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Update Summary

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ASIC CORPORATE INVESTIGATIONS AND HEARINGS

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Updated Commentary

Financial services regulation - design and distribution obligations and product intervention

Section 994E of the *Corporations Act 2001* is "forward-looking" and requires the court to consider whether the defendant had implemented "adequate systems, policies, practices, and procedures – including a process of oversight and supervision – to address identified or reasonably identifiable risks of retail product distribution conduct which was inconsistent with the" target market determination. To establish a contravention of s 994E the court must be satisfied (on the *Briginshaw* civil standard of proof) that the defendant "failed to take reasonable steps that either would have resulted in, *or* would have been reasonably likely to have resulted in (i.e. there was a real and not remote chance), the Distribution Conduct being consistent with the" defendant's target market determination (*ASIC v Firstmac Ltd* [2024] FCA 737). See [1.160].

Superannuation trustees - disqualification order – compliance risk

Disqualification orders are made under s 126A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) where ASIC (or the AAT) is concerned that allowing the person to remain in the relevant position would create a future compliance risk. ASIC (or the AAT) may be satisfied (on the balance of probabilities) that the affected person presents a future compliance risk, and may not comply with the obligations and required standards of a trustee of a superannuation fund, where that person demonstrates a reluctance to "unconditionally accept responsibility for the contraventions" of the SIS Act. When deciding whether to make a disqualification order against a superannuation trustee under s 126A, ASIC (or the AAT) will take into account the objects of the SIS Act and the need to promote general deterrence and compliance with the SIS Act (*Coronica v Federal Commissioner of Taxation* [2024] AATA 2592). See [2.770].

ASIC's power to investigate suspected contraventions - due care and diligence

The fact that the defendant's act or omission does not have a material effect on the corporation's share price does not determine whether there has been a contravention of s 180(1) of the *Corporations Act 2001* and does not determine whether any contravention of s 180(1) was serious (*ASIC v iSignthis Ltd* [2024] FCA 669). See [4.300], [4.480] and [8.1500].

ASIC's power to investigate suspected contraventions – improper use of position

Section 182(1) of the *Corporations Act 2001* is concerned with the purpose of the directors' conduct or the directors' "moving cause," "actuating motive," or the "real purpose" of their conduct and not the effect of that conduct in terms of whether it caused an advantage or detriment. Where the directors acted for "conventional and legitimate business purposes," there is no breach of s 182, even where those legitimate purposes are consistent with the directors' own self-interests (*ASIC v iSignthis Ltd* [2024] FCA 669). See [4.860].

Accessorial civil liability – involved in a contravention

For a person to be involved in a contravention in terms of s 79(a) – (d) of the *Corporations Act 2001*, or ss 5, 80 and 169 of the *National Consumer Credit Protection Act 2009* (Cth),

as a civil accessory, that person must have intentionally participated in that contravention. This means that it must be shown that that person had "actual knowledge" of the essential matters that constitute the contravention. By contrast, ASIC or a private plaintiff does not have to establish that the defendant had actual knowledge of the essential matters that constitute the contravention to prove a contravention of s 180(1) of the *Corporations Act 2001*. Section 180(1) is contravened where the defendant departed from the required standard of care and diligence (*ASIC v iSignthis Ltd* [2024] FCA 669). See [4.480] and [8.1980].

Asset preservation orders

The court may grant asset preservation orders on an urgent ex parte basis under s 1323(3) of the *Corporations Act 2001*. In the context of an ex parte application, ASIC must disclose all material facts to the court including "possible defences and facts adverse to and known to" ASIC. ASIC must observe the duty of utmost good faith and it is no excuse for ASIC to claim that it was not aware of the importance of those facts:*ASIC v NGS Crypto Pty Ltd (No 3)* [2024] FCA 822. See [8.880].

Injunctions and remedial orders

The court may make an order under s 1101B of the *Corporations Act 2001* "to restrain ongoing misconduct, or to remove the risk of future misconduct when such a risk is suggested by a history of persistent past misconduct": *ASIC v NGS Crypto Pty Ltd (No 3)* [2024] FCA 822.

In *ASIC v Open4Sale Global Ltd* [2024] FCA 718 the court stated, in the context of ASIC's application for an interim injunction under s 1324(4) of the *Corporations Act 2001*, that "[i]n its discretion, the Court has not required ASIC to give an undertaking as to damages in light of its status as a regulator responsible for the administration and enforcement of the Act." It is difficult to see how the court could describe this as an exercise of "discretion" when s 1324(8) provides that the court "must not" require ASIC to give an undertaking as to damages as a condition of granting the interim injunction. See [8.980] and [8.1020].

