also a factor, but that is not a characteristic of the customer, it is merely an aspect of the context in which the Code would be applied. The current Code test is based upon the previous year's annual turnover being less than $10M, having less than 100 employees (or FTEs) and the total debt to all credit providers.
1.11	There should be a national farm debt mediation scheme. **Government** agrees.	In his report, the Commissioner makes the further observation that lenders should offer farm debt mediation as soon as a loan is classified as distressed and that the Banking Code should be amended accordingly.
1.12	APRA's prudential standard APS 220 - Credit Quality should be amended to require that internal appraisals of land be independent on loan origination and provide for valuation of agricultural land to recognise the likelihood of external events and the impact on realisable value of the time it may take to sell. **Government** agrees.	APRA had already announced an intention to effect changes requiring this level of independence of valuations.
1.13	The Banking Code should be amended to prevent banks from charging default interest (including a higher rate of interest) on agricultural land which is the subject of a declaration of drought or natural disaster. **Government** agrees.	The Commissioner refers to "powerful reasons" for this recommendation without articulating them. He makes the observation that he would not stop banks changing default interest as a general proposition.
1.14	Banks should take certain protective measures for farmers when dealing with distressed agricultural loans (including by using experienced agricultural bankers, offering mediation sooner, proceeding on the footing that "working out" will be the best outcome, recognising receivers as a last resort and ceasing default interest where there is no reasonable prospect of recovery).	In his report, the Commissioner also urges banks dealing with distressed loans to apply their hardship policies in light of evidence that they had not always done so for distressed agricultural loans. In relation to default interest for distressed agricultural loans, the Commissioner expressed a concern that it is nothing more than a bargaining chip "with no

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	Government agrees.	realisable value".
Enforceability of industry codes		
1.15	The law should be amended to provide for: • ASIC to approve codes of conduct for all APRA regulated entities and ACL holders; • "enforceable code provisions" in approved codes which would have legal force and the extent of enforceable code provisions should be considered by ASIC in approving a code; • Provide for remedies based on Part VI of the Competition and Consumer Act; • provide for establishing and imposing such financial services industry codes **Government** agrees.	On one view, by representing that it complies with the Code, a subscribing bank is bound by all of a code's provisions both as a matter of contract and as a representation in trade or commerce. A concern of the Commissioner is that codes such as the Banking Code contain a broad range of provisions with only some being binding promises. The Commissioner proposes that there be a clear distinction between provisions which are "enforceable code provisions" and provisions which are not. An unintended consequence of this approach may be that the provisions which are not "enforceable code provisions" are diminished in there effect because they would not be "enforceable" provisions. The Commissioner has proposed that if industry did not put forward it proposed enforceable code provisions in a timely manner, consideration would have to be given to whether it is desirable to impose a mandatory code. This is curious because codes have evolved as a device for industry self-regulation serving as an alternative to government imposed regulation. The concept of an imposed industry code therefore raises the question of why bother with a code at all.
1.16	Drawing on recommendation 1.15, the ABA's Banking Code should stipulate that provisions which govern the terms of the customer contract and any guarantee are enforceable code provisions. **Government** agrees.	This reflects the Commissioner's commentary in relation to recommendation 1.15 and suggests that the only enforceable code provisions would be those which relate to contact or guarantee terms.
Processing and administrative errors		
1.17	After consultation, APRA should determine a new responsibility for an accountable person under s. 37BA(2)(b) of the Banking Act (BEAR provisions) which would relate to the design, delivery and maintenance of all	This is intended to address the lack of "ownership" for product failures and failures in remediation. The Commissioner proposes that APRA consult with at least the big 4 banks on how to define the new "accountable person" responsibility.

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	products offered to customers by the ADI and any necessary remediation). **Government** agrees.	
Financial Advice		
Ongoing Fee Arrangements		
2.1	The law should be amended to mandate annual renewal of ongoing fee arrangements; annual recording of the services clients will be entitled to receive and the total fees to be charged. The arrangements may neither permit nor require payment of fees from any client without express written authority given immediately after the latest renewal of the fee arrangement. **Government** agrees.	This recommendation responds to the conduct described as "fees for no service" whereby institutions would set and forget fees which were not clearly attributable to any actual service received by clients. Since the conflicted remuneration probation in the FOFA reforms, it had become commonplace to charge service fees as a means of earning revenue in place of earlier commissions. In many cases the fees were said to be charged "invisibly" in the sense that they were simply deduced from client superannuation funds and other investment accounts often without records of the services to which they related. In some cases there was not "adviser" to whom the fees could relate.
Lack of independence		
2.2	The law should be amended so that rather than simply restricting use of the words "independent", "impartial" and "unbiased", a financial adviser who is so restricted in giving personal advice must give a retail client a written statement explaining why the adviser is not "independent", "impartial" and "unbiased". **Government** agrees.	The Commissioner has expressed concern that the disclosures in a FSG will be inadequate to put a client on notice that the advice being received is not "independent", "impartial" and "unbiased". The recommendation places faith in the effect of disclosure documents. In circumstances of multiple existing disclosure documents such as FSGs, statements of advice and product disclosure statements which all include other important information, a question arises as to how effective yet another disclosure document will be.
Quality of advice		
2.3	By 30 June 2022, the Government and ASIC should review the effectiveness of changes to improved advice quality and whether the existing "safe harbour"	The recommendation is made in the context of the Commissioner's reservations about the "tick-a-box" approach which the existing safe harbour provision

