

# IMPORTANT CHANGES IN THE AFSL LANDSCAPE

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Legal Briefings - By **Fiona Smedley, Ewan MacDonald, and Nick Alexander**

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The Australian financial services license (**AFSL**) landscape has just shifted under your feet. The Australian Securities & Investments Commission (**ASIC**) now requires all new and current applicants for the grant or variation of an AFSL to satisfy a 'fit and proper person test' in relation to the applicant's officers, all 'controllers' of the applicant, their officers and in some cases their senior management.

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ASIC has also been armed with new powers, including the power to:

- cancel a new applicant's AFSL if it is not used within the first 6 months of it being granted, and
- ban specific persons from carrying out their functions within a financial services business.

## WHAT HAS CHANGED?

Hot on the heels of the Royal Commission, the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures) Act 2020* (Cth) has received royal assent, introducing the following changes:

1. all applicants for the grant or variation of an AFSL must satisfy ASIC that they meet the higher threshold set by the 'fit and proper person test' (gone are the days of the 'good fame and character' test);
2. the new fit and proper test is applied well beyond the applicant itself, right up the chain of ownership, to all 'controllers' of the applicant and their officers, partners or trustees (as applicable); and
3. ASIC is now equipped with a number of new AFSL-related powers, including the power to:
  - direct an AFSL holder to provide a statement for the purposes of considering whether or not the fit and proper person test is satisfied in relation to the AFSL holder and the AFSL;
  - make a banning order or apply to the Court for a disqualification order against a person who is not a 'fit and proper' person; and
  - cancel an AFSL if the AFSL holder does not provide a financial service before the end of 6 months after the grant of the AFSL.

We provide an overview of the impact of these changes below.

## **WHO'S CAUGHT UNDER THE NEW 'FIT AND PROPER PERSON' TEST?**

Previously ASIC has only required the following persons to meet the fit and proper test:

1. if the applicant is a *natural person*, that natural person;
2. if the applicant is a *body corporate*, its 'responsible officers' (being those officers who perform duties in connection with the holding of an AFSL); and

3. if the applicant is a *partnership* or *trust*, its partners or trustees (as applicable).

Now ASIC is now casting its net much wider, to include:

- if the applicant is a *body corporate*, all of its officers (as defined in section 9 of the Corporations Act);
- if the applicant is a *partnership* or *trust*, all of its partners or trustees (as applicable) and its senior managers; and
- for *every applicant*, all its controllers, being any person who 'controls' the applicant (as defined in the newly-inserted section 910B of the Corporations Act), right up the chain of ownership to the applicant's ultimate 'controller', including:
  - where the controller is a body corporate, all of its officers; and
  - where the controller is a partnership or trust, all of its partners or trustees (as applicable) and its senior managers.

## **WHAT MATTERS MUST ASIC HAVE REGARD TO WHEN APPLYING THE NEW 'FIT AND PROPER PERSON' TEST?**

In addition to the matters ASIC has had regard to when applying the 'good fame and character' test, ASIC must now also have regard to additional matters when considering whether there is a reason to believe that a person is not 'fit and proper' including:

- whether the person's Australian credit licence or registration has been suspended or cancelled (no longer just a person's AFSL);

- whether the person has been the subject of a banning or disqualification order made under Part 2-4 of the *National Consumer Credit Protection Act (NCCP Act)* (no longer just orders made under Subdivision B of Division 8 of Part 7.6 of the Corporations Act);
- whether the person has ever been disqualified under the Corporations Act or any other law of the Commonwealth or of a State or Territory from managing corporations;
- whether the person has ever been banned from engaging in a credit activity within the meaning of the NCCP Act);
- whether the person has ever been linked to a refusal or failure to give effect to a determination by AFCA; and
- whether, in the last 10 years, the person has been convicted of an offence (no longer just an offence that involves dishonesty and is punishable by imprisonment for at least 3 months).

## **HOW IS ASIC ADMINISTERING THE FIT AND PROPER PERSON TEST?**

As a practical matter, ASIC is administering the fit and proper person test by requiring each person to complete and provide:

- a national criminal history check;
- a bankruptcy check; and
- a tailored 17-question 'Statement of Personal Information' questionnaire. A similar statement was previously only required to be completed by the 'responsible managers' nominated by an applicant.

While at first glance this may not appear particularly onerous, for any applicant that is a subsidiary within a large, global corporate group with multiple layers of offshore controllers and officers, generating and collecting this level of information and checks will be a substantial logistical task and increase application costs.

## **DIRECTIONS, BANNING ORDERS AND DISQUALIFICATION ORDERS**

The combined practical effect of ASIC's new powers to:

- direct an AFSL holder to make a statement for the purposes of considering whether or not the fit and proper person test is satisfied in relation to the AFSL holder and the AFSL; and
- make a banning order or apply to the Court for a disqualification order against a person if the person is not a 'fit and proper' person,

is that ASIC now has more information-gathering and enforcement powers at its disposal to prohibit a person from providing financial services, from controlling an entity that carries on financial services, and even from performing a specific function involved in the carrying on of that financial services business (including as an officer, manager, employee, contractor or in some other capacity).

## **NEW 'USE IT OR LOSE IT' RULE**

If an AFSL is granted and the AFSL holder does not provide a financial service covered by its AFSL within 6 months of the grant of the AFSL:

- it must notify ASIC in a prescribed form; and
- ASIC may cancel the AFSL by written notice.

Importantly, under the transitional provisions, this change took effect on 18 February 2020 including in relation to AFSLs granted before that date. So if you were recently granted an AFSL, and haven't used it yet to provide a financial service covered by your AFSL, use it before you lose it!

## **KEY CONTACTS**

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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