
**FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION RESPONSE –
PROTECTING CONSUMERS (2020 MEASURES)) BILL 2020: FSRC REC 4.5
(DUTY OF DISCLOSURE TO INSURER)**

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
Bill	Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
Insurance Contracts Act	<i>Insurance Contracts Act 1984</i>
Insurance Contracts Regulations	<i>Insurance Contracts Regulations 2017</i>
New duty	The duty to take reasonable care not to make a misrepresentation as defined in section 20B of the Insurance Contracts Act

Chapter 1

Duty of disclosure to insurer

Outline of chapter

1.1 Schedule # to this Exposure Draft Bill amends the Insurance Contracts Act to replace the duty of disclosure for consumer insurance contracts with a duty to take reasonable care not to make a misrepresentation. These amendments implement Recommendation 4.5 of the Financial Services Royal Commission.

1.2 All references in this Chapter are to the Insurance Contracts Act.

Context of amendments

1.3 Under the current law, an insured is required to disclose matters known to the insured that are relevant to the insurer's decision of whether or not to accept the risk and, if so, on what terms (section 21).

1.4 A modified duty of disclosure applies to 'eligible contracts of insurance' (section 21A). These contracts are prescribed in the Insurance Contracts Regulations and include contracts relating to motor vehicle insurance, home buildings insurance, home contents insurance, sickness and accident insurance and travel insurance. They do not include life insurance.

1.5 Under this modified duty of disclosure, the insurer must ask specific and relevant questions. The insured's duty does not extend beyond responding to those questions. When the insured renews their contract, the insurer may ask the insured specific questions or ask them to confirm or update the information they previously gave the insurer.

1.6 Insurers must inform the insured clearly in writing of their duty of disclosure (section 22). Otherwise the insurer cannot rely on the duty of disclosure.

1.7 If an insured breaches their duty of disclosure the insurer may access the remedies outlined in Division 3 of Part IV of the Insurance Contracts Act. Broadly, depending on the circumstances of the failure to comply with the duty of disclosure, these remedies can allow the insurer to:

- reject a claim;
- reduce a payout;

- increase a premium; or
- avoid the contract.

1.8 In assessing the current duty of disclosure, the Financial Services Royal Commission found the existing approach to disclosure is no longer relevant for modern consumer contracts of insurance. Commissioner Hayne concluded that the duty does not recognise the breadth and depth of the gap between what a consumer knows and what an insurer knows is relevant. That is, the duty fails to recognise the extent of the information asymmetry between a consumer and an insurer.

1.9 The Financial Services Royal Commission final report set out observations made in the UK Law Commission and the Scottish Law Commission’s 2009 joint report: *Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation*. Commissioner Hayne found those observations – that, even where consumers act honestly and reasonably, they may be denied cover and they can easily misunderstand the insurer’s questions – apply equally in the Australian context.

1.10 The Financial Services Royal Commission concluded that the duty to take reasonable care not to make a misrepresentation to an insurer is more appropriate for consumer contracts of insurance and is substantially less complex than the current duty. Commissioner Hayne noted it placed the burden on an insurer to elicit the information that it needs and does not require the consumer to surmise or guess what information might be important to an insurer.

1.11 In agreeing to amend the duty of disclosure for consumers, the Government noted the current requirements fall short of adequately safeguarding consumers against having their claims declined where they may have inadvertently failed to disclose their past circumstances or because insurers have failed to ask the right questions.

Summary of new law

1.12 Schedule # to this Exposure Draft Bill replaces the existing duty of disclosure with a new duty for an insured to take reasonable care not to make a misrepresentation when entering into, varying, extending or renewing a consumer insurance contract. The new duty applies only to contracts of insurance (including general and life insurance contracts) obtained for the insured’s personal, domestic or household purposes.

1.13 In determining whether the insured has taken reasonable care not to make a misrepresentation, all relevant circumstances must be taken into account. Any characteristics or circumstances of the insured of which the

insurer was or ought reasonably have been aware must also be taken into account.