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	checklist for the "best interests obligation" (s. 961B(2) Corporations Act) be retained. **Government** agrees. Earlier FoFA reforms will also be reviewed.	promotes. He seeks to defer any decision to remove the safe harbour until an assessment can be made of the other reforms.
Conflicted remuneration		
2.4	Grandfathering provisions for conflicted remuneration should be repealed. **Government** agrees to end grandfathering arrangements by 1 January 2021 and from that date rebates to clients of previously grandfathered conflicted remuneration will be required for identifiable clients. If clients cannot be identified (eg for volume based remuneration), the benefit should be passed on indirectly, say through reduced fees. **Government** will commission ASIC to monitor and report on the extent to which product issuers are acting to end grandfathering between 1 July 2019 and 1 January 2021 and passing on benefits to clients.	The Commissioner says that this is necessary to eliminate conflicts of interest. The grandfathering provisions allow conflicted remuneration to continue for general insurance, risk life insurance and basic banking product and potentially other prescribed circumstances. If the exemptions were ever justified, the Commissioner says they have outlived their validity.
2.5	ASIC's 2021 post-implementation review of recent remuneration reforms for life risk insurance and its Corporations Life Insurance Commissions) Instrument 2017/510 (which concerns acceptable benefit ratios) should consider further reducing the cap on commissions which should be zero in the absence of clear justification. **Government** agrees.	The Commissioner expressed doubt that a complete ban on conflicted remuneration would lead to significant under-insurance as had been claimed in submissions, noting that more than 70% of life insurance was held through superannuation funds. However, the Commissioner accepted that it was appropriate to assess the impact of commissions being lowered over the next few years and the advice industry will need to absorb these changes.
2.6	The review of reforms referred to in recommendation 2.3 should also consider each remaining exemption to the ban on conflicted remuneration. **Government** agrees.	The Commissioner observes that monetary and non-monetary benefits given solely in relation to general insurance products are currently wholly exempt from the ban on conflicted remuneration as are monetary benefits for consumer credit insurance and certain non-monetary benefits set out in section 963C of the Corporations Act (eg benefits with training purposes or which provide IT support).
Professional discipline of financial advisers		

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2.7	AFSL holders should be required as a licence condition to conduct reference checking and to follow information-sharing protocols for financial advisers as set out in the ABA 'Financial Advice — Recruitment and Termination Reference Checking and Information Sharing Protocol'. **Government** agrees.	The Commissioner observes that licensees are not doing enough to communicate between themselves about the backgrounds of prospective employees and that licensees frequently fail to respond adequately to requests for references. This allows advisers facing disciplinary action to shop around for employment. The Commissioner proposes that compliance with the ABA Protocol be mandatory for AFSL holders.
2.8	AFSL holders should be required as a licence condition to report "serious compliance concerns" about individual financial advisers to ASIC on a quarterly basis. **Government** agrees.	According to the Commissioner, "serious compliance concerns" are where the licensee believes or has some credible information in support of the concerns identified that a financial adviser may have engaged in dishonest, illegal, deceptive and/or fraudulent misconduct or any misconduct that, if proven, would be likely to result in an instant dismissal or immediate termination; or deliberate non-compliance with the financial services laws or gross incompetence or gross negligence. These are distinguishable from other compliance concerns such as breaches of internal business rules or standards, adverse findings from audits, and conduct resulting in actual or potential financial loss to clients.
2.9	AFSL holders who detect that a financial adviser has engaged in misconduct in giving advice should be required to: • make whatever inquiries are reasonably necessary to determine the nature and extent of misconduct; • tell and remediate affected clients where there is sufficient information to suggest such misconduct. **Government** agrees.	The Commissioner was concerned about evidence that entities have not always acted on evidence of misconduct and that as a result damage may not come to light until much later.
2.10	A single disciplinary body should be established by law for financial advisers that requires registration (for personal advisers). AFSL holders should be required to report "serious compliance concerns" to the body and clients and other stakeholders should also be able to make reports about conduct. **Government** agrees.	The Commissioner expresses the view that the investigation of, and punishment for, breaches of the law should not be outsourced to private bodies such as industry associations. The Commissioner states that a breach of the code of ethics must not be allowed to obscure. Or be treated as more significant than, a breach of the law.

