

The Hayne Recommendations: Why is there no debate?

by Phil Anderson, AFA General Manager, Policy and Professionalism

Last month marked the six-month anniversary of the release of the Banking Royal Commission final report. It was the toughest month for the financial adviser community, in what has been an extremely challenging six months.

On top of news of the closure of CBA licensee, Financial Wisdom, we also heard the adviser community at AMP faces enormous challenges, with expectations of a significant reduction in adviser numbers and a unilateral re-writing of Buyer of Last Resort (BOLR) terms. It's easy to say these are just two of the big institutionally owned groups, however the reality is the Royal Commission has impacted the entire advice profession. Across multiple measures, the impact has been seismic.

Recent speech by Kenneth Hayne

Recently, we noticed the first public statement by Banking Royal Commissioner, Kenneth Hayne since the release of the final report¹. Hayne spoke on the topic of Royal Commissions, arguing that a Royal Commission's work can be captured by the words 'independent', 'neutral', 'public' and 'yielding a reasoned report'.

He suggested this differed from "...modern political practices with its emphasis on party difference, and with decision making processes that not only are opaque but also, too often, are seen as skewed, if not captured, by the interests of those large and powerful enough to lobby government behind closed doors". He further argued, "Reasoned debates about issues of policy are now rare. (Three or four word slogans have taken their place.)" and, "Policy ideas seem often to be framed only for partisan or sectional advantage with little articulation of how or why their implementation would contribute to the greater good."

Advisers who have had their livelihoods significantly challenged by the Royal Commission recommendations may look at these statements in amazement. What appetite has there been to challenge Hayne's recommendations, the recommendations of just one person? This leads us to ask the question - was Hayne referring to how the political process responded to his report?

Where is the debate?

Ten days before the release of the Royal Commission Final Report, Chris Bowen, the then Shadow Treasurer, said, "A Labor government will seek to carry out all the recommendations of the Royal Commission into financial services." He further stated, "Your default position should be, if the Royal Commission recommends it, it shall be done."

The Government released its response just three days after receiving the final report, announcing it would take action on all 76 recommendations. Is this lack of debate and consultation what Hayne was

¹ Hayne spoke at the 2019 Centre for Comparative Constitutional Studies (CCCS) Constitutional Law Conference at the Melbourne Law School on 26 July 2019 http://alumni.online.unimelb.edu.au/s/1182/images/editor_documents/MLS/cccs/on_royal_commissions_-_the_hon_k_m_hayne.pdf

referring to? There was no debate and no appetite for it. What Hayne said, would be implemented – no ifs, no buts, no maybes. Why, given his recent statement, has Hayne himself not called out the lack of debate?

Our political processes are not perfect, and this is the key point that Hayne is rightly making, however the aftermath of this Royal Commission is no better. When the recommendations of one person, appointed on the basis of their legal, not industry experience, go unchallenged, despite the broad and devastating impact they may have, it reads like a form of autocracy.

Where is the room for alternative arguments and, most importantly, where is the voice of clients and the small business financial advisers who will be impacted the most?

Is it politically incorrect to challenge the Royal Commission?

It might be politically incorrect, however the last thing we should do, as a democracy, is drive fundamental change at break-neck speed just because one person says so.

The Association of Financial Advisers (AFA) repeatedly called for a focus upon the value of good financial advice. On 19 November 2018, in the final round of hearings, Senior Counsel Assisting made reference to the AFA, suggesting we were the only party defending the retention of Grandfathered Commissions. In fact, our argument focussed upon the complexity of this issue, and the need to take into account clients who are happy in their current arrangements and will be disadvantaged if forced to move. Our position was not fairly represented and we were not given a chance to respond.

In December 2018 we wrote to the Royal Commission seeking to clarify our position and offering the Royal Commission the opportunity to talk to quality advisers about the work they do with clients. Not only was this offer never taken up, we never heard back. Presumably minds were made up and nobody was prepared to hear a different view.