1.14 The amendments in Schedule # will take effect from 5 April 2021.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>An insurance contract will be a consumer insurance contract if:</p> <ul style="list-style-type: none"> • the insurance is obtained wholly or predominantly for the personal, domestic or household purposes of the insured; or • the contract is for new business and, before the contract is entered into, the insurer gives the insured a written notice stating that the contract is a consumer insurance contract. 	<p>Eligible contracts of insurance are prescribed in the Insurance Contracts Regulations.</p>
<p>The insured has a duty to take reasonable care not to make a misrepresentation to the insurer on entering into, varying, extending or renewing a consumer insurance contract.</p> <p>For other contracts:</p> <ul style="list-style-type: none"> • the insured’s duty to disclose all matters that they know to be relevant to the insurer’s decision and all matters that a reasonable person in the circumstances could be expected to know continues to apply; and • the insured’s duty not to make a misrepresentation during the negotiations for a contract before it is entered into, varied, extended or renewed continues to apply. 	<p>For eligible contracts of insurance, the insured’s duty of disclosure is limited to responding to specific questions asked by the insurer, including that the insured confirm or update information previously given to the insurer when entering into, varying, extending or renewing an insurance contract.</p> <p>For other contracts:</p> <ul style="list-style-type: none"> • the insured has a duty to disclose all matters that they know to be relevant to the insurer’s decision and all matters that a reasonable person in the circumstances could be expected to know would be relevant when entering, varying, extending into or renewing the contract; and • the insured has a duty not to make a misrepresentation during the negotiations for a contract before it is entered into, varied, extended or renewed.

Detailed explanation of new law

1.15 Schedule # to this Exposure Draft Bill amends the Insurance Contracts Act to replace the duty of disclosure with a new duty for an insured to take reasonable care not to make a misrepresentation when entering into, varying, extending, or renewing a consumer insurance contract.

Consumer insurance contracts

1.16 The new duty to take reasonable care not to make a misrepresentation to the insurer applies in relation to:

- consumer insurance contracts; and
- proposed contracts of insurance that, if entered into, would be consumer insurance contracts.

[Schedule #, item 2, section 20A]

1.17 A contract of insurance (as defined by section 10) is a **consumer insurance contract** if the insurance is obtained wholly or predominantly for the personal, domestic or household purposes of the insured.

[Schedule #, items 1 and 2, definition of ‘consumer insurance contract’ in subsections 11(1) and 11AB(1)]

1.18 Consumer insurance contracts include both general and life contracts of insurance.

1.19 Therefore, for a contract of life insurance that is a consumer insurance contract, a person who is a life insured must take reasonable care not to make a misrepresentation. This replaces the current obligation on the life insured to comply with the duty of disclosure in section 31A.

[Schedule #, items 13 and 25, subsection 27AA(2)]

1.20 Consumer insurance contracts are likely to include contracts that were previously classified as ‘eligible contracts of insurance’ – such as contracts relating to motor vehicle insurance, home buildings insurance, home contents insurance, sickness and accident insurance and travel insurance. The definition also captures other insurance contracts which are not currently ‘eligible contracts of insurance’, such as pet insurance.

1.21 If a contract for insurance is for new business, an insurer may elect to notify the insured that a contract is considered to be a consumer insurance contract. This broadly replicates the existing regulation 6(3) of the Insurance Contracts Regulations. *[Schedule #, item 2, subsection 11AB(2)]*

1.22 If it is alleged that a contract of insurance is a consumer insurance contract, the contract is presumed to be a consumer contract unless proved otherwise. *[Schedule #, item 2, subsection 11AB(3)]*

1.23 The duty of utmost good faith in Part II of the Insurance Contracts Act will continue to be an implied term of any pre-contractual negotiation, and operates alongside the duty to take reasonable care not to make a misrepresentation. However, in relation to the disclosure of a matter to the insurer in relation to a consumer insurance contract, the insured does not have a duty under Part II of the Insurance Contracts Act other than the duty to take reasonable care not to make a misrepresentation. *[Schedule #, item 3, section 12]*

1.24 For contracts of insurance that are not consumer insurance contracts, Division 1 (Duty of Disclosure) and Division 2 (Misrepresentations) of Part IV of the Insurance Contracts Act continue to apply.

