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# Update Summary

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**FEDERAL OFFENCES**

**S Odgers SC, G Nash QC, Prof M Bagaric**

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## September 2024 Print Update Summary

### Updated Commentary

Gerard Nash has added the following updates to Federal Offences:

#### Chapter 8F

CACA.75B.40- Knowledge

Updated commentary; *Australian Competition and Consumer Commission v. Master Wealth Control Pty Ltd* [2024] FCA 244

- The respondent, acting under the business name “DG Institute”, conducted a series of lectures promoting a lecture program, which advised participants as to methods of accruing wealth by assisting homeowners who, by reason of financial stringency, were likely to have their properties repossessed. The lectures were premised on propositions as to the law relating to mortgagee’s rights which were totally erroneous.

CACA.Sch.2.4.40 Reasonable Grounds for Representation

- Updated commentary; *Sykes v. Reserve Bank of Australia* [1998] FCA 1405 (1998) 88 FCR 51 at 513
- *Kytec Pty Ltd v Prolearn Corporation Pty Ltd* [2024] VSCA 23 at [204]; the respondent advertised a 10% coupon code discount for a limited period and prior to the promotion, it increased its prices and shortly after the promotion reduced its prices to their former level. The promotional statements were held to convey representations which “were misleading or deceptive or likely to deceive”. Accordingly, Davies J was satisfied there had been “a contravention of ss 18 and 29(1)(i) of the ACL

CACA.Sch2.18.20 Misleading or deceptive

- Updated commentary; *Kytec Pty Ltd v. Prolearn Corporation Pty Ltd* [2024] VSCA 23, per Macauley J at [62]
- *Australian Competition and Consumer Commission v Kogan Australia Pty Ltd* (2020) 145 ACSR 609; updated commentary

CACA.Sch.2.18.30 Misleading Conduct

- *Nadinic v. Drinkwater* [2020] NSWCA 2; updated commentary,

- “Silence is itself a fact that must be assessed like any other and, unless the circumstances as a whole are such as to give rise to a reasonable expectation of disclosure of some relevant fact known to exist but not communicated, there is no basis on which silence of itself can warrant an inference of a representation that the fact does not exist”:

Insert new section: CACA.Sch2.18.33 Accessorial Liability

- There must be both knowledge and participation to attract accessorial liability and participation requires ‘some practical involvement’ in the misleading conduct, i.e. helping, encouraging, or inducing the conduct.

CACA. Sch2.18.35 Recipient of representation

- Updated commentary; *Australian Competition and Consumer Commission v. Master Wealth Control Pty Ltd* [2024] FCA 244

CACA.Sch2.29.20 False or misleading

- Updated commentary; *Australian Competition and Consumer Commission v. Master Wealth Control Pty Ltd* [2024] FCA 344

## Chapter 8- Corporations Act 2001

CORPS.180.20 Duty of Care and Diligence-

- *Fitzgerald, In the matter of Tempo Holidays Pty Ltd (in liq.) v. Tully* [2024] FCA 391; updated commentary
- In order to hold that there has been a breach of s. 180 it is necessary to determine how a reasonable person would exercise powers and discharge duties with care and diligence if a director of the relevant company and in its circumstances occupying the same office as the director in question and having the same responsibilities
- *Stone (Liquidator), in the matter of Ironbark Blacksmithing Pty Ltd (in liq.) v. Mizzi* [2024] FCA 696; the directors of the company Halley J increased the size of their shareholder loans, at a time when the company was insolvent. This resulted in breaches of each of ss 180,181 and 182.

CORPS.180.140 Non-executive directors

- *Fitzgerald, In the matter of Tempo Holidays Pty Ltd (In liq) v Tully* [2024] FCA 391; updated commentary

#### CORPS.181.20 Good Faith

- *Fraser v Professional Services of Australia Pty Ltd* [2024] FCA 420; updated commentary

#### CORPS.182.20 Misuse of position

- *Fraser v Professional Servies Australia Pty Ltd* [2024] FCA 420; updated commentary

#### CORPS.182.40 Impropriety

Updated commentary; *Australian Securities and Investments Commission v. ISignthis Limited* [2024] FCA 669; *Doyle v. Australian Securities and Investments Commission* [2005] HCA 78; (2005) 227 CLR 18 at 28 [35]. See also *R. v. Byrnes* (1995) HCA 1; (1995) 183 CLR 501 at 515-514 and *Angas Law Services Pty Ltd (in liq.) v. Carabelas* [2005] HCA 23 (2005) 226 CLR 507 at 531 [65], 553 at [72].

- *Doyle v. Australian Securities and Investments Commission* [2005] HCA 78;

#### Insert new section: CORPS.206B.10 Offence that involves dishonesty

- *Waters v. Diesel Holdings Pty Ltd* [2024] VSCA 77; new commentary
- In the Court of Appeal, Walker JA (with whose judgement the other members of the Court agreed) found that the purpose of paragraph (iii) of section 206B(1)(b) had been articulated in relation to a precursor provision by Bowen CJ in Eq in *Re Magna Alloys & Research Pty Ltd* [1975] 1 ACLR 203 at 205.

#### CORPS.1322.10 Procedural Irregularity

Updated commentary:

- The expression “procedural irregularity” in s 1322, as defined in s 1322(1)(a), has a much wider meaning than it bears elsewhere in the *Corporations Act*, and it includes the absence of a quorum at a meeting of a corporation. See *Atkins v North Australian Aboriginal Justice Agency Ltd* [2024] FCA 686.

#### CORPS.1322.20 Validating an invalid act

Updated commentary

- The remedial operation of s. 1322(2) is “automatic”, unless the court forms the opinion that the irregularity has caused, or may cause, substantial injustice that cannot be remedied by an order see *Weinstock v. Beck* [2013] HCA 14; (2013) 251 CLR 396 at [7], per French CJ.
- Under s 1322(4), the court may relieve a person or a corporation from the effects of failing to comply with a provision of the Act or a provision in the constitution of a corporation
- In *Atkins v. North Australian Aboriginal Justice Agency* [2024] FCA 686 at [575], Charlesworth J took the view that the provisions of s 1322(4) operated whether or not the lack of a quorum resulted from a breach of the company’s constitution, and that the subsection did not restrict the ambit of s 1322(2).

Insert new section: CORPS.1389.20 Certificate is conclusive

Section 1389 establishes an irrebuttable presumption that the registration of a company is valid and the prerequisites to its incorporation have been satisfied

