

Super & Insurance changes post Hayne Royal Commission

What's changed for consumers?



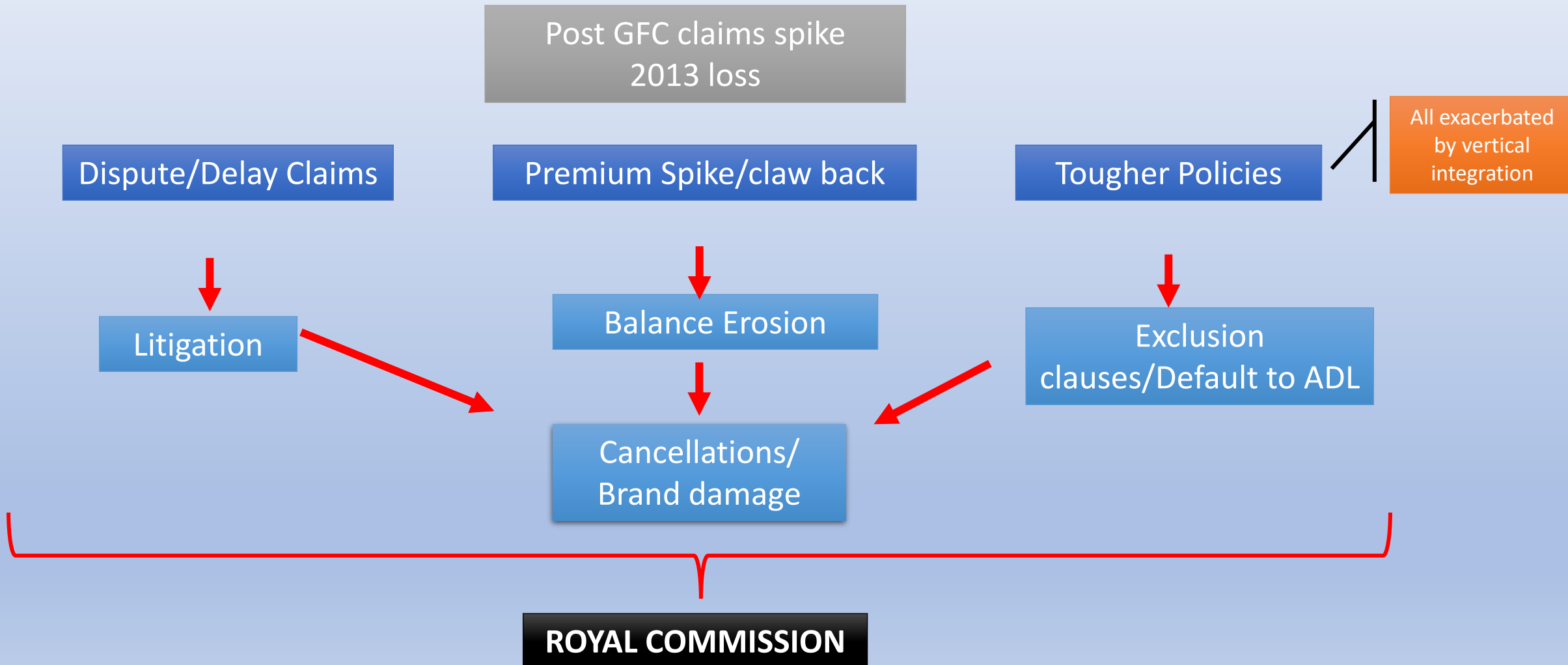
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What we'll cover today

- What led to the RC?
- Bombshell moments
- Reforms since
- Current state of the industry

Insurance in Super

- 2000's – generous underwriting, account based cover, low claims experience, banks in wealth management
- From 2014, the Stronger Super reforms made TPD automatic for all default (MySuper) accounts



The bombshell moments

Super

BT delivered its mainly older customers in cash holdings just 0.5 per cent returns over five years, compared to the Cth's bond yield of 2.5 per cent per year.



