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Update Summary

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ASIC CORPORATE INVESTIGATIONS AND HEARINGS

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Updated Commentary

Year in Review

The 2024 Year in Review is included in this update. See **[YR.30000]**.

ASIC – regulatory functions – insurance

Insurance contracts are subject to the "unfair contracts terms" regime in ss 12BF and 12BG of the ASIC Act (s 15(2)(d) of the *Insurance Contracts Act 1984* (Cth); and *ASIC v Auto & General Insurance Company Ltd* [2024] FCA 272).

Regulatory overlap

The Australian Consumer Law (Sch 2 of the *Competition and Consumer Act 2010* (Cth)), as a Commonwealth law, does not apply to the financial services sector. This is because s 131A of the *Competition and Consumer Act 2010* (Cth) provides that the Australian Consumer Law, as a Commonwealth law, does not apply to the supply of financial services or financial products. However, there is no equivalent to s 131A of the *Competition and Consumer Act 2010* (Cth) in the legislation of the various States and Territories that apply the Australian Consumer Law as a law of the relevant State or Territory. This means that the Australian Consumer Law, as a State or Territory law, may apply to the financial services sector (*Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd (No 5)* [2024] FCA 477. See **[1.210]**

Relevance of state of mind of directors, officers, employees or other agents to the corporation's civil liability

Corporations may be liable as civil accessories under the knowing assistance rule or the knowing receipt rule (*Plutus Payroll Australia Pty Ltd (in liq) v Saikali* [2024] NSWSC 1093). See **[2.650], [8.3740]** and **[8.3900].**

State of mind of the corporation – statutory reform

Section 769B(3) of the *Corporations Act 2001* only attributes to the corporation the state of mind of the director, employee or agent who engaged in the conduct which is the subject matter of the proceeding. Section 769B(3) cannot be used to attribute the state of mind of the corporation's agent to the corporation when that agent's conduct is not the same conduct which is the subject of the current proceeding against the corporation (and in respect of which conduct it is relevant to establish the state of mind of the corporation). The same reasoning applies to a similar provision in s 12GH(1) of the ASIC Act (*ASIC v Retail Employees Superannuation Pty Ltd* [2024] FCA 1081). See **[2.750].**

ASIC's investigation and enforcement powers – superannuation

The definition of "financial service" in s 12BAB(1)(ea) of the ASIC Act includes the provision of superannuation trustee services (*ASIC v Retail Employees Superannuation Pty Ltd* [2024] FCA 1081). See **[2.770].**

Orders appointing a receiver and manager

Receivers may be appointed by the court under s 1323(1)(h) of the *Corporations Act 2001* for a range of purposes (that protect the interests of the aggrieved persons) including assisting to identify the relevant assets and creating the opportunity for the assets of the suspect to be ascertained, preserving or preventing dissipation of the assets, and securing and recovering the relevant assets. The fact of dissipation of assets, and the fact that there is a substantial shortfall between the moneys invested in a scheme, and the moneys remaining in that scheme, are significant factors that support the exercise of the court's discretion in favour of appointing a receiver (*ASIC v Keystone Asset Management Ltd* [2024] FCA 1019). See **[8.880].**

Travel restraint orders or passport surrender orders

The court is required to balance public and private rights when deciding whether to make travel restraint orders or passport surrender orders under s 1323(1)(j) or (k) of the *Corporations Act 2001*. The court will consider a range of factors when conducting this balancing exercise including: the importance of protecting the aggrieved persons' interests, the length of time that the defendant has already been subjected to the travel restriction order, the risk that the defendant may leave the jurisdiction and not return, the defendant's legitimate interests in being permitted to travel and how long the matter has been ongoing (*ASIC v Guo (No 2)* [2024] FCA 251; and *ASIC v Guo (No 3)* [2024] FCA 1032. See **[8.920].**

Injunctions – punitive or non-punitive nature

In *ASIC v Macrolend Pty Ltd* [2024] FCA 1028 the court indicated that where ASIC seeks an injunction to compel the defendant to comply with the law or an existing duty, the injunctive relief sought does not have a punitive effect and is therefore not penal. For example, where the injunction permanently restrains the defendant from carrying on a financial services business without holding an Australian financial services licence, the injunction does not seek to punish the defendants, rather it ensures that the defendants comply with s 911A of the *Corporations Act 2001*. See **[8.1160], [8.1180], [8.1520], [9.102], [14.1900]** and **[14.1920].**

Declarations

The court is reluctant to make a declaration in a civil matter that directly impinges upon criminal proceedings. Criminal proceedings should be permitted to run their ordinary course unless it is shown that it is necessary in the interests of justice to make a declaration (*Palmer v ASIC* [2024] FCA 1167).

Where a question will or may arise in criminal proceedings, then in the absence of exceptional circumstances that justify resolving that question in separate civil proceedings, that question should be dealt with by the criminal court. In *Palmer v ASIC* [2024] FCA 1167 the court held that issues relating to the legality of oral examinations, conducted under s 19 of the ASIC Act, and the possible application of s 49(4) of the ASIC Act, should be dealt with by the criminal court, rather than be the subject of declaratory relief in the civil court.

