Liability in the new financial advice regime

This fact sheet provides an overview of the potential consequences of breaching the new financial advice duties (as introduced under the Financial Services Legislation Amendment Act 2019).

This factsheet does not set out all legal duties that may apply to those providing a financial advice service. We recommend seeking independent legal advice for specific guidance on the liability implications of your particular circumstances.

DUTIES

FOR ALL WHO GIVE FINANCIAL ADVICE

(including financial advice providers, financial advisers and nominated representatives)

- Comply with a new code of conduct and meet the standards of competence, knowledge and skill set in the code
- Ensure the client understands the nature and scope of the advice
- Give priority to the client's interests where there is a conflict between the interests of the client and the advice giver
- Exercise care, diligence and skill in giving advice
- Do not recommend financial products that do not comply with the FMC Act
- Make prescribed information available to clients (as per disclosure regulations)
- Do not make false or misleading statements and omissions in disclosure information.

ADDITIONAL DUTIES FOR FINANCIAL ADVICE PROVIDERS AND INTERPOSED PERSONS

- Take all reasonable steps to ensure individuals they engage comply with their duties (as set out above)
- Have processes and controls that limit advice given by nominated representatives
- Do not give incentives to nominated representatives that may encourage them to breach their duties.

LIABILITY

FINANCIAL ADVICE PROVIDERS

- Financial advice providers may be held responsible for their own conduct as well as the conduct of their financial advisers and nominated representatives, and any authorised bodies under their licence.
- Financial advice providers may be subject to penalties and/or required to pay compensation. The maximum penalty that may apply varies depending on the duty breached and the seriousness of the breach:
  - In most cases the maximum penalty is up to $200,000 (for an individual) or $600,000 (in any other case e.g. for an entity).
  - In relation to false or misleading statements and omissions in disclosure information the maximum penalty can be either up to three times the value of the loss or gain related to the breach, or up to $1 million (for an individual) or $5 million (in any other case) – whichever is greater.
- A financial advice provider may not be ordered to pay a penalty if they have taken all precautions to ensure their financial advisers comply with the duties but where the financial adviser breaches a duty anyway.
- Dispute resolution schemes may require financial advice providers to pay compensation to their clients. Each scheme sets the maximum amount payable, which currently ranges from $200,000 to $350,000.
- Financial advice providers may also be subject to licensing actions by the Financial Markets Authority (FMA), which could include loss of licence and deregistration orders.

FINANCIAL ADVISERS AND NOMINATED REPRESENTATIVES

- Financial advisers are subject to disciplinary action from the Financial Advisers Disciplinary Committee (FADC) and the FMA for breaches of the duties:
- FADC can subject financial advisers to fines of up to $10,000.
- FADC and the FMA can direct the Registrar of Financial Service Providers to deregister or suspend a financial adviser.
- Financial advisers and nominated representatives can be personally liable for penalties in cases of serious misconduct where they knowingly breach a duty (for example, deliberately trying to mislead the client by falsifying disclosure material). The maximum penalty that may apply varies depending on the duty breached and the seriousness of the breach:
  - In most cases the maximum penalty is up to $200,000.
  - In relation to false or misleading statements and omissions in disclosure information the maximum penalty can be either up to three times the value of the loss or gain related to the breach, or up to $1 million – whichever is greater.

REFERENCES

New sections 431I to 431R of the Financial Markets Conduct Act 2013 (FMC Act) set out the core duties and new section 431H sets out who is responsible if duties are breached and the nature of the person's liability.

Amended section 449 of the FMC Act sets out the maximum penalties for breaches of duties and section 495 provides for the court to order compensation to aggrieved parties.