Pecuniary civil penalty

Where the parties' agreed penalty falls within the permissible range, the court will not depart from that agreed penalty merely because the court may have selected a different penalty: *ASIC v American Express Australia Ltd* [2024] FCA 784.

The amount of the pecuniary penalty that is required to achieve specific deterrence is larger for a corporation with significant resources: *ASIC v Mercer Superannuation (Australia) Ltd* [2024] FCA 850.

The totality principle may not result in a reduction from the penalty that the court would otherwise impose. If the court decides that the cumulative total of the penalties that may be imposed is too high or too low, the court must adjust the final penalties so that they are just and appropriate. Whether the court applies the course of conduct principle depends on the need to ensure that the resulting penalty promotes the

appropriate deterrent effect: *ASIC v American Express Australia Ltd* [2024] FCA 784. See [8.1500] and [8.1560].

Compensation orders and pecuniary civil penalty orders
1317QF of the *Corporations Act 2001* provides that where the Court thinks that it is appropriate to make a pecuniary penalty order, it must consider the effect that making the pecuniary penalty order would have on the defendant's ability to pay a statutory compensation order. Section 1317QF requires the court to give a preference to the order. Section 1317QF does not specify any particular way for giving that preference; that will depend on the circumstances of each case: *ASIC v Noumi Ltd* [2024] FCA 862. See [8.1500], [8.1800] and [8.1840].

Civil evidence and procedure rules – civil penalty proceedings – concise statements
The courts have criticised "the unsatisfactory nature of concise statements in cases of complexity, or where multiple representations are said to have been conveyed in myriad places." According to the courts, a "concise statement was a most unfortunate way of pleading a case about alleged false, misleading or deceptive representations said to arise from a large body and variety of promotional material": *ASIC v LGSS Pty Ltd* [2024] FCA 587.

Apprehended bias – civil penalty proceedings
There is a tension between the orthodox principles concerning recusal of a judge on the ground of apprehended bias, and the orthodox method of conducting civil penalty proceedings. Where a judge makes an adverse finding about the credibility (honesty or truthfulness) of a defendant/witness in civil penalty proceedings in the "first phase" of those proceedings (the process of determining whether a contravention of a civil penalty provision has occurred), that judge would be required to recuse themselves from the "second phase" of those proceedings (the process of deciding the appropriate level of the civil penalty) if the same defendant/witness was also required to give contentious evidence in that "second phase" about the appropriate level of civil penalty. By contrast, the mere fact that a judge has made findings (not involving adverse credit findings) against a defendant in the "first phase" of the civil penalty proceedings does not prevent that judge from hearing the second phase of those civil penalty proceedings: *ASIC v SunshineLoans Pty Ltd (No 3)* [2024] FCA 786. See [8.1500], [8.1520], [8.1560], [8.1800] and [10.1020].

Level of criminal penalty – sentencing guidelines
"General deterrence and denunciation are prime considerations when sentencing for serious fraud against the Commonwealth and its agencies." The element of general deterrence is an important sentencing consideration in white collar crimes because the perpetrators of such crimes "are likely to be rational, profit-seeking individuals who can weigh the benefits of committing a crime against the costs of being caught and punished" and they "are more likely to be first-time offenders": *Director of Public Prosecutions (Cth) v Allen* [2024] VCC 1127.

The discount for an early guilty plea should only reflect the utilitarian benefit (such as saving public resources on a trial), and there should be no discount relating to the subjective implications of an early guilty plea such as demonstrating the defendant's

contrition or remorse or the defendant's willingness to assist the course of justice: *R v Bigatton (No 5)* [2024] NSWDC 285. See [8.2965].

Australian financial services licence

Section 911B of the *Corporations Act 2001* restricts the persons who can provide financial services on behalf of the holder of an AFSL. Section 911B protects "members of the public from the conduct of unqualified and untrained persons, by ensuring that financial intermediaries uphold high standards within the financial services industry": *R v Bigatton (No 5)* [2024] NSWDC 285.

A contravention of s 911B involves a breach of public trust. This may, in turn, cause "a reduction in both domestic and international investment, which is necessary for Australia's economic growth, or at the very least, poor investment decisions, which are not just detrimental to individuals, but to the entire market, which becomes uninformed and therefore inefficient." There is a real public interest in ASIC securing compliance with s 911B: *R v Bigatton (No 5)* [2024] NSWDC 285. See [9.102].

