The Commission’s view is the requirement to provide financial services “efficiently, honestly and fairly” means the enterprise must do more than not break the law; it must also seek to do “the right thing”. Here, partner Brit Ibanez explains how this standard means more than mere compliance with the law.

What Does “Efficiently, Honestly and Fairly” Mean?

The Letters Patent establishing the Commission state:

All Australians have the right to be treated honestly and fairly in their dealings with banking, superannuation and financial services providers. The highest standards of conduct are critical to the good governance and corporate culture of those providers.

The courts have explained what they believe “efficiently, honestly and fairly” means in a generic sense as follows:

• The words “efficiently, honestly and fairly” connote a requirement of competence in providing advice and in complying with relevant statutory obligations.
• The word “efficient” refers to a person who performs their duties efficiently meaning the person produces the desired effect and is capable and competent. Inefficiency may be established by demonstrating that the performance of a licensee’s functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect.
• It is not necessary to establish dishonesty in the criminal sense. The word “honestly” when used in conjunction with the word “fairly” when used in conjunction with the word “fairly” tends to give the flavour of a person who not only is not dishonest but also is ethically sound.

It is not necessary for another provision to be breached to fall foul of the “efficiently, honestly and fairly” standard. The statutory standard itself is the source of the obligation.

Do No Harm or Do What Is Best?

Generally, it seems the industry has taken a “do no harm” approach to compliance with this provision, as opposed to “do what is best”. This minimalistic approach, coupled with compliance being seen as a “cost of business”, rather than an integral part of the strategy of any financial services business, means the law has not been effective in creating a culture of efficiency, honesty and fairness.

The Commission queries whether ASIC has been tough enough on pursuing civil action for breaches of this and other provisions. For example, much has been made of the fact ASIC has never prosecuted any breach of section 912D of the Corporations Act which requires a breach report to be made as soon as practicable or within 10 business days.

We are often involved in the deliberations of our clients about whether something is a breach, whether it is significant, and when to report. These
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deliberations are difficult when the breach is proposed to be of the “efficiently, honestly and fairly” standard. We are asked what attitude ASIC will take to a particular breach. Our advice has consistently been it is best to lodge the report when there is uncertainty. This facilitates the proper functioning of the entire system.

The Commission emphasises the use of the word “all” in the section to draw our attention to the fact everything that could be done to provide the financial services efficiently, honestly and fairly must be done. This requirement is highlighted in Regulatory Guide 256 Client review and remediation conducted by advice licensees. There, ASIC states a financial services licensee’s general obligation to provide the services efficiently, honestly and fairly requires the licensee to “take responsibility” for the consequences of their actions if things go wrong and clients suffer loss or detriment.

THE FINAL MESSAGE

The clear message from the Report is that “efficiently, honestly and fairly” requires entities to behave in a way that seeks to do the right thing which means something more than mere compliance with the law.

COMING SOON

Financial Services Thinking

The Banking Royal Commission, along with a raft of proposed and upcoming legislative changes, such as the Design and Distribution Obligations and Product Intervention Powers Bill, signal major disruption to every facet of the financial services sector.

To ensure you’re up to date with the impact of the latest developments and what it means for you, we’re launching Financial Services Thinking: a series of regular practical insights, industry commentary and comprehensive updates specifically for financial services stakeholders.

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