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ASIC powers questioned by Law Council

Andrew Starke

Editor

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"Best interest is another sticking point for the legal committee."

The 2002 science fiction film *Minority Report* examines a futuristic society where criminals can be caught before the crimes they commit occur, a grey area in to which some believe the financial services regulator is heading.

In a late December submission to the Parliamentary Joint Committee on Corporations and Financial Services, the Law Council of Australia registered it concerns over the scope of new powers given to the Australian Securities and Investments Commission (ASIC).

The legal committee, which represents 56,000 lawyers across Australia, believes that the government's *Future of Financial Advice* (FoFA) reform, if passed in its present form, could have unintended and potentially negative consequences on superannuation funds and their members.

In particular, the body has concerns about the breadth of ASIC's discretion to refuse to grant an Australian financial service licence, to cancel a licence and to make a banning order.

The proposed Bill currently allows ASIC to make a banning order where it has reason to believe that the applicant or licensee is "likely to contravene" their obligations as a licensee.

It is this clause and the notion of a 'PreCrime' that leads the reform into murky legal waters.

"The Committee is concerned by the breadth of the discretion these powers give to ASIC," states the Law Council submission. "There is no standard of proof which must be satisfied by ASIC and no prescription of the matters which go to whether a person is 'likely to contravene' their obligations.

"Given the consequences that can flow from an exercise of ASIC's powers under new sections 913B(1)(b), 915C(1)(aa), 920A(1)(f) and 920A(1)(h), including the closure of a licensee's business, the Committee submits that what is required in order for ASIC to form the view that a licensee is 'likely to contravene' their obligations should be subject to greater certainty."

Best interest is another sticking point for the legal committee, with the group concerned that the proposed statutory best interests duty in section 961B(1) do not accord with the general law duty of a fiduciary to act in the best interests of their client.

"The general law says that a duty to act in another person's best interests requires a person to act for a proper purpose (to further the other person's interests), to act without a conflict of interest or duties except with consent and not to make an unauthorised profit," it states.

"The best interests duty at general law is therefore concerned with the provider's motives. In very stark contrast, section 961B(2) sets out the steps the provider should take in providing advice."

In the Committee's opinion, the law could go a long way to achieving these aims if the steps in section 961B(2) omitted paragraph (g), that is the obligation to take "*any other step that would reasonably be regarded as being in the best interests of the client*".

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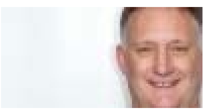

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