The bombshell moments

Super

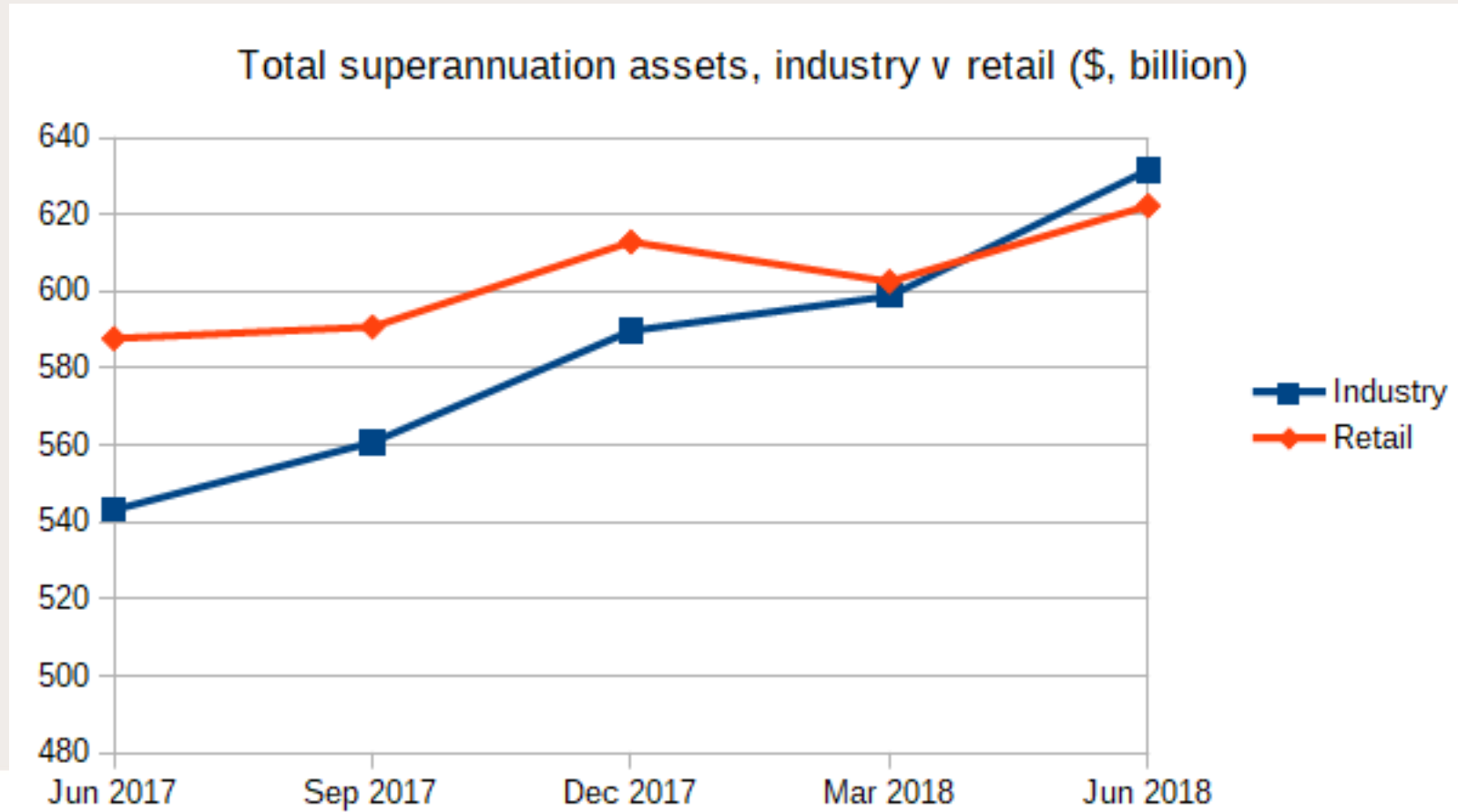
CBA came under fire when it emerged it had failed to move thousands of super accounts to the no-frills MySuper accounts by the deadline.

CBA argued in its written submissions that it merely made 'honest mistakes' and had 'genuine misunderstandings'... 15,000 times.



Members vote with their feet

\$1.5B of super funds have been transferred from retail to industry super funds as at 2018



The bombshell moments

Life insurance

Ms Orr took the Financial Services CEO to task for being unable to answer questions about its own Life Insurance Code of Practice – we were told a different staff member at the FSC was responsible for that.



The bombshell moments

Life insurance

Insurance giant TAL hired an investigator to invade the privacy of a mentally-ill nurse who had tried to claim income protection insurance - an ordeal that stretched over eight years.