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Superannuation		
Trustee's obligations		
3.1	A trustee of an RSE should be prohibited from assuming any obligation other than those arising form or in the course of performance of duties of a trustee of a superannuation fund. **Government** agrees.	In relation to dual-regulated entities, the Commissioner recommends that a superannuation fund trustee be prevented from acting as both trustee of an RSE and a responsible entity of a managed investment scheme because of the inherent conflicts involved. The Commissioner also went further to recommend that a trustee should not undertake *any* obligation that does not arise out of its holding the office of trustee. This recommendation should be read as focused on the trustee entity and not directors, because directors will of course often hold other roles. The recommendation does not prevent an RSE licensee being the trustee of more than one superannuation fund.
3.2	Deduction of any advice fee (other than for intra-fund advice) from a MySuper account should be prohibited. **Government** agrees.	The Commissioner expressed concern about the 'invisibility' of charging some fees. He notes that ongoing service fees payable to an advice licensees (or authorised representative) are fees charged under a contract between the member and that licensee or representative. Due to concerns about the services being loosely defined, the Commissioner notes that deducting such fees may not be consistent with the sole purpose test. The Commissioner observes that the nature of the advice that may properly be paid for from a superannuation account 'is limited to advice about particular actual or intended superannuation investments', which may include 'consolidation of superannuation accounts, selection of superannuation funds or products, or asset allocations within a fund'. However, it would not include 'broad advice on how the member might best provide for their retirement or maximise their wealth generally' - and this is what the law already requires. But the law in respect of MySuper accounts should be modified so as to permit *no* deduction for advice fees of any kind.

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		However, this recommendation does not affect the existing intra-fund advice arrangements which are not subject to any recommendations for change.
3.3	Limitations on advice fees recoverable from choice superannuation accounts **Government** agrees.	In relation to ongoing advice (other than intra-fund advice), the Commissioner recommends that deduction of any fee from superannuation accounts should be prohibited unless certain annual renewal and authority requirements are satisfied (see recommendation 2.1). This recommendation arises because of the Commissioner's concern that as long as ongoing service fees are permitted, there is some risk of members being charged fees for no service.
'Selling' superannuation		
3.4	Hawking of superannuation products prohibited **Government** agrees.	The Commissioner notes that because superannuation is compulsory, it is not a product to be sold. Accordingly, all forms of unsolicited offering of superannuation arrangements should be prohibited. Section 992A(1) of the Corporations Act should be amended to clarify that contact with a person during which one kind of product is offered is unsolicited unless the person participated in the contact for the express purpose of inquiring about the offer of that kind of product. (For example, if a person has a telephone call to enquire about a credit card account, there should be no offer made about a superannuation product.)
Nominating default funds		
3.5	One default account. **Government** agrees.	The Commissioner agrees with the Productivity Commission's recommendation that default superannuation accounts should only be created for new workers, or workers who do not already have a superannuation account. A person should only have one default fund. That default account should then be carried over ('stapled') to a person as they move jobs. However, the Commissioner notes that 'the manner in which default funds should be fixed goes beyond my Terms of Reference'.

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3.6	Trustees of regulated superannuation funds prohibited from inducing employees into fund membership - no 'treating' of employers **Government** agrees.	The Commissioner recommends that section 68A of the SIS Act be amended to ensure that it achieves its intended purpose of preventing trustees from 'treating' employers in order to gain members. Trustees should not be permitted to attempt to influence employers' decisions about which default fund to appoint through 'irrelevant considerations'. It should be amended to prohibit supply 'where the supply may reasonably be understood by a recipient to be made with a purpose of having the recipient nominate the fund as a default fund, or having one or more employees of the recipient apply or agree to become members of the fund'. It should be a civil penalty provision.
Regulation		
3.7	Civil Penalties for breach of SIS Act covenants and obligations **Government** agrees.	Because the SIS Act covenants are central to the proper administration of a superannuation fund, the Commissioner recommends that breach of the covenants and obligations set out in section 52, 52A, 29VN and 29VO should be a civil penalty provision.[1] It would then be an offence to breach those covenants or provisions if the trustee or director acted dishonestly and intended to gain an advantage or intended to deceive or defraud someone.
3.8	APRA and ASIC to co-regulate superannuation - adjustment of roles **Government** agrees.	The Commissioner acknowledges the difficulties of the regulatory overlap between ASIC and APRA which creates doubt about which regulator will and should act in a particular case. It is also noted that each regulator has different remedies available to it. Although some of these factors may point toward the need for one regulator, the Commissioner concludes that such a recommendation may create more problems than it would solve. Accordingly, there is no recommendation for the creation of a superannuation-only regulator. However, the Commissioner recommends that dual regulation should be adjusted, as referred to in recommendation 6.3, reflecting the general principle of APRA as the prudential regulator and ASIC as the conduct regulator.

