

## Compensation scheme to follow Hayne's indictment of financial sector

Written by Michelle Grattan, Professorial Fellow, University of Canberra

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The Morrison government has promised to establish a compensation scheme of last resort - paid for by the financial services industry - as it seeks to avoid the outcome of the banking royal commission becoming a damaging election issue for it.

Treasurer Josh Frydenberg, releasing Commissioner Kenneth Hayne's three-volume [report](#) which excoriates the financial sector, said the government would be "taking action" on all 76 recommendations.

The commissioner has made 24 referrals to the regulatory authorities over entities' conduct in specific instances. All the major banks have been referred except Westpac. AMP, Suncorp, Allianz and Youi are among entities that have been referred.

Commissioner Hayne has made civil and criminal conduct referrals - he was dealing with entities rather than individuals.

In an indictment of years of bad behaviour which has left many customers devastated, Hayne says "there can be no doubt that the primary responsibility for misconduct in the financial services industry lies with the entities concerned and those who managed and controlled those entities".

"Rewarding misconduct is wrong. Yet incentive, bonus and commission schemes throughout the financial services industry have measured sales and profit, but not compliance with the law and proper standards," the commissioner says.

"Entities and individuals acted in the ways they did because they could.

"Entities set the terms on which they would deal, consumers often had little detailed knowledge or understanding of the transaction and consumers had next to no power to negotiate the terms."

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Hayne says that "too often, financial services entities that broke the law were not properly held to account.

"The Australian community expects, and is entitled to expect, that if an entity breaks the law and causes damage to customers, it will compensate those affected customers. But the community also expects that financial services entities that break the law will be held to account."

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**Read more: [Banking Royal Commission: no commissions, no exemptions, no fees without permission. Hayne gets the government to do a U-turn](#)**

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The commissioner stresses that "where possible, conflicts of interest and conflicts between duty and interest should be removed" in financial services.

Hayne says that because it was the financial entities, their boards and senior executives, who bore primary responsibility for what had happened, attention must be given to their culture, governance and remuneration practices.

Changes to the law were "necessary protections for consumers against misconduct, to provide adequate redress and to redress asymmetries of power and information between entities and consumers".

The commission's multiple recommendations propose:

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simplifying the law so that its intent is met

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removing where possible conflicts of interest

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improving the effectiveness of the regulators, the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC)

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driving cultural change in institutions and increasing their accountability

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increasing protection for consumers from “misconduct or conduct that falls below community standards and expectations”, and providing for remediation.

The government has provided [point-by-point responses](#) to the recommendations.

The commission had seven rounds of public hearings with about 130 witnesses, and reviewed more than 10,000 public submissions. It dealt with banking, financial advice, superannuation and insurance.

While there have been claims the fallout from the commission could risk a further tightening of credit for small business in particular, Hayne has been careful in his report to minimise that danger.

But he makes it clear there should be no excuse for avoiding needed action. “Some entities used the undoubted need for care in recommending change as a basis for saying that there should be no change. The ‘Caution’ sign was read as if it said ‘Do Not Enter’.”

The commissioner has some sharp words for the NAB in his report, saying that “having heard

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from both the CEO Mr Thorburn, and the Chair, Dr Henry, I am not as confident as I would wish to be that the lessons of the past have been learned.

"More particularly, I was not persuaded that NAB is willing to accept the necessary responsibility for deciding, for itself, what is the right thing to do, and then having its staff act accordingly. I thought it telling that Dr Henry seemed unwilling to accept any criticism of how the board had dealt with some issues.

"I thought it telling that Mr Thorburn treated all issues of fees for no service as nothing more than carelessness combined with system deficiencies [...] Overall, my fear – that there may be a wide gap between the public face NAB seeks to show and what it does in practice – remains."

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### Hayne's main recommendations:

- Mortgage brokers required to act in the best interests of the borrower
  - Mortgage brokers to charge borrowers rather than lenders
  - Insurance providers required to "take reasonable care"
  - Funeral insurance to be subject to financial service laws
  - Cap on insurance sales commissions for car dealers
  - Reduced cap on life insurance commissions
  - Cold call selling of financial products banned
  - Ongoing fee arrangements to be reapproved annually
  - "Grandfathering" of fee arrangements to stop
  - Banks to no longer charge dishonour fees on basic accounts
  - Banks to no longer provide overdrafts on basic accounts without consent
  - National scheme for mediation of farm debt
  - Industry-funded compensation scheme of last resort
  - Super fund trustees not to be employees of super fund owner
  - Australians to be defaulted into only one super fund, once
  - ASIC to use court action as the "starting point" for considering how to take action
  - External body to oversee APRA and ASIC
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Among his specific recommendations Hayne says that grandfathering provisions for conflicted

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remuneration "should be repealed as soon as is reasonably practicable". The government has said it will do this from January 2021.

Hayne proposes a new oversight authority that would monitor APRA and ASIC.

He lashes ASIC for not cracking down on fees for no service.

"Until this commission was established, ASIC and the relevant entities approached the fees for no service conduct as if it called, at most, for the entity to repay what it had taken, together with some compensation for the client not having had the use of the money.

"That is, the conduct was treated as if it was no more than a series of inadvertent slips brought about by some want of care in record keeping."

In a number of recommendations about mortgage brokers, Commissioner Hayne says the borrower, not the lender, should pay the mortgage broker fee for acting on home lending. But the government is not accepting the proposal at this time.

In relation to the sale of products the commission recommends the removal of the exclusion of funeral expenses policies from the definition of "financial product". It should be put "beyond doubt that the consumer protection provisions of the ASIC act apply to funeral expenses policies."

On superannuation the commission says that "hawking" of superannuation products should be prohibited, and that a person should have only one default account.

In a statement Scott Morrison and Frydenberg said that in outlining its response to the commission "the government's principal focus is on restoring trust in our financial system and delivering better consumer outcomes, while maintaining the flow of credit and continuing to promote competition."

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They said the government would expand the remit of the Australian Financial Complaints Authority (AFCA) so it could award compensation for successful claims going back a decade.

Shadow treasurer Chris Bowen said that Labor accepted all the recommendations "in principle".

"The government simply cannot say that they've accepted the recommendations ... they've got weasel words in there about various recommendations," he said.

*Michelle Grattan owns bank shares.*

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**Read more** <http://theconversation.com/compensation-scheme-to-follow-haynes-indictment-of-financial-sector-110981>