The duty to take reasonable care not to make a misrepresentation

1.25 The new duty is that an insured must take reasonable care not to make a misrepresentation to the insurer. It applies when a consumer insurance contract is ‘entered into’. *[Schedule #, item 2, subsection 20B(1)]*

1.26 Under section 11(9), a reference to the entering into of a contract of insurance also includes a reference to:

- for life insurance contracts – the making of an agreement by the parties to the contract to extend or vary the contract;
- for other contracts of insurance – the making of an agreement by the parties to the contract to renew, extend or vary the contract; or
- the reinstatement of any previous contract of insurance.

1.27 In determining whether the insured has fulfilled the new duty to take reasonable care not to make a misrepresentation to the insurer, regard must be had to all the relevant circumstances of a particular case. *[Schedule #, item 4, subsection 20B(2)]*

1.28 As the circumstances that are relevant in determining whether the insured has fulfilled the new duty to take reasonable care not to make a misrepresentation to the insurer will vary depending on the facts of the particular case, there is no limitation on the range of factors that can be considered (noting that all relevant circumstances must be considered).

1.29 However, more specifically:

- subsection 20B(3) specifies a range of matters that may be taken into account – the specified matters would often be relevant in determining whether an insured has fulfilled the new duty; and
- subsection 20B(4) effectively requires the insurer to take into account particular characteristics or circumstances about the

insured of which the insurer was aware, or ought to have been aware – as a result, the insured will satisfy the new duty even if they do not specifically disclose those particular characteristics or circumstances to the insurer.

Matters that may be taken into account in determining whether the insured has fulfilled the new duty

1.30 Without limiting the range of factors that may be taken into account in determining whether the insured has fulfilled the new duty to take reasonable care not to make a misrepresentation to the insurer, consideration may be given to the following matters:

- the type of consumer insurance contract in question, and its target market;
- explanatory material or publicity produced or authorised by the insurer;
- how clear, and how specific, any questions asked by the insurer were;
- how clearly the insurer communicated the importance of answering their questions and the possible consequences of failing to do so; and
- whether or not an agent was acting for the insured.

[Schedule #, item 4, subsection 20B(3)]

1.31 These factors would often be relevant in determining whether an insured has fulfilled the new duty. In applying these factors (and any other factor that may be relevant), it should generally be assumed that the insured is an average person with no special skills or knowledge, noting that the relevance of any particular factor will vary depending on the circumstances of the case.

1.32 In addition, if the insurer knew, or ought to have known, about particular characteristics or circumstances of the insured individual, these characteristics or circumstances must be taken into account in determining whether the insured has taken reasonable care not to make a misrepresentation to the insurer. *[Schedule #, item 4, subsection 20B(4)]*

The type of consumer insurance contract in question and its target market

1.33 The type of consumer insurance contract and its target market may be taken into account when determining whether the insured took reasonable care not to make a misrepresentation to the insured.

1.34 Consumer insurance contracts can vary widely. For instance, they can have different pricing mechanisms, payment arrangements, subject-matter and terms. They can be negotiated, standard-form, written,

verbal, online, or a mix of these. New, renewed, varied and extended contracts also have different circumstances attached to them. Therefore, the type of insurance contract may affect what the insured is required to do to discharge their duty of disclosure.

1.35 Similarly, consumer insurance contracts can have different target markets. Policies containing options and levels of cover may have a broad target market with narrower components within – for example, motor vehicle insurance may have a ‘luxury/sports’ option targeting a different demographic to the market targeted by its ‘family’ option, with different categories under each option for more specific intended markets. Whether the insured fell within the target market of the consumer insurance contract may also be relevant in determining whether the insured fulfilled the new duty of disclosure.

Example 1.1

Harold entered into a consumer insurance contract for which he was not part of the target market (for example, if Harold was unemployed).

This circumstance may lower the standard of care required on Harold’s behalf to discharge his duty.

Example 1.2

Lesley entered into a consumer insurance contract for travel insurance by initially speaking to the insurer in person when attending her local branch then applying online. This mixed verbal/written type of contract may be considered relevant as Lesley may have told the insurer about certain matters in person and not repeated those in her application, having already disclosed them.