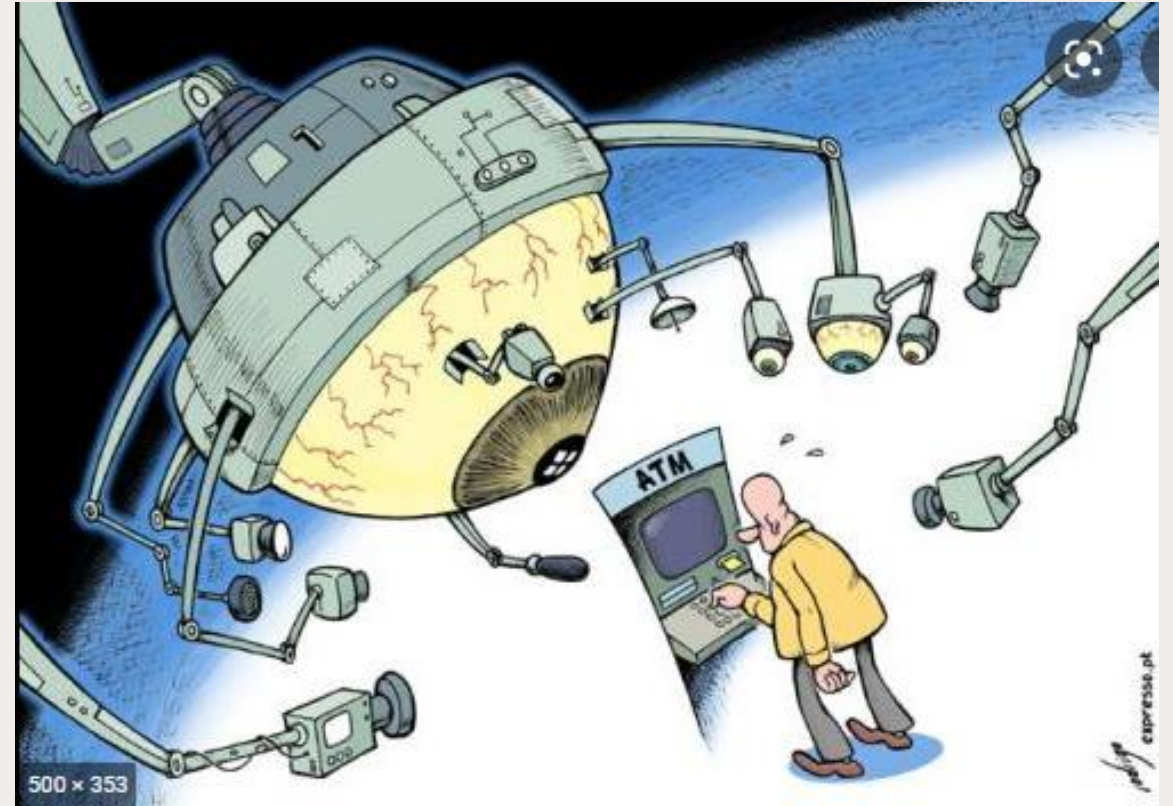
After being ordered to pay by the Ombudsman, TAL told the investigator "I want results" as TAL tried to kick her off claim.



The bombshell moments

Life insurance

At Suncorp, surveillance had been used in 17.2% of claims lodged by consumers with mental health issues between 2014 and 2016, and 9.3 per cent at Westpac.



The bombshell moments

Life insurance

CommInsure's use of ill-defined and outdated medical definitions was scrutinised, with the commission examining the story of a woman with breast cancer whose surgery was not considered "radical" enough for the insurer.



The bombshell moments

The Regulators

APRA was described as the 'hear no evil, see no evil' regulator:

- It had not contemplated taking any action on any 'fees for no service' scandal,
- Over the past decade it had only disqualified one super trustee and had not effected any Enforceable Undertakings,
- It did not consider any actions or fines were necessary regarding CBA's 15,000 + criminal breaches in failing to move members into MySuper products on time.



Poll question

The consequences for financial institutions guilty of misconduct have been too lenient:

1. Strongly agree;
2. Agree;
3. Disagree;
4. Strongly disagree.



Recommendations that have been implemented -

New duty of disclosure rules (Rec. 4.5)

Recommendation 4.5: Replace the duty of disclosure with a duty to take reasonable care not to make a misrepresentation to an insurer.

The *Insurance Contracts Act 1984* (s.21) has been amended to replace the duty of disclosure for 'consumer insurance contracts' entered after 5 October 2021.