[1] The Commissioner did note that a Bill to make breach of section 52A and section 29VO civil penalty provisions is currently before Parliament but has not been passed: *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017*.

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3.9	BEAR accountability regime to extend to RSE licensees **Government** agrees.	The Commissioner notes that there is no reason in principle why the directors and senior executives of at least the large superannuation funds should not be subject to statutory obligation of a kind generally similar to those imposed on members of the board and banking executives by the 'Banking Executive Accountability Regime' (BEAR) focusing on duties to act with honesty and integrity, and with due care and diligence, dealing with regulators in an open, constructive and co-operative way, and taking steps to prevent matters from arising that would adversely affect the prudential standing or reputation of the fund.
Insurance		
Manner of sale and types of products sold: Hawking		
4.1	Hawking of insurance should be prohibited. **Government** agrees.	This is consistent with the prohibition recommended for superannuation. In the Report, the Commissioner has also called for a statutory definition of the concept of "unsolicited" perhaps based upon the definition used by ASIC: that a meeting or telephone call is unsolicited unless it takes place in response to a positive, clear and informed request from a consumer. The Commissioner says it should be made plain that a solicited meeting, call or contact to discuss one type of product may not be used for the unsolicited offering of some other type of product.
4.2	The law should be amended to remove the exclusion of funeral expenses policies from the definition of financial product and to put beyond doubt that the ASIC Act consumer protection provisions apply to them. **Government** agrees.	The value of these products and selling practice for them were examined by the Commissioner through various case studies. Funeral expense policies are carved out of the definition of "financial product" of the Corporations Act and are therefore not subject to its anti-hawking provisions. Some doubts were raised in submissions whether they are also excluded from the ASIC Act.
Specific steps in respect of particular products: Add-on insurance		
4.3	A Treasury led working group should develop and industry-wide deferred sales model for add-on insurance for implementation as soon as practicable	This draws on work of ASIC and the Productivity Commission. The Productivity Commission proposed a deferred sales model for all "add-on insurance products"

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	(excluding comprehensive motor vehicle insurance). **Government** agrees.	with a consultation period to deal with solid cases for exemptions. Under such a model, insurers or their representatives would be required to wait for a specified period of time before attempting to sell add-on insurance products to their customers (such as guaranteed asset protection (**GAP**) insurance and tyre and rim insurance). The Commissioner is essentially adopting ASIC's proposal in ASIC Consultation Paper 294: The Sale of Add-on Insurance and Warranties Through Caryard Intermediaries. The Report states that one likely consequence of a change to a deferred sales model is that the premiums payable for policies subject to the model could not be financed by the loan made to purchase the vehicle without specific adjustment of the loan arrangement. However, in the Commissioner's view, the potential inconvenience caused by this outcome is justified in light of the benefits to the consumer of moving to a deferred sales model. Of course, the inconvenience referred to may include the need for a further unsuitability assessment and physical amendments to contract documents. Another factor not mentioned in the Report is that some extended warranty products in the market are not regulated as financial products because they are sold by the dealer incidentally to the sale of the vehicle under the 'incidental product' exemption in the *Corporations* Act (s. 763E). These are currently outside ASIC's jurisdiction and it is unclear how a deferred sales model would apply to them. If they became subject to a deferred sales model, the deferral of their sale would likely prevent them from benefiting from the incidental product exemption.
4.4	ASIC should impose a cap on the amount of commission that may be paid to vehicle dealers in relation to add-on insurance. **Government** agrees.	The Commissioner recommended that caps on commissions should be introduced for add-on insurance products sold in connection with the sale of a motor vehicle with the level of the cap being determined from time to time by an ASIC legislative instrument. This recommendation was based on evidence that the levels of commissions paid to motor vehicle dealers contributed to the miss-selling of those products. ASIC stated in its September 2016 report on the sale of add-on insurance through dealers, that in the 2015 financial year, the commissions paid to dealers for the sale of add-on insurance products were as high as 79% of the premium. ASIC also observed that the amounts paid in commissions on these