This circumstance would generally lower the standard of care required on Lesley’s behalf to discharge her duty.

Explanatory material or publicity produced or authorised by the insurer

1.36 The provision of easily comprehensible, accessible material by the insurer that explains the specific consumer insurance contract in question would generally be expected to result in the insured’s duty being lowered.

Example 1.3

Dee entered into a consumer insurance contract. The insurer provides Dee with easily understood material, including written materials and a short video. In the application form, the questions asked are accompanied by relevant examples of the types of information that the insurer considers relevant.

This circumstance would generally raise the standard of care required on Dee’s behalf to discharge her duty.

How clear, and how specific, any questions asked by the insurer were

1.37 The clarity and specificity of questions asked by the insurer may be taken into account when determining whether the insured took reasonable care not to make a misrepresentation to the insured. For example, it would generally be more difficult for an insured to answer:

- compound questions that are open-ended, general or long; or
- questions that are difficult to understand or interpret.

1.38 If the insurer asks these kinds of questions, it would generally be expected to result in the insured’s duty being lowered.

1.39 While there is no express consequence for insurers asking general or difficult questions (as is the case with the existing disclosure requirements for eligible insurance contracts), the inclusion of this factor creates a strong disincentive for insurers to ask such questions.

Example 1.4

Eleanor enters into a consumer insurance contract for life insurance online. In the online questionnaire, the insurer asks questions about her medical history without any reference to a relevant time period. The long duration of the open time period may be considered relevant as Eleanor may have had many medical appointments over the course of her life.

This circumstance would generally lower the standard of care required on Eleanor’s behalf to discharge her duty.

Example 1.5

Eva enters into a consumer insurance contract for home building insurance. The insurer asks whether her home’s construction was completed after 2012. Eva remembers she renovated her home during 2014 and 2015, and therefore she responds ‘yes’. The insurer does not clearly specify whether they are asking whether the initial construction or the current, whole structure was completed after 2012.

This circumstance would generally lower the standard of care required on Eva’s behalf to discharge her duty.

How clearly the insurer communicated the importance of answering those questions (or the possible consequences of failing to do so)

1.40 If an insurer takes active steps to inform the insured about the importance of answering questions, as well as the consequences of failing to do so, the insured would not generally lower the standard of duty to take reasonable care not to make a misrepresentation to the insurer.

1.41 This factor encompasses both non-written communications and their effect and written communications by the insurer. For example, if an insurer provided both clear, relevant written material and a verbal

explanation of the duty in lay person terms, this might reduce the potential for confusion or misunderstanding. Consequently, while insurers are not required to give notice to the insured, the new law is more flexible as it enables insurers to focus resources on communication that is most effective in the circumstances in which they deal with the insured

1.42 Consequently, the notice requirement in section 22 (which provides that the insurer cannot rely on its rights under the existing duty of disclosure unless it notifies the insured of their duty) will not apply to consumer insurance contracts. However, the substitution of this factor for section 22 does not reduce expectations that the insurer should give specific, clear communications to the insured.

Example 1.6

Belinda has motor vehicle insurance. At the time for renewal, the insurer asks whether she has had any accidents over the last year but does not clearly ask whether the motor vehicle being insured has been involved in any accidents and whether she, or someone else was driving.

This circumstance would generally lower the standard of care required on Belinda's behalf to discharge her duty.

Whether or not an agent was acting for the insured

1.43 One of the factors that is relevant in determining whether the insured has fulfilled the new duty to take reasonable care not to make a misrepresentation to the insurer is whether or not an agent (such as a financial advisor or insurance broker) is acting for the insured.

1.44 The appointment of an agent by the insured does not, of itself, change the insured's duty to take reasonable care not to make a misrepresentation to the insurer. However, depending on the nature of the agent's involvement, this may be evidence that the insured has taken reasonable steps to fulfil their duty.