Previously, an insured under a consumer insurance contract was under a **duty of disclosure**, which required them to disclose every matter that is known to the insured which the insured knows to be relevant to the decision of the insurer whether to accept the risk, or a reasonable person in the circumstances could be expected to know to be a matter so relevant.

Now, an insured under a consumer insurance contract is under a **duty to take care not to make a misrepresentation** to the insurer before the relevant insurance contract is entered into.

Recommendations that have been implemented -

New duty of disclosure rules (Rec. 4.5)

Who does it apply to?

This new duty on applies to **consumer insurance contracts**, which are contract of insurance 'obtained wholly or predominantly for the personal, domestic or household purposes of the insured. This could capture general and life insurance contracts.

A contract of insurance for a 'new business' is also a consumer insurance contract.

What will it mean in practice?

The new duty not to make a misrepresentation will effectively shift the burden on the an insurer to elicit any information which it desires in order to make an assessment as to whether to offer cover and how to price it. Previously, the onus was on the insured to engage in an exercise of disclosing anything which the insured considered might be relevant to the insurer.

Recommendations that have been implemented -

Avoidance of life insurance policies (Rec. 4.6)

Recommendation 4.6: Section 29(3) of the Insurance Contracts Act 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 (see recommendation 4.6).

The amendments apply to contracts/variations from entered into from 5 April 2021.

The law was said to result in “an ‘avoidance’ regime that is unfairly weighted in favour of insurers” and “that the effect of the 2013 amendments was to tilt the balance in favour of insurers”.



Recommendations that have been implemented -

Avoidance of life insurance policies (Rec. 4.6)

What will it mean in practice?

If an insurer would have been prepared to enter into *any* contract of life insurance on any terms (for example, a contract of death, total and permanent disablement, trauma or income protection insurance) it cannot avoid a policy even where there was (non-fraudulent) non-disclosure.

Any such avoidance must still occur within 3 years from the policy commencement.

However in circumstances where the insurer would have entered into a contract on different terms, it will remain open to the insurer to vary the contract under ss29(6) and (7) of the Act. The 3 year rule does not apply for variation.

To avoid or vary the insurer faces an objective onus of proof i.e. expert evidence and/or evidence from other insurers.

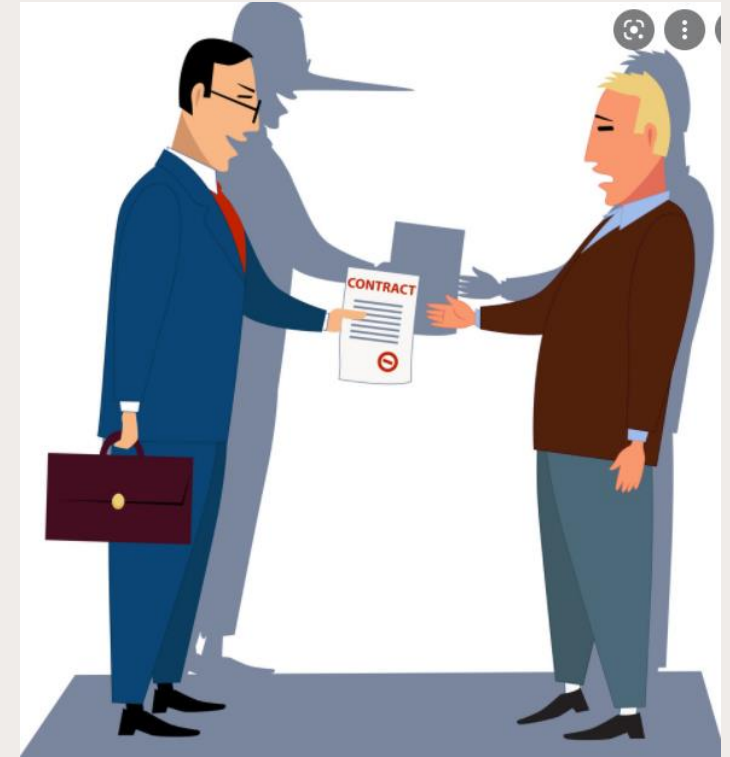
Recommendations that have been implemented -

- Unfair contract terms in insurance contracts (Rec. 4.7)

Recommendation 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 (separate to duty of utmost good faith).

Changes to the *Australian Securities and Investments Commission Act 2001* means that the UCT regime now applies to insurance contracts.