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		products exceeded the amounts paid out to customers who made claims. In 2017, in response to the perceived problems created by the high commissions paid to dealers, the ICA prepared a submission to the Australian Competition and Consumer Commission proposing that insurers cap commissions at 20% of the premium. It is possible that ASIC will follow the lead of the ICA and cap commissions at an amount of 20%.
Pre-contractual disclosures and representations		
4.5	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). **Government** agrees.	A duty to take reasonable care not to make a misrepresentation to an insurer places the burden on an insurer to elicit the information that it needs in order to assess whether it will insure a risk and at what price. The duty does not require an individual to surmise, or guess, what information might be important to an insurer. Breach of the duty of an insured not to misrepresent will engage the provisions of Division 3 of Part IV of the Act (sections 27A–33). Some consequential amendments to those provisions will be needed to recognise that there will no longer be a duty, in some cases, to make disclosures, only a duty not to misrepresent.
4.6	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. **Government** agrees.	A comparison was made to the pre 2013 amendments to section 29 (3). Given that a number of changes to section 29 were effected by the amending Act, the shift in the standard for avoidance may not be immediately apparent. However, the submissions to the Commission showed that the amendment has been understood, at least by some, as expanding the circumstances in which an insurer could avoid a contract of life insurance, so that a life insurer can now avoid a contract of life insurance if it can show that it would not have entered into the same contract of life insurance.
Unfair contract Terms		
4.7	The unfair contract terms provisions now set out in the ASIC Act should apply to insurance contracts regulated by the Insurance Contracts Act. The	The considerations that render a UCT regime appropriate for other contracts for financial products and services will apply equally to insurance contracts.

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	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. The duty of utmost good faith contained in section 13 of the Insurance Contracts Act should operate independently of the unfair contract terms provisions. **Government** agrees.	
Claims handling		
4.8	The handling and settlement of insurance claims, or potential insurance claims, should no longer be excluded from the definition of 'financial service'. **Government** agrees.	The Report referred to the handling and settlement of insurance claims being carved out from the definition of 'financial service' by regulation 7.1.33 of the Corporations Regulations. Commissioner Hayne noted (by reference to the case studies examined in the sixth round of hearings, particularly those of CommInsure and TAL regarding life insurance claims), that ASIC is limited in the regulatory interventions it can take due to the claims handling exemption.
Status of industry codes		
4.9	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. 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'. **Government** supports the FSC, the ICA and ASIC acting on this	The Report considered it important that some provisions of industry codes be picked up and applied as law, so that breaches of those provisions will constitute a breach of the law.

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	recommendation.	
4.10	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. **Government** supports the FSC and the ICA acting on this recommendation.	The Report recommends that FSC and the ICA 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. When considering whether to impose sanctions following a breach, the Committees should continue to be guided by the matters referred to in section 13.14 of the General Insurance Code of Practice and section 13.13 of the Life Insurance Code of Practice.
External dispute resolution		
4.11	Section 912A of the Corporations Act should be amended to require AFSL holders to co-operate with AFCA including by making documents available. **Government** agrees.	The recommendation seeks to expand the general obligations of an AFSL holder. This was based upon observations from some of the case studies considered by the Commission.
Accountability		
4.12	Over time, provisions modelled on the BEAR accountability regime should be extended to all APRA-regulated insurers. **Government** agrees.	The Commissioner considers it appropriate that the BEAR provisions apply to all APRA regulated financial services institutions including RSE licensees and insurers.
Group life policies		
4.13	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. **Government** agrees.	In many cases, default members will not have made any active choice about the fund they have joined or considered the insurance offered through that product. Often a member will join the default fund chosen by their employer. Members are not always able to identify how key terms, definitions and exclusions will affect their coverage under their policy. ASIC Report 591 noted the difficulties that consumers face when comparing