Particular characteristics or circumstances of the insured that are known by the insurer must be taken into account

1.45 Where the insurer knew, or ought to have known, about particular characteristics or circumstances of the insured, these characteristics or circumstances must be taken into account in determining whether the insured has taken reasonable care not to make a misrepresentation to the insurer. [*Schedule #, item 4, subsection 20B(4)*]

1.46 In this regard it is important to note that subsection 23B(3) lists matters that, if relevant, may be taken into account in determining whether the insured has taken reasonable care not to make a misrepresentation to the insurer.

1.47 In contrast, if the insurer knew, or ought to have known, about particular characteristics or circumstances of the insured, subsection 23B(4) requires those characteristics or circumstances to be taken into account in determining whether the insured has taken reasonable care not to make a misrepresentation to the insurer. As a result, the insured will satisfy the new duty even if they do not specifically disclose those particular characteristics or circumstances to the insurer.

1.48 The question as to whether an insurer knew, or ought to have known, about particular characteristics or circumstances of the insured should be determined on the basis of whether it is reasonable to conclude that the insured knew, or ought to have known, about those particular characteristics or circumstances having regard to their dealings with the insured and any other relevant facts.

Example 1.7

Tom has advanced alzheimers disease. He applied for home insurance over the phone. During the phone call it was apparent that Tom was unable to remember simple facts.

This characteristic would lower the standard of care required on Tom's behalf to discharge his duty.

Example 1.8

Kevin is dyslexic. He went to Roof Cover Pty Ltd and entered into a consumer insurance contract for a home contents insurance product. Kevin did not tell Roof Cover's representative about his dyslexia and there was no other reason the insurer ought have been aware of his dyslexia. Roof Cover sent out the application form and asked Kevin to read the relevant documents. Kevin sent back the application form completed and signed.

This characteristic would not lower the standard of care required on Kevin's behalf to discharge his duty.

Example 1.9

Eileen has poor eyesight. She entered into a consumer insurance contract for a home contents insurance product with Safe Houses Ltd. Eileen advised a representative of Safe Houses that she has poor eyesight. Safe Houses gives Eileen written materials in a small font size.

This characteristic would lower the standard of care required on Eileen's behalf to discharge her duty.

Failure to answer a question

1.49 Consistent with the current law, the insured is not to be taken to make a misrepresentation in respect of the new duty merely because they

failed to answer a question or gave an obviously incomplete or irrelevant answer to a question. *[Schedule #, item 4, subsection 20B(5)]*

1.50 This ensures that an insurer is not complicit in allowing information that is obviously incomplete or irrelevant to be a misrepresentation. The insurer should bear the onus to follow up in such cases.

Fraudulent misrepresentation

1.51 Consistent with the current law, any misrepresentation made fraudulently is taken to be a breach of the new duty, with the corresponding remedies under Division 3 of Part IV of the Insurance Contracts Act available to the insurer. *[Schedule #, item 4, subsection 20B(6)]*

Group life insurance

1.52 The new duty to take reasonable care not to make a misrepresentation to the insurer applies to a life insured under a group life contract that is a consumer insurance contract. *[Schedule #, items 26 to 29, section 32]*

1.53 A *group life contract* is defined in section 11 to mean a contract of life insurance that is maintained for the purposes of:

- a superannuation or retirement scheme under which there can be more than one life insured; or
- another kind of group life scheme (including a scheme that is not related to employment) under which there can be more than one life insured.

1.54 The new duty to take reasonable care not to make a misrepresentation to the insurer also applies to a life insured under a group life contract in relation to the holder of a Retirement Savings Account that is a consumer insurance contract. *[Schedule #, items 30 to 31, section 32A]*

1.55 In this regard, an insurance contract held by the life insured will generally fall within the definition of a consumer insurance contract.

1.56 The new duty does not apply to a superannuation fund trustee or authorised representative who enters the group contract with the insurance company for the purposes of offering the insurance to fund members or employees. Like other commercial contracts, this relationship will continue to be subject to the existing duty of disclosure.

Remedies for breach of the new duty

1.57 The remedies available to the insurer once a breach of the duty has been established depend on the nature of the consumer’s misrepresentation.

1.58 The amendments in Schedule # to this Exposure Draft Bill do not alter the remedies available under the existing law for non-disclosure and misrepresentations by the insured. However, separate amendments are being made to amend subsection 29(3) 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. These amendments will implement Recommendation 4.6 of the Financial Services Royal Commission.