Following Government reforms passed in early 2020, unfair contract terms protections will apply to new insurance contracts that are entered into, or contracts that are renewed, on or after 5 April 2021.



Recommendations that have been implemented -

- Unfair contract terms in insurance contracts (Rec. 4.7)

A term in a **standard form contract** is unfair if it:

- would cause significant imbalance in the parties' rights and obligations arising under the contract;
- is not reasonably necessary to protect the legitimate interests of the parties that would benefit from the term; and
- would cause detriment (financial or otherwise) to a consumer if it were to be applied or relied on.

Does not apply to group super policies, where 70% of workers get their life and disability insurance.

Recommendations that have been implemented --

- Unfair contract terms in insurance contracts (Rec. 4.7)

ASIC examples of changes made:

- removing terms that gave insurers unilateral discretion to do something
- removing or qualifying terms to reduce barriers for an insured person to lodge a legitimate claim
- qualifying overly broad terms so that they only apply in specific situations
- extending certain timeframes that might be difficult for an insured person to meet
- removing or qualifying terms where compliance with preconditions was not feasible
- amending terms to provide greater collaboration between the insurer and the insured around decision-making processes
- amending insurance policies to provide greater transparency and clarity for consumers.

Recommendations that have been implemented -

- Unfair contract terms in insurance contracts (Rec. 4.7)

The unfair contract terms law applies only to contracts which:

- Are **consumer contracts**;
 - at least one party must be an individual acquiring a financial product or services wholly or predominantly for personal, domestic or household use or consumptions;
 - in addition, the UTC laws also protects small businesses.
- Are **standard form contracts**; and
 - a contract prepared by the business offering a product or service without negotiation between the parties (i.e. offered on a 'take it or leave it' basis);
 - *ASIC Act* provides list of indicia of a standard form contract.
- Are contracts for a **financial product or service**.

Recommendations that have been implemented -

- Handling & settlement obligations (Rec. 4.8)

Recommendation 4.8: The handling and settlement of claims to no longer be excluded from the definition of 'financial service'.

Previously, the handling and settlement of insurance claims or potential insurance claims was carved out of the definition of 'financial services' in the *Corporations Regulations*.

That carve out has been removed, and the handling and settlement of insurance claims now falls within the umbrella of 'financial services'.

What does this mean?

From 1 January 2021, persons providing claims handling and settlement services are now under an obligation to do all things necessary to ensure that they provide those services **efficiently, honestly and fairly**.

Recommendations that have been implemented -

Handling & settlement obligations (Rec. 4.8)

Compensation arrangements

Section 912B of the *Corporations Act* requires insurers to have compensation arrangements in place if financial services (which now includes claims handling and settlement) are provided to persons as retail clients for compensation those persons for loss and damage suffered because of breaches of financial services license obligations.

This could result in compensation for consequential losses claims e.g. due to delay in claim assessment. E.g. loss of home due to inability to pay mortgage during claim assessment.



Recommendations that have been implemented -

Handling & settlement obligations (Rec. 4.8)

From 1 January 2022, insurers and their agents, as well as insurance brokers, must obtain an Australian Financial Services Licence (AFSL) covering claims handling:

- (a) must provide appropriate disclosure to retail clients when offering to settle a general insurance claim using cash payments;
- (b) can authorise representatives to provide claims handling services on their behalf;
- (c) can continue to appoint service providers, such as tradespeople to fulfil insurance contracts on their behalf;
- (d) must ensure insurance claims are handled and settled efficiently, honestly and fairly.

Recommendations that have been implemented -

Handling & settlement obligations (Rec. 4.8)

Exemptions under the new regime:

- (a) Lawyers acting in their professional capacity as a lawyer. For example, lawyers providing coverage advice to insurers or insureds in relation an insurance claim;
- (b) superannuation trustees;
- (c) independent medical examiners;
- (d) loss adjusters.

These don't require an AFSL.

Recommendations that have been implemented

– Design & distribution obligations

These reforms were already underway when the Royal Commission Final Report was released in February 2019, however following COVID delays they did not come into effect until 5 October 2021.

An issuer of a financial product is now required to consider the design of its product and to determine an appropriate target market for the product, including whether one exists – that is, whether there is a class of consumer for whom the product, including its key attributes, would likely be consistent with their likely:

- objectives
- financial situation; and
- needs.

If an appropriate target market cannot be identified, an issuer will not be able to offer the product.

