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Update Summary

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ASIC CORPORATE INVESTIGATIONS AND HEARINGS

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Updated Commentary

Financial services regulation

A person who provides financial services in a repetitive manner to obtain income is carrying on a financial services business (*ASIC v Finder Wallet Pty Ltd* [2024] FCA 228). See [1.160] and [9.102].

Credit regulation

Section 202 of the *National Consumer Credit Protection Act 2009* (Cth) provides that in civil and civil penalty proceedings ASIC must prove the physical elements of the contravention to the civil standard of proof of "on the balance of probabilities."

Section 170 of the *National Consumer Credit Protection Act 2009* (Cth) requires the court to apply the rules of evidence and procedure for civil matters in civil and civil penalty proceedings under the Act.

Section 177 of the *National Consumer Credit Protection Act 2009* (Cth) gives ASIC standing to apply to the Court for an injunction in relation to contraventions of the *National Credit Code*.

Section 166 of the *National Consumer Credit Protection Act 2009* (Cth) applies to civil penalty provisions in the *National Credit Code* and gives ASIC standing to apply to the court for a declaration of a contravention of a civil penalty provision in the *National Credit Code* (including s 24(1A)).

Section 167 of the *National Consumer Credit Protection Act 2009* (Cth) gives ASIC standing to apply to the Court for an order that the defendants pay a pecuniary penalty in relation to a contravention of s 24(1A) of the *National Credit Code*: *ASIC v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345. See [1.165], [8.980], [8.1460], [8.1500] and [8.1520].

Enforceable undertakings

ASIC may obtain an enforceable undertaking that a person will not provide financial services, carry on a financial services business, or perform any functions relating to carrying on such a business including as a contractor, employee, officer, manager, or responsible manager of an entity that carries on a financial services business for a stated period. The enforceable undertaking may also require that the relevant person completes professional training courses in areas that ASIC deems appropriate before that person re-enters the financial services industry (*ASIC v Blumenthal* [2024] FCA 384). See [1.700].

Informal inquiries – Voluntary Confidential Legal Professional Privilege Disclosure Agreement

ASIC's "Voluntary Confidential Legal Professional Privilege Disclosure Agreement" is intended to facilitate the administration of justice by allowing relevant information to be brought to ASIC's attention in a timely manner thereby saving time and cost in relation to ASIC's subsequent investigation and regulatory enforcement proceedings (*ASIC v Noumi Ltd* [2024] FCA 349). Whether the voluntary disclosure of privileged material to ASIC pursuant to a voluntary disclosure agreement will constitute an implied waiver of legal professional privilege, and ASIC's derivative use of the information (disclosed

under that agreement) in ASIC's regulatory proceedings, are discussed in *ASIC v Noumi Ltd* [2024] FCA 349. See [2.900], [3.1000], [14.1760], [15.900].

Interim reports of the investigation

Section 16(1) of the ASIC Act requires ASIC to prepare an interim report of the investigation where it forms the opinion that a serious contravention of the relevant regulatory law has been committed. ASIC's power of investigation under s 13(1) of the ASIC Act is triggered where ASIC has a reason to suspect "any" contravention of the relevant regulatory laws whereas s 16 only operates in relation to "serious" contraventions. Accordingly, ASIC could commence and continue an investigation under s 13(1) even where ASIC has not formed any opinion about whether it involves a serious contravention in terms of s 16. The fact that ASIC does not form the opinion, required by s 16, during the s 13(1) investigation does not mean that ASIC no longer has the power to conduct the s 13(1) investigation (*Provide Nominees Pty Ltd v ASIC* [2024] FCA 303). See [4.300] and [7.100].

Winding up – just and equitable ground

In some cases, the paramountcy of the public interest in winding up a corporation may prevail over the private interest of the corporation in continuing its existence and business (*ASIC v Marco (No 15)* [2024] FCA 347). See [8.720].

Court's power to make certain orders - principal contravenor and accessories

Section 1101B(4)(b) of the *Corporations Act 2001* authorises the court to make orders against the corporation's directors where that corporation was the contravener, provided that the order would not unfairly prejudice any person (*ASIC v M101 Nominees Pty Ltd (in liq) (No 7)* [2024] FCA 381). See [8.980].

Travel restraint orders

The court's power to make travel restraint orders under s 1323(1)(j) of the *Corporations Act 2001* are discussed in *ASIC v NGS Crypto Pty Ltd* [2024] FCA 373. See [8.920].

Declarations

Even if there were potential limits to ASIC's power to seek a declaration under the ASIC Act, those limits are irrelevant where ASIC applies for the declaration under s 21 of the *Federal Court of Australia Act 1976* (Cth) (rather than the ASIC Act). ASIC has general administration of the *ASIC Act* and has the standing and authority to bring proceedings for declarations (even where no consequential relief is claimed) under s 21 of the *Federal Court of Australia Act 1976* (Cth) to vindicate the public interest and promote compliance with the ASIC Act (*ASIC v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345).