Did the Royal Commission comply with the Terms of Reference?

Paragraph (k) of the Banking Royal Commission Terms of Reference stated:

We direct you to have regard to the implications of any changes to laws, that you propose to recommend, for the economy generally, for access to and the cost of financial services for consumers, for competition in the financial sector and for financial system stability.

There was little discussion about the implications of the financial advice recommendations. There was no discussion on the number of clients impacted, or the impact on the adviser population. There was no reference to the impact on accessibility or the cost of financial advice.

The implementation of these recommendations will put access to affordable advice at increasing risk for everyday Australians. This was demonstrated by a recent statement from the MLC advice business, that they, “will focus on affluent clients, not mass clients”.

In his recent speech, Hayne also said, “Too often, the information that is available is neither read nor understood. And even if the information has been read and understood, debate proceeds by reference only to slogans coined by partisan participants.”

Although he was describing the conventional policy debate process, this could equally describe the Royal Commission's process.

The Impact of the Royal Commission on financial advice

Big decisions have been made by Government, and more recently by large institutions, however the impact has been felt greatest by thousands of self-employed advisers and the staff working in advice practices.

The exit of licensees

Westpac will exit financial advice, closing down its large self-employed licensees, Magnitude and Securitor. CBA has sold Count Financial for less than one per cent of what they paid for it eight years ago. CBA will also exit other businesses including Financial Wisdom. AMP will reduce up to a third of its 2,300 advisers. MLC has announced plans for significant restructuring. What impact will these decisions have on affected clients?

Remuneration

The regulators have issued directives that will impact the ability for small business financial advice practices to charge ongoing fees from superannuation accounts.

The Government has moved to ban trail commissions in 16 months' time. Groups like AMP have committed to removing it in less than half that time. This impacts clients who are exposed to the loss of access to advice in this short timeframe. The impact is hardest felt by those advisers who have recently bought businesses with trail commission clients, typically with borrowed funds. It will also have a big impact in regional and remote areas.

Many advisers around the country are at the moment subject to horrendous stress. For the big institutions, offloading advice operations is just a matter of a rounding error. For some advisers it will mean losing their lifetime savings.

While even advisers have mixed views on the debate about the removal of grandfathered commissions, it is an issue that stands out as a demonstration of the lack of good policy process. There were no examples presented at the Royal Commission of poor advice as a result of grandfathered commissions, the issue and the history were misrepresented. There is a lack of information on the number of impacted clients and the consequences. The Government directed the regulator to oversee the removal of grandfathering before any law was passed. The Government failed to do a Regulation Impact Statement, claiming that the Royal Commission process was equivalent, when it is clear that the Royal Commission did not consider the implications.

Government overreach

The Government wants product providers to cancel contractual commitments prior to the start of any legislation to avoid any constitutional issues. It is hard to believe that a Royal Commission recommendation could lead to the Government trying to circumvent the law and in coordination with the regulator encourage large companies to breach their contracts with small businesses. This is no doubt the type of poor policy process that Hayne was referring to.

Advisers have every reason to feel unfairly treated. There are many who feel sidelined and stereotyped by the Royal Commission, sacrificed and bullied by the Government, tormented by over-zealous regulators, deserted and slammed by institutional licensees and abandoned by product providers.

The announcement by the Government on Friday 30 August 2019 with respect to the extension of the deadline for the FASEA exam and the education requirement was pleasing, however the FASEA reforms are just one of many challenges that financial advisers face at this point in time.

Is it too late to have a sensible informed policy debate?

Given Hayne's recent speech, we wonder why he did not support genuine debate on his recommendations. Did he think his views were so well reasoned and so correct, there was no need for debate?

Why didn't he question the ALP's commitment to fully implement his recommendations, even before they were released, and the Government's response being handed down within three days? If he wanted to make a stand about the lack of public debate and insufficient focus upon the contribution to public good, he could have started by inviting a genuinely informed debate on his own recommendations.

He still has this chance.

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