Recommendations that have been implemented

– Design & distribution obligations

Issuers of financial products are now required to prepare a 'target market determination' for a financial product (excluding MySuper products). The target market determination must be such that it would be reasonable to conclude that the product would be consistent with the likely objectives, financial situations and needs of retail clients in the target market.

Remedies?

If a consumer suffers loss or damage due to breach of the design and distribution obligations in ss 994Bm 994D, 994E(1) or (3), they can recover that loss or damage or the Court can make other such as declaring a contract void or ordering the return of monies paid.

There are also civil penalty provisions.

Recommendations that have been implemented - Stapling (Your Future, your Super)

Commissioner Hayne proposed a single default superannuation fund for all workers to be carried over or 'stapled' to members as they move jobs.

Pursuant to the Your Future, Your Super Bill 2021, stapling will apply to employees starting employment on or after 1 November 2021.

From this date employees will have their existing super account 'stapled' to them as they change jobs, stopping the creation of multiple accounts that reduce employee's retirement savings.



Recommendations that have been implemented -

Stapling (Your Future, your Super)

When a choice of fund form isn't returned, employers will need to log into the ATO's online service, enter the employee's details to find their stapled super account and pay the employee's super into that account.

Employers will still need their default fund to create accounts for employees who don't choose a fund or don't have an existing super fund (e.g. an employee starting their first job).

Treasury has estimated that the new stapling arrangements will save Australians about \$2.8 billion over the next 10 years as fewer people will be paying fees and insurance premiums to multiple super funds.



Poll question

Ordinary workers super fund members interests are now better protected by financial institutions through the law and real cultural changes:

1. Strongly agree;
2. Agree;
3. Disagree;
4. Strongly disagree.



Recommendations that have not been implemented – enforceable code provisions (Rec.1.15)

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’.

Current status?

Draft Bill and EM circulated, consultation process completed. Was due 30 June 2021, but the Bill does not currently appear to be before Federal Parliament. Hence there is no code of practice with any real sanctions available for breaches.

Recommendations that have not been implemented – Universal terms (Rec. 4.13)

Recommendation 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.

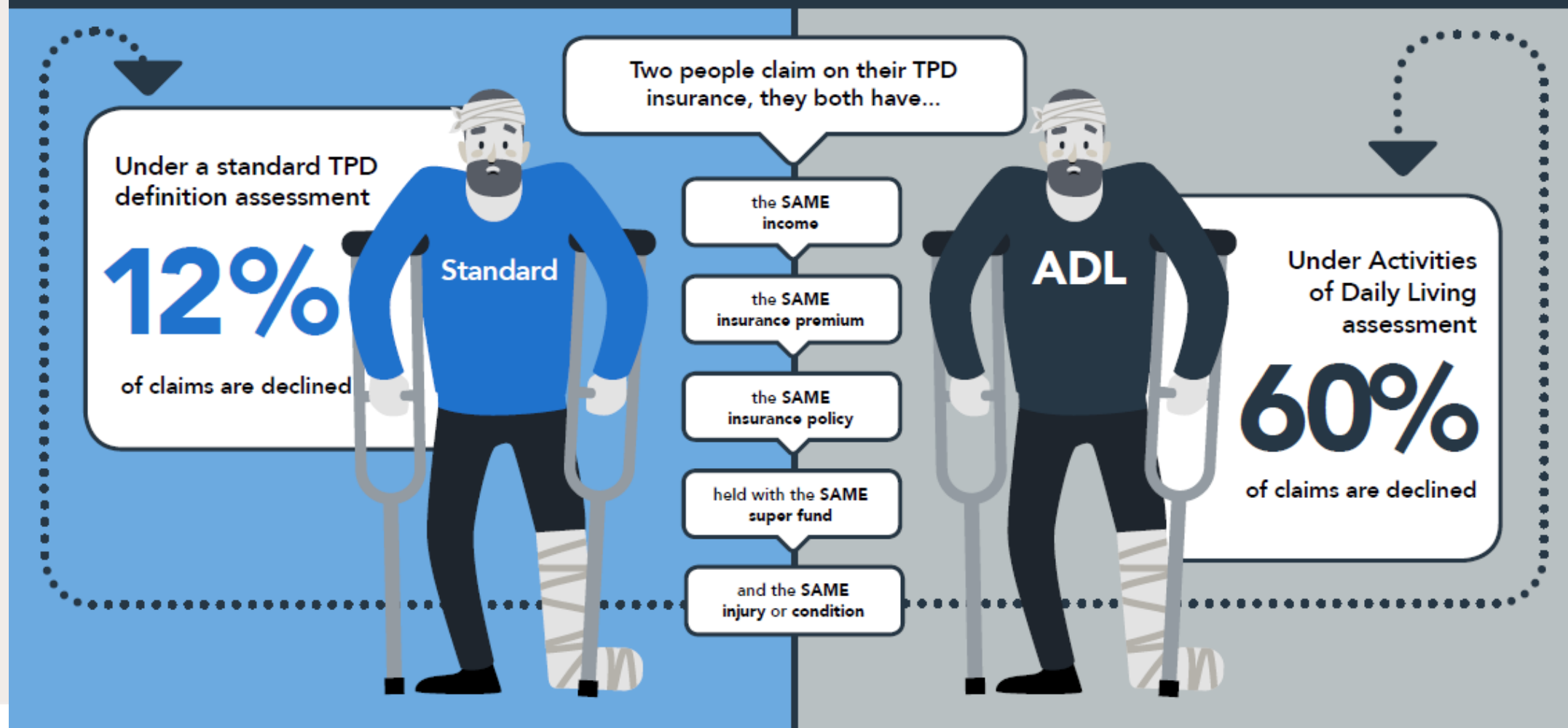
Treasury, in consultation with industry, **did** undertake a review in 2019, which received 18 submissions from industry bodies, law firms, superannuation funds and insurance companies.