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		definitions in policies such as the definition of total and permanent disability. ASIC considered there was scope for improvement in this regard, including by the use of standardised definitions in policies. The adoption of standardised terms should be carefully considered, and the consequences of change identified, before they are implemented.
4.14	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 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. **Government** supports APRA acting on this recommendation.	Entities that elect to integrate their businesses do so, overwhelmingly, for their own reasons (i.e. AMP and AMP Life). The entity's motivation will usually be to increase market share, to increase revenue, to increase profit, to place commercial pressure on its competitors, or some combination of those facto. The need for assurance of the appropriateness of the arrangements is all the stronger in circumstances where, as with the introduction of MySuper and the requirements for default superannuation, a policy decision has been made that is, by design, protective of the interests of members.
4.15	Prudential Standard SPS 250 should be amended 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. **Government** supports APRA acting on this recommendation.	The Report comments that this proposal would require consideration by a RSE licensee of whether the status attributed is statistically appropriate (such as "blue collar" or "smoker" or other status affecting the premium to be charged for insurance.
Culture, governance and remuneration		
Remuneration		
5.1	In conducting prudential supervision of remuneration systems and revising standard and guidance, APRA should give effect to the Financial Stability Board's (FSB) publications concerning sound compensation principles and practices. **Government** agrees.	The Commissioner expressed concern with APRA's approach of understanding an entity's attitude to the risk of misconduct merely as a means of understanding an entity's attitude to risk more generally, rather than as being an end in itself. The Commissioner observed that this distinguished APRA from the FSB and other international bodies.

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5.2	In conducting prudential supervision of remuneration systems and revising standard and guidance about remuneration APRA should have, as one of its aims, the sound management by APRA-regulated institutions of not only financial risk but also misconduct, compliance and other non-financial risks **Government** agrees.	The FSB was founded in 2009 as successor to the G7's Financial Stability Forum. Its function is to develop and implement strong regulatory, supervisor and other policies in the interests of financial stability. The principles seek to realign executive remuneration systems with prudent risk management and long-term financial sustainability.
5.3	APRA should review remuneration systems to encourage management of financial and non-financial risk and increase transparency. **Government** agrees.	
5.4	All financial services entities should review at least once year the design and implementation of their remuneration systems for front line staff to ensure there is a focus not only on what they do, but how they do it. **Government** agrees.	It is unclear how this may be implemented as the recommendation is directed at "all financial services entities". No change of law or regulatory guidance is contemplated and the scope of "financial services entities" is unclear.
5.5	Banks should implement fully the recommendations of the Sedgwick Review **Government** agrees.	There were 21 recommendations for reform in the report of the Sedgwick Review into payments in retail banking commissioned by the ABA and published in April 2017. A key recommendation of the Sedgwick Review was the removal of variable reward payments and campaign related incentives that are directly linked to sales or the achievement of sales targets. Sedgewick also recommended that eligibility to receive any variable reward should be based on an overall assessment against a range of factors that reflect the breadth of responsibilities of each role.
Culture and governance		
5.6	Each financial services entity should, as often as reasonably possible, take proper steps to assess its culture and governance, identify and deal with problems and determine whether changes have made a difference. **Government** agrees.	The Commissioner states in the Report that what the recommendation requires is much more than an exercise in "box-ticking". Its proper application demands intellectual drive, honesty and rigour. It demands thought, work and action informed by what has happened in the past, why it happened and what steps are now proposed to prevent its recurrence. Above all, it demands recognition that the

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		primary responsibility for misconduct in the financial services industry lies with the entities concerned and with those who manage and control them: their boards and senior management**.**
5.7	APRA should: • build a supervisory program focused on building culture that will mitigate the risk of misconduct; • use a risk-based approach to its reviews; • assess the cultural drivers of misconduct in entities; and • encourage entities to give proper attention to sound management of •conduct risk and improving entity governance. **Government** agrees.	The Commissioner acknowledged that increasing the intensity of supervision in this area would require additional resources but says that the work of the FSB, G30 and international practice more generally shows that this work is essential to the proper prudential supervision of banks and other large APRA regulated institutions and that because it is an essential part of prudential supervision, APRA must have the resources to do it.
Regulators		
Twin peaks		
6.1	The twin-peaks model of financial regulation should be retained. **Government** agrees.	The ‘twin peaks’ model of regulation describes the arrangement where, APRA is responsible for prudential regulation and ASIC for regulation of conduct and disclosure. The Commissioner was concerned that detaching significant parts of ASIC's remit and transferring them to another agency would disrupt the process of responding to what has happened in the financial services industry and how it has been brought into the public gaze by the Commission's work.
ASIC's enforcement practices		
6.2	ASIC should adopt an approach to enforcement that: • takes, as its starting point, the question of whether a court should	Even before the Royal Commission, ASIC has become subject to Parliamentary scrutiny in relation to its approach to enforcement. The Commissioner observed that it was untenable for a regulator to regulate on

