

FOFA LAYS DOWN THE LAW ON BROKERS' BEST INTERESTS

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There is a new world on the horizon for brokers. They will have to be more careful when selling a policy in the future.

They will have to ensure they are acting in the best interest of the client at all times and have not been be influenced by producers.

While many brokers will argue they do this every day, from July 1 next year they will have to do it by law.

The second tranche of the Future of Financial Advice (FOFA) reforms has defined what brokers and financial advisers must do to meet the best interests of the client.

For brokers, they must have "identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client".

Brokers will also have identified the subject matter of the advice being sought by the client and the objectives, financial situation and needs of the client "that would reasonably be considered as relevant".

If the broker feels it is "reasonably apparent" that the information supplied by the client is incomplete or inaccurate, they will have a duty to make "reasonable enquiries to obtain complete and accurate information".

Life insurance advisers will also have to be assessed whether they have the expertise to give the advice, conduct reasonable investigation into financial products that meet the client's needs and base all judgements on the client's "relevant circumstances".

A final condition for advisers meeting the best interests test has been described as vague and impossible to fulfil.

It requires the adviser to have "taken any other step that would reasonably be regarded as being taken in the best interests of the client, given the client's relevant circumstances".

Peter Townsend, MD of legal firm Townsends told insuranceNEWS.com.au this clause in the bill is confusing and he isn't sure what the adviser is supposed to do.

“I can’t figure out if it is an active obligation that means the adviser must take this step or if the adviser merely intends to act in the client’s best interest,” he said.

“It is not clear what the adviser has to do or how they will comply with this clause.”

Mr Townsend says too many of the terms are “rubbery” and are open to question on how they will be inter-related.

“An average insurance adviser, with a reasonable level of expertise, has exercised care yet they now have to do all these additional things,” Mr Townsend said.

“Now they have to meet all these requirements that use terms that are waffle, such as ‘reasonable’, which appears several times.”

Minter Ellison partner Richard Batten says the difficulty of meeting the best interests test will be in the application of the legislation.

“The day-to-day level of administrating these requirements will be considerable,” he told insuranceNEWS.com.au.

“At a fundamental level, the new regulations are not significantly different from what is in the existing Corporations Act, but now there is more detail and some extra wording.”

While the definitions will be open to interpretation, in the short-term Mr Batten says it will be unlikely there will be any test cases in the courts.

“A lot of the definitions will be proved by Financial Ombudsman Service (FOS) decisions,” he said.

“There will be angles on best interest complaints that will be tested by FOS.”

Mr Batten says he expects any court case on best interest will occur if there is a major collapse similar to that of investments company Westpoint.

Mr Townsend says he expects the Australian Securities and Investments Commission (ASIC) will clear up a lot of the vague definitions through regulatory guides and other pronouncements.

“While ASIC is not the legislator, it will be the regulator that will lay down how best interest is to be dealt with,” he said.

Mr Batten says for most brokers and advisers, the most significant impact will be the paperwork.

“Advisers and brokers will need to document everything and records will need to be robust,” he said.

“We are seeing an increasing amount of poorly documented records from advisers and this will have to change.”