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FUTURE OF FINANCIAL ADVICE SERIES

ASIC'S NEW POWERS

This update is intended as a general overview, targeted specifically at claims officers and underwriters of insurers of professionals required to comply with the Future of Financial Advice (FOFA) reforms.

WHAT IS IT?

The Australian Securities and Investments Commission (ASIC) has now increased powers to protect the public and reinforce the integrity and reputation of the financial services industry due to the FOFA reforms.

Prior to implementation of FOFA, a number of factors were impacting on the ability of ASIC to exercise its powers including decisions of the Administrative Appeals Tribunal (AAT) relating to when someone "will" breach the law, the difficulty with removing individuals (given that the existing legislation focused upon licensees) and the lack of scope for ASIC to remove representatives in certain circumstances, such as where they were not of good fame and character.

ASIC has been given expanded powers to:

- 1 Refuse to issue, cancel or suspend a licence where the licensee is likely to contravene its obligations;
- 2 Ban individuals from providing financial services if they are likely to contravene a financial services law;
- 3 Ban individuals from providing financial services if they are not of good fame and character or not adequately trained or competent to provide financial services; and
- 4 Ban individuals who are involved, or likely to be involved in a contravention of a financial services law by another person.

Changes to the licensing and banning thresholds include that ASIC can refuse or cancel a licence, or ban a person, where that person is likely to contravene (rather than breach) the law.

In particular, in the course of investigating whether an Insured has engaged in conduct which causes ASIC to act on one of the powers set out above, that party (or a related party) may be summoned to attend ASIC to provide information for that purpose. These reforms may therefore give rise to an increased number of claims for indemnity by insureds pursuant to "inquiry costs" extensions and similar clauses.

COMPLIANCE - WHAT TO LOOK FOR

As with the exercise of any administrative powers, any decision made by ASIC will be based on the individual circumstances of each case, but would generally take account of factors such as the nature and seriousness of the misconduct, the internal controls on the licensee or the person and the previous regulatory record of the person.

To this end, insurers should pay particular regard to the internal controls the licensee has in place prior to Policy inception as it may be pertinent to any subsequent claim brought against the Insured party. Insureds will nevertheless continue to have existing review rights in relation to ASIC decisions about licensing and banning, including to the AAT.

With the scope of its powers increased, it appears ASIC will be further enabled to remove unscrupulous operators from the industry, improve overall industry standards and promote broader consumer and investor confidence in financial services.

CHECKLIST FOR INSURERS

We recommend claims officers consider the checklist below when reviewing any claim brought against a financial adviser post-FOFA. We also recommend that insurers review current claim form and proposal form templates and consider updating them to include reference to the matters set out below.

- 1 Does the adviser have sufficient internal controls in place to ensure it has complied with its obligations?
- 2 Has the adviser kept diligent records in respect of compliance?

RELATED UPDATES

[Click here](#) for our related update "Best interests duty."

[Click here](#) for our related update "Ban on conflicted remuneration."

[Click here](#) for our related update "Opt-in and fee disclosure."

MORE INFORMATION

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