Continuous disclosure

Section 674(2) of the *Corporations Act 2001*, and the Listing Rules, require the disclosure of price-sensitive information that is not generally available. Listing Rule 3.1 provides that "[o]nce an entity becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell the ASX that information". The definition of "aware" includes actual and constructive awareness. If the evidence shows the court that the information existed, reasonable information systems or management procedures should have brought that information to the relevant corporate officer's attention, and a reasonable officer should have understood the significance of the information, then s 674 and the Listing Rules deem that the corporation was "aware" of the information: *ASIC v Noumi Ltd* [2024] FCA 862.

Section 676(2)(a) of the *Corporations Act 2001* provides that the information is generally available if it consists of a "readily observable matter." This means that the information "could have been observed easily or without difficulty." This involves an objective test where "the understanding and perceptions of institutional investors on what information was in the market place, and what could be deduced, concluded or inferred from that information...may be relevant." It does not include information that is speculative or involves conjecture: *ASIC v iSignthis Ltd* [2024] FCA 669. See [9.110].

ASIC – release of information - practical refusal reason

Section 24AA(1)(b) of the *Freedom of Information Act 1982* (Cth) (FOIA) provides that a "practical refusal reason" exists where the applicant's request for access to documents does not satisfy the identification requirement in s 15(2)(b) of the FOIA. FOIA Guidelines [3.109] and [3.110] provide that the applicant's request for access to documents can be framed "quite broadly" and "must be read fairly" by ASIC. ASIC must not take a "narrow or pedantic approach" to the construction of the request. However, if the applicant's request is too broad and/or ambiguous, it is invalid. Applicants may describe the documents by referring to a class of documents. The applicant's request does not have

to identify a document by reference to a file or folio number: *AMA v ASIC* [2024] AICmr 149. See [11.1400].

False oral statements and documents

Section 1309(2), (11) and (12) of the *Corporations Act 2001* provide that directors or other persons may be subject to a civil penalty, or commit a fault-based criminal offence, where they authorise information, relating to the affairs of the corporation, to be sent to the Australian Securities Exchange (ASX) that was, to their knowledge, false or misleading in a material particular. There is no defence to a failure to comply with s 1309(2) where the defendant claims that "compliance was inconvenient, or inconsistent with wider corporate objectives": *ASIC v iSignthis Ltd* [2024] FCA 669. See [12.2200].

Administrative Appeals Tribunal - review and stay of ASIC's decision

Section 41(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act) makes it clear that ASIC's reviewable decision comes into effect, according to its terms, regardless of whether an application for review of ASIC's decision has been made to the AAT. Section 41(1) reflects the fact that the public is entitled to the benefit of a decision when it is made by ASIC in the course of pursuing its regulatory objectives of protecting and promoting the public interest: *Luff v ASIC* [2024] AATA 2637.

Section 41(6) of the AAT Act permits the AAT to impose conditions upon its stay order. The conditions may include requiring the applicants to give undertakings about their conduct while a stay order is in force: *Xtrade.Au Pty Ltd v ASIC* [2024] AATA 1372; *Luff v ASIC* [2024] AATA 2637. The AAT will grant a stay where appropriate to ensure that successful applications for review are not rendered nugatory. This "goes to the heart of the purpose of the stay power, which is about preserving the status quo where necessary to effectuate the review": *Luff v ASIC* [2024] AATA 2637.

The public interest is a primary or important factor that should be considered by the AAT when deciding whether to grant a stay. The central consideration for the AAT is "good regulation and good administration, not an overanxious desire to permit regulated activity wherever possible". General deterrence promoted by a banning order, and its protective purpose, are public interest considerations that favour the refusal of a stay: *Rogers v ASIC* [2024] AATA 954. See [16.870].

Administrative Appeals Tribunal's proceedings – evidence and procedure after successful appeal to the Federal Court

Where the Federal Court remits the case to the AAT for the AAT to decide the matter again, the AAT must review that matter according to directions given by the Federal Court. When reviewing the matter again, the AAT is not bound by the findings made its original decision concerning that matter. In the remittal hearing, the AAT must exercise its own independent judgment to ascertain the relevant facts that are necessary for making the new decision. The AAT's obligation to determine the relevant facts is not diminished in the remittal hearing (*Coronica v Federal Commissioner of Taxation* [2024] AATA 2592. See [16.940].

Administrative Appeals Tribunal - public or private hearing

Public hearings assist to remove any doubts and misapprehensions the public may have about the operation of the regulatory system. Public hearings also reduce the opportunity for abuse and injustice by the persons involved in the hearing process, by making such persons publicly accountable: *SYRL v ASIC* [2024] AATA 2636. See [16.970].