1.59 Therefore, subject to this change, the existing remedies in Division 3 of Part IV of the Insurance Contracts Act will apply for a breach of the new duty to take reasonable care not to make a misrepresentation. These remedies are currently available for a breach of the duty of disclosure and for the making of a misrepresentation. The remedies in Division 3 will be available for a ‘relevant failure’ by the insured.

1.60 A ***relevant failure*** in relation to a contract of insurance is:

- if the contract is a consumer insurance contract – a misrepresentation made by the insured in breach of the duty to take reasonable care not to make a misrepresentation; or
- for other insurance contracts – a failure by the insured to comply with the duty of disclosure or a misrepresentation made by the insured to the insurer before the contract was entered into.

[Schedule #, items 1 and 13 to 31, definition of ‘relevant failure’ in subsection 11(1), sections 27AA, 28, 29, 31, 32 and 32A]

1.61 The remedies in subsection 60(1) (which allow for an insurer to cancel a contract of general insurance in relation to a failure to comply with the duty of disclosure or a misrepresentation during negotiations for the contract before it was entered into) are also available under the new law for a breach of the new duty to take reasonable care not to make a misrepresentation for consumer insurance contracts. *[Schedule #, items 32 and 33, paragraphs 60(1)(a) to (c)]*

1.62 In seeking a remedy, the onus of proof is on the insurer to show that the insured has failed to discharge the duty to take reasonable care not to make a misrepresentation.

1.63 Consistent with section 24, a statement made in or in connection with a contract of insurance, being a statement made by or attributable to

the insured, with respect to the existence of a state of affairs does not have effect as a warranty but has effect as though it were a statement made to the insurer by the insured during the negotiations for the contract but before it was entered into. *[Schedule #, item 4, section 20C]*

Consequential amendments

1.64 Schedule # to this Exposure Draft Bill makes a number of consequential amendments.

1.65 First, consequential amendments provide that the duty of utmost good faith, contained in Part II of the Insurance Contracts Act does not impose any duty on the insured under a consumer insurance contract, in relation to the disclosure of a matter to the insurer, other than the duty to take reasonable care not to make a misrepresentation. *[Schedule#, item 3, section 12]*

1.66 Second, consequential amendments provide that the general duty of disclosure in section 21 applies only in relation to contracts (and proposed contracts) of insurance that are not consumer insurance contracts. *[Schedule #, item 6, section 20E]*

1.67 Finally, consequential amendments repeal sections 21A and 21B (which contain a modified duty of disclosure that applies in relation to ‘eligible contracts of insurance’) – as the concept of an eligible contract of insurance will be replaced with the concept of a consumer insurance contract, there is no longer a need for the modified duty of disclosure in sections 21A and 21B. *[Schedule #, item 7, sections 21A and 21B]*

Application and transitional provisions

1.68 The new duty to take reasonable care not to make a misrepresentation will apply in relation to consumer insurance contracts that are entered into on or after 5 April 2021. *[Schedule #, subitems 34(1) and (2)]*

1.69 For consumer insurance contracts other than contracts of life insurance, the new duty will also apply in relation to the making of agreements by the parties to the contract to renew, extend, or vary the contract. This also includes the reinstatement of the contract (see subsection 11(9)).

1.70 In relation to life insurance contracts, if a life insurance contract entered into prior to 5 April 2021 is varied on or after that date then, to the extent of that variation, the contract is treated as though it were entered into after 5 April 2021. This only applies in relation to expressly agreed variations to increase the sum insured in respect of one or more of the life

insureds or to provide one or more additional kinds of insurance cover between the insurer and the insured. [*Schedule #, subitem 34(3)*]

1.71 Applying the new law from 5 April 2021 means the start date will align with:

- the date of application of the Design and Distribution Obligations in Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*; and
- the proposed date of application of the unfair contract terms regime for insurance contracts contained in Schedule 1 to the Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Bill 2019 – this Bill was introduced into the House of Representatives on 28 November 2019 to implement Recommendation 4.7 of the Financial Services Royal Commission.