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<table>
<tr><th>Rec. number</th><th>Recommendation and Government Response</th><th>Issues and implications</th></tr>
<tr><td></td><td>determine the consequences of a contravention;
• recognises that infringement notices should principally be used in respect of administrative failings by entities, will rarely be appropriate for provisions that require an evaluative judgment and, beyond purely administrative failings, will rarely be an appropriate enforcement tool where the infringing party is a large corporation;
• recognises the relevance and importance of general and specific deterrence in deciding whether to accept an enforceable undertaking and the utility in obtaining admissions in enforceable undertakings; and
• separates, as much as possible, enforcement staff from non-enforcement related contact with regulated entities.
Government agrees.</td><td>the basis of "How can this be resolved be agreement?" The Commissioner refers to "a deeply entrenched culture of negotiating outcomes rather than insisting upon public denunciation of, and punishment for, wrongdoing.
In response to the Interim Report of the Commissioner, ASIC has already announced that it will change its enforcement priorities and start with the question "Why not litigate?"
The Commissioner has flagged that if it becomes apparent that ASIC is not sufficiently enforcing the laws within its remit, or if the size of its remit comes at the expense of its litigation capability, further consideration should be given to developing a specialist agency for enforcement.</td></tr>
<tr><td colspan="3">Superannuation: Conduct regulations</td></tr>
<tr><td>6.3</td><td>The roles of APRA and ASIC in relation to superannuation should be adjusted to accord with the general principles that:
• APRA, as prudential regulator, is responsible for establishing and enforcing Prudential Standards and practices designed to ensure that, under all reasonable circumstances, financial promises made by superannuation entities APRA supervises are met within a stable, efficient and competitive financial system; and
• as the conduct and disclosure regulator, ASIC's role in superannuation primarily concerns the relationship between RSE licensees and individual consumers.
Government agrees.</td><td rowspan="2">The Commissioner has observed that under the current regulatory arrangements, where an RSE licensee's conduct gives rise to harm to a member (other than in respect of disclosure) and is a breach of one or more covenants under s. 52(2) of the SIS Act, the prospect of regulatory action is slight because APRA, as the prudential regulator, does not naturally administer those covenants with consumer protection in mind. ASIC, as the conduct regulator, has a role limited to disclosure matters.</td></tr>
<tr><td>6.4</td><td>Without limiting APRA powers under the SIS Act, ASIC should be given the power to enforce all provisions in the SIS Act that are, or will become, civil penalty provisions or otherwise give rise to a cause of action against an RSE</td></tr>
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	licensee or director for conduct that may harm a consumer. There should be co-regulation by APRA and ASIC of these provisions. **Government** agrees.	
6.5	APRA should retain its current functions, including responsibility for the licensing and supervision of RSE licensees and the powers and functions that come with it, including any power to issue directions that APRA presently has or is to be given. **Government** agrees.	
The BEAR: Co-Regulation		
6.6	APRA and ASIC to jointly administer BEAR with ASIC having responsibility for consumer protection and market conduct matters (in Divs 1-3 of Part IIA) and APRA having responsibility for prudential aspects under Part IIA. **Government** agrees.	The Commissioner has observed that BEAR has both a conduct and prudential outlook because it requires ADIs to take reasonable steps to prevent matters from arising that would adversely affect the ADI's prudential standing or reputation. This is viewed by the Commissioner as a reason ASIC should have a role.
6.7	Sections 37C and 37CA of the Banking Act should be amended to make clear that an ADI and accountable person must deal with APRA and ASIC (as the case may be) in an open, constructive and co-operative way and practical amendments should be made to provisions such as sections 37K and 37G(1) so as to facilitate joint administration. **Government** agrees.	
6.8	Over time, provisions modelled on the BEAR should be extended to all APRA-regulated financial services institutions jointly administered by APRA and ASIC. **Government** agrees.	
Co-ordination and information sharing		