Declarations by consent promote "important public policy involved in promoting predictability in the outcome of civil penalty proceedings" (*ASIC v Lanterne Fund Services Pty Ltd* [2024] FCA 353).

The civil courts have recognised the right of enforcement agencies to apply for a declaration of contravention of a statutory provision where a criminal proceeding, in relation to the same subject matter as the declaration, may be commenced. In such cases the court has indicated that the declaration is not a declaration that a criminal

offence has been committed (*ASIC v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345). See [8.1460].

Pecuniary penalty

A pecuniary penalty under s 1317G of the *Corporations Act 2001* may be imposed where the contravention is “serious.” The contravention is serious where it involved a significant departure by the defendant from the requisite standard of care and diligence imposed by s 180(1) of the *Corporations Act 2001* (*ASIC v Blumenthal* [2024] FCA 384). See [4.480] and [8.1500].

Disqualification orders

Disqualification orders under s 206C and s 1101B of the *Corporations Act 2001* serve similar purposes including protecting the public, promoting public confidence in both the financial system and financial services licensees, promoting specific and general deterrence and punishing the defendants (*ASIC v Lanterne Fund Services Pty Ltd* [2024] FCA 353).

General deterrence helps to send a compliance message to similarly placed professionals, and shows the broader community that serious consequences may be imposed for contraventions and thereby promotes greater public confidence in the integrity of the financial system (*ASIC v Blumenthal* [2024] FCA 384).

The established practice of the courts considering disqualification orders before pecuniary penalty orders is based on the principle that the primary purpose of disqualification orders is to protect the public, while the purposes of a pecuniary penalty are to promote specific and general deterrence, prevent repetition of the contravening conduct and secure compliance with the regulatory laws (*ASIC v Holista Colltech Ltd* [2024] FCA 244). See [8.1560].

Power of court to grant relief from liability

Where the defendants have “acted in a wrongheaded manner over an extended period of time” and have not attempted to ascertain the true effect of the relevant regulatory laws in relation to their operations, those repeated failures indicate that they do not satisfy the requirement (in s 183 of the *National Consumer Credit Protection Act 2009* (Cth)) that they “ought fairly to be excused” from liability for a contravention of those laws. The situation may be different where the defendants engaged in “a single and excusable isolated contravention” and immediately rectified their conduct when their non-compliance was first identified (*ASIC v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345). See [8.2120].

Obligations of an Australian financial services licence holder

The licensees’ obligations in s 912A(1)(ca) of the *Corporations Act 2001* to: act “efficiently, honestly and fairly,” supervise their authorised representatives, ensure adequate resources, maintain organisational competence, ensure adequate training and competence of their authorised representatives and ensure adequate risk

management are discussed in *ASIC v Lanterne Fund Services Pty Ltd* [2024] FCA 353. See [9.102].

Continuous disclosure

The civil penalty proceedings and criminal proceedings that may be commenced for a breach of the continuous disclosure provisions in the *Corporations Act 2001* are discussed in *ASIC v Holista Colltech Ltd* [2024] FCA 244. The *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (Cth) did not include definitions of the words “knowledge” or “recklessness,” as used in the “continuous disclosure” civil penalty provisions contained in ss 674A(2) or 675A(2) of the *Corporations Act 2001*. It has been suggested that the definitions of “knowledge” and “recklessness” in the *Criminal Code Act 1995* (Cth) (Schedule: ss 5.3 and 5.4 respectively) apply to both the criminal offence and the civil penalty provision created by ss 1311(1) and 1317E of the *Corporations Act 2001*, respectively (*ASIC v Holista Colltech Ltd* [2024] FCA 244). See [9.110].

Freedom of Information Act 1982 (Cth)

ASIC can claim that documents are exempt from release to the applicant under s 47C of the FOIA where those documents relate to ASIC's deliberative processes. If the document does not contain a deliberative process or matter, it is not conditionally exempt under s 47C, irrespective of whether any harm may be caused by the disclosure (FOIA Guideline [6.55]; and *AHZ v ASIC (No 1)* [2024] ALCmr 45). See [11.1400].

Excuses for non-compliance - abuse of power

The person challenging ASIC's exercise of statutory power bears the burden of establishing impropriety or abuse of power even where the statutory power (such as the statutory power in s 13 of the *ASIC Act*) is exercisable upon the existence of reasons for a specified belief (*Provide Nominees Pty Ltd v ASIC* [2024] FCA 303). See [4.300], [13.850] and [13.1000].

Legal professional privilege

The privilege does not apply to communications between the client and a third party where they are simply “routed” to the lawyer”. If the decision to create the document would have been made regardless of any purpose of obtaining legal advice, then the dominant purpose test is not satisfied (*ASIC v Noumi Ltd* [2024] FCA 349). See [15.100] and [15.250].