However, Parliament has **not** any universal key definition, terms and exclusions for default MySuper group life policies, nor does there appear to be any Parliamentary bills proposing such universal terms.

Restrictive definitions such as the Activities of Daily Living (ADL) test produce **UNFAIR OUTCOMES** for consumers. Here is a comparison of claim outcomes:



ASIC
Australian Securities &
Investments Commission



(ASIC REP 633 Holes in the safety net: a review of TPD insurance claims)

RC Implications: Industry profit & loss trend

Net profit after tax for risk products, for year ended September 2017 to September 2021



Risk products net profit after tax (NPAT) for the year ended 30 September 2021

(in \$ million, unless noted otherwise)

	Year ended 30 Sep 2020	Year ended 30 Sep 2021	September Quarter 2021
Individual lump sum	361.6	427.0	186.7
Individual disability income insurance	-1,414.7	124.0	144.9
Group lump sum	-403.2	-97.5	-122.6
Group disability income insurance	-147.9	-14.4	26.7
Total	-1,604.2	439.1	235.6

<https://www.apra.gov.au/sites/default/files/2021-11/Quarterly%20life%20insurance%20performance%20statistics%20Highlights%20September%202021.pdf>

RC Implications: Value comparison - Group vs Retail

12 months to December 2019

Australian Prudential Regulation Authority
(APRA) has released its Life Insurance
Claims and Disputes statistics
<https://www.apra.gov.au/life-insurance-claims-and-disputes-statistics>

Table 2: Claims paid ratio[^] by cover type and distribution channel

Cover type	Individual Advised	Individual Non-Advised	Group Super	Group Ordinary
Death	43%	41%	80%	54%
TPD	45%	58%	85%	61%
Trauma	58%	44%	*	112%
DII #	70%	106%	82%	91%
CCI	n/a	29%	n/a	*
Funeral	n/a	25%	n/a	n/a
Accident	4%	24%	n/a	n/a

[^] The claims paid ratio is the dollar amount of claims paid out in the reporting period as a percentage of the annual premiums receivable in the same period.