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6.9	The law should oblige APRA and ASIC to co-operate with each other, share information to the maximum extent practicable and notify each other of breaches relevant to the other's enforcement responsibility. **Government** agrees.	The Commissioner states that the HIH Royal Commission's findings are evidence of harm that can come from a lack of co-ordination between ASIC and APRA. The Commissioner concluded that co-operation must go beyond the current MOU and informal meetings between the agencies. Statutory force should be give to the arrangements for co-operation by amendments to the ASIC Act and APRA Act.
6.10	ASIC and APRA should prepare and maintain a joint memorandum setting out how they intend to comply with their statutory obligation to co-operate. It should be reviewed biennially with each party reporting on the operation of and steps taken under it in its annual report. **Government** agrees.	
Governance		
6.11	The ASIC Act should include provisions similar to the provisions of the APRA Act dealing with meeting procedures. **Government** agrees.	The Commissioner says that this will serve to reinforce the centrality of collective decision-making and that legal and procedural formality is warranted for meetings of ASIC's Commissioners.
6.12	In a manner agreed with the external oversight body (the establishment of which is the subject of Recommendation 6.14) each of APRA and ASIC should internally formulate and apply to its own management accountability principles of the kind established by the BEAR. **Government** agrees.	This recommendation adopts accountability measures in BEAR and applies them to the regulators. The Commissioner draws on experience in the UK where the two regulators for the Senior Managers Regime have chosen (voluntarily) to apply the core elements of that regime to the agencies.
6.13	APRA and ASIC should be subject to at least quadrennial capability reviews. **Government** agrees and has announced a review of APRA commencing in 2019 to be chaired by Graeme Samuel AC. It will build on the recently completed IMF Financial Sector Assessment Program.	As justification for this, the Commissioner cites the pace of change and the fact that while ASIC has recently undergone a capability review, APRA has not.
Oversight		

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6.14	A new oversight authority for APRA and ASIC, independent of Government, should be established by legislation to assess the effectiveness of each regulator in discharging its functions and meeting its statutory objects. The authority should be comprised of three part-time members and staffed by a permanent secretariat. It should be required to report to the Minister in respect of each regulator at least biennially. **Government** agrees and has noted that the new body will not have the ability to comment on specific enforcement actions, regulatory decisions or complaints. Also the Financial Sector Advisory Council will be disbanded in light of this new body.	The government's decision to disband the Financial Sector Advisory Council is interesting in light of the Commissioner's observations that it serves as an important, formal occasion for discussion between financial regulators and should not, therefore, be given the additional task of overseeing APRA and ASIC.
Other Important Steps		
External dispute resolution		
7.1	The three principal recommendations to establish a compensation scheme of last resort made by the panel appointed by government to review external dispute and complaints arrangements made in its supplementary final report should be carried into effect. **Government** agrees but says that the CSLR will be established as part of AFCA. The government will fund the payment of legacy unpaid determinations from FOS and CIO.	This refers to recommendations of a panel in a 2016-2017 Government review of external dispute resolution and complaints arrangements in the financial system. One of its recommendations resulted in a single EDR body, the Australian Financial Complaints Authority (AFCA) taking the place of the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman Service (CIO) and the Superannuation Complaints Tribunal. In a supplementary report, the Panel recommended that: • a compensation scheme of last resort (CSLR) be established, but should be limited and carefully targeted at the areas of the financial sector where there clear evidence of recurrent problems with uncompensated losses; • A CSLR should initially be restricted to financial advice failures where a financial adviser but it should be scalable so it can be expanded in the future; • A CSLR should have certain features (eg it should apply prospectively, claimants should first have an unsatisfied decision of AFCA or a court; a

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		maximum 12 month claim period would apply; AFCA should be required to certify that it does not consider a claim will be satisfied; oversight by ASIC). One significant feature is that the CSLR would be funded by financial firms engaged in the type of financial services it covers. The mechanism for quantifying contributions is likely to be controversial.
ASIC Enforcement Review Taskforce Government Response		
7.2	Recommendations of the ASIC Enforcement Review Taskforce made in December 2017 that relate to self-reporting of contraventions by financial services and credit licensees should be carried into effect. **Government** agrees. The government will also provide ASIC with powers to give directions to AFSL and ACL holders.	These included recommendations that: • the significance test should be retained but clarified; • a self-reporting regime should be introduced for ACL holders; • reporting obligations should apply to employee and representative misconduct; • reporting must be within 30 days; • the content of breach reports should be prescribed; • criminal penalties for non-reporting should be increased and civil penalties introduced; • a co-operative approach should be encouraged where licensees report at the earliest opportunity; • reporting for managed investment schemes should be streamlined; • ASIC should publish breach reporting information annually.
Simplification so that the law's intent is met		
7.3	As far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated. **Government** agrees.	This significant of this recommendation should not be understated. Little is said about it in the Final Report, yet it has potential application to countless qualifications and exceptions, some of which are relied upon by entire industry sectors. Little clue is given to which qualification and exceptions the government

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		may ultimately remove.
7.4	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. **Government** agrees.	The Commissioner is promoting a principles based approach to regulation starting with identification of "fundamental norms" of behaviour. The Commissioner expressly recognises the challenges of simplification without volunteering any solutions to deal with the countess exceptional circumstances for which qualifications and exceptions have been included. The Commissioner makes no comment about the compatibility of principles based regulation with strict criminal offences where certainty of application is so important.

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