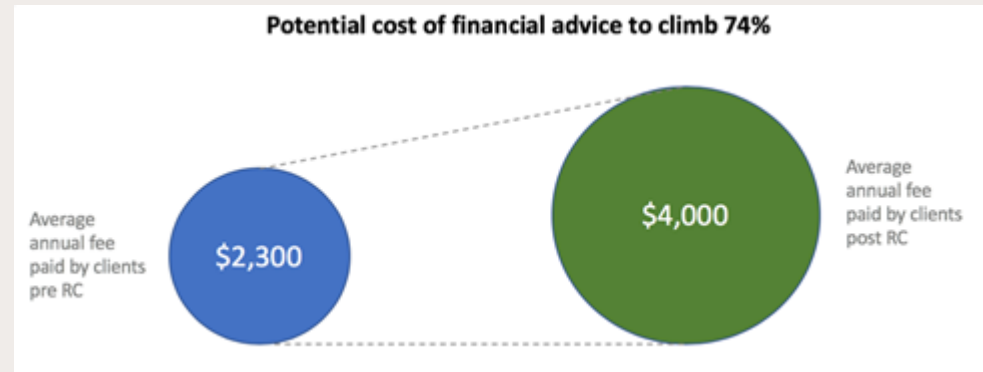
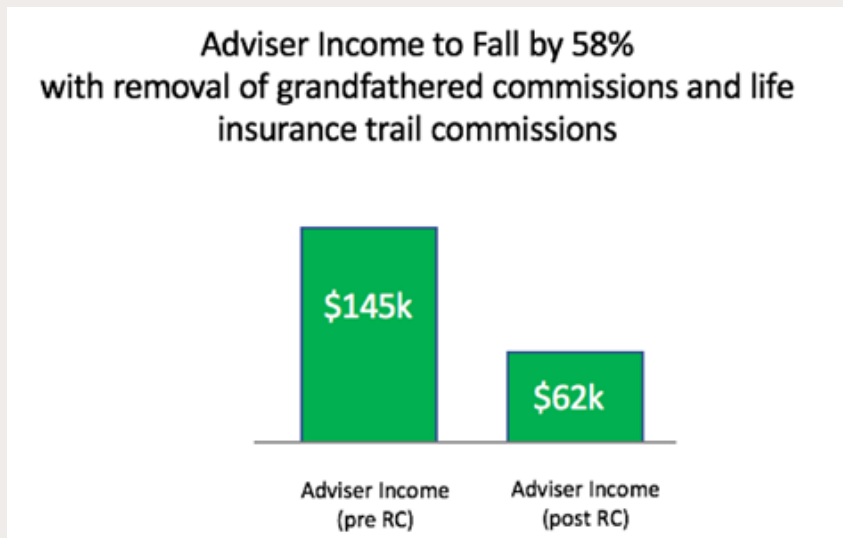
DII has recurring monthly payments. For the purposes of the reported claims ratio, total payments are approximated using an assumed 24-month payout period.

RC Implications: Financial adviser exodus

Active advisers to be 50% lower than pre-Hayne levels (<https://www.afr.com/companies/financial-services/financial-adviser-workforce-set-to-halve-by-2023-20210409-p57hsg>)

160% increase in the ASIC levy over 3 years (<https://www.moneymanagement.com.au/features/expert-analysis/walking-walk-%C2%A0advocacy>)

58% decrease in average adviser income after the removal of grandfathered commissions (<https://www.adviserratings.com.au/news/ending-commissions-what-it-means-for-advisers/>)



RC Implications: Pulling back default cover

The [Treasury Laws Amendment \(Putting Members' Interests First\) Act 2019](#) (PMIF)

- Passed in September 2019, the PMIF laws that from 1 April 2020, members of choice super products and MySuper funds will no longer be provided with automatic death and disability insurance if:
 - their account balance has not been \$6,000 or more on or after 1 November 2019; or
 - they are a new member after 1 April 2020 and are under the age of 25.
- 'Dangerous occupation' exception may apply.
- The PMIF reforms build on the March 2019 [Treasury Laws Amendment \(Protecting Your Superannuation\) Act 2019](#) (PYSP) which caused a member's automatic death and disability insurance to cease if their account is inactive (does not receive a contribution for more than 16 months).
- Members can opt-in to get cover but may be subject to underwriting.

COVID-19 Early release changes

- \$10,000 before 1 July 2020, and up to a further \$10,000 from 1 July 2020
- Tens of billions withdrawn, disproportionately by lower earners
- Long term financial impact (Analysis by Industry Super Australia points out that withdrawing \$20,000 over the next year could cost a 30-year-old \$100,000 at retirement, and a 40-year-old \$63,000)
- Loss of insurance when its needed most (half a million accounts emptied)
- Coercion ('Up to 70,000 women may have been coerced into withdrawing super')

Poll question

If elected this year, a Labour Government will do a better overall job in the financial services portfolio:

1. Strongly agree;
2. Agree;
3. Disagree;
4. Strongly disagree.



**Labor throws down super
gauntlet**

Maurice
Blackburn
Lawyers
Since 1919

**WE
FIGHT
FOR
FAIR[®]**