See **[5.100], [5.900], [8.1460]** and **[8.3240].**

Pecuniary civil penalty

In deciding the appropriate pecuniary civil penalty under s 12GBB of the ASIC Act the court will also consider a range of factors including:

(a) whether the contravention was perpetrated by senior management or at a lower level;

(b) the corporation's size and financial position; and

(c) whether the corporation's corporate culture was conducive to compliance with the ASIC Act as demonstrated by educational programmes and disciplinary or other remedial measures in relation to any admitted contraventions (*ASIC v Vanguard Investments Australia Ltd (No 2)* [2024] FCA 1086).

See **[8.1500].**

Civil penalty proceedings – rules of evidence and procedure

ASIC's alleged contravention of the civil penalty provisions must be "finally and precisely" pleaded and ASIC must "identify the case it seeks to make … clearly and distinctly" *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd (No 5)* [2024] FCA 477. The *Briginshaw* rule, the equivalent provision in s 140 of the *Evidence Act 1995* (Cth), and the equivalent State legislation, apply to ASIC's civil penalty proceedings (*ASIC v Darranda Pty Ltd* [2024] FCA 1015). See **[8.1520].**

Knowing assistance rule

Liability under the knowing assistance rule is based on a personal or an in personam liability. The remedies are not dependent on the knowing assistant having kept any part of the property (or any traceable proceeds) that was obtained as a consequence of the dishonest and fraudulent design (*O'Brien v Supercheap Security Pty Ltd* [2024] NSWSC 1117).

Under the second category of knowledge, the knowing assistant's wilful blindness, is treated as equivalent to actual knowledge. However, neither negligence nor recklessness is sufficient to establish liability as a knowing assistant. The third category of knowledge involves "such a calculated abstention from inquiry as would disentitle the third party to rely upon lack of actual knowledge of the trustee's or fiduciary's wrongdoing" (*Plutus Payroll Australia Pty Ltd (in liq) v Saikali* [2024] NSWSC 1093; and *O'Brien v Supercheap Security Pty Ltd* [2024] NSWSC 1117).

The knowing assistant does not need to know every aspect of the dishonest and fraudulent design for liability to arise. Liability arises where "the third party has a sufficient level of knowledge of those facts so that he or she has, or ought to have, an understanding that there is a dishonest and fraudulent design" (*O'Brien v Supercheap Security Pty Ltd* [2024] NSWSC 1117). See **[8.3740].**

Knowing receipt rule

Liability under the knowing receipt rule can arise irrespective of whether the defaulting fiduciary is a trustee (*Plutus Payroll Australia Pty Ltd (in liq) v Saikali* [2024] NSWSC 1093. See **[8.3900].**

Credit and financial services licensees - efficiently, honestly and fairly

The principles enunciated by the court in relation to whether financial services licensees have conducted their licensed activities "efficiently, honestly and fairly" in the context of s 912A(1)(a) of the *Corporations Act 2001* are equally applicable to the same obligations contained in s 47(1)(a) of the *National Consumer Credit Protection Act 2009* (Cth). Both sections impose a standard that is regarded as a "statutory norm" that is interpreted in the applicable statutory context. The credit licensee's failure to comply with the requirements of the *National Credit Code* demonstrates a failure to conduct credit activities efficiently, honestly and fairly. Section 912A(1)(a) of the *Corporations Act 2001* and s 47(1)(a) of the *National Consumer Credit Protection Act 2009* (Cth) are civil penalty provisions (s 912A(5A) and s 1317E of the *Corporations Act 2001*; s 47(4) of the *National Consumer Credit Protection Act 2009* (Cth); and *ASIC v Darranda Pty Ltd* [2024] FCA 1015).

The word "fairly" cannot be solely defined by using negative conditions (for example, free from bias and free from dishonesty). However, the use of such negative conditions is "not unhelpful." The word "fairly" is viewed from the perspectives of all parties including investors, borrowers, other persons interacting with the licensee and the licensee. This is because s 912A(1)(a) "is not a back door into an 'act in the [best] interests of' obligation'" (*ASIC v Darranda Pty Ltd* [2024] FCA 1015). See **[1.165]** and **[9.102].**

ASIC's banning orders

ASIC's Regulatory Guide 98 "*Licensing: Administrative action against financial services providers*" indicates that the main purpose of ASIC's banning order power is to promote the objectives of the financial services regime. Banning orders protect the public, investors and consumers and deter misconduct. They ensure that the public has confidence in financial advisors. The duration of the banning order is directed to promoting both personal and general deterrence (*Betalli v ASIC* [2024] AATA 2085 at [17] and [23]; and *Karamian v ASIC* [2024] AATA 2006).

Section 920A(1)(ba) of the *Corporations Act 2001* provides that ASIC may make a banning order where ASIC has reason to believe that a person is "likely to" contravene the obligations under s 912A. The word "*contravene*" in s 920A(1)(ba) includes a failure to comply with a duty imposed by the law, even if the section that imposes the duty does not attract a civil penalty or a criminal penalty (s 920A(1B) of the *Corporations Act 2001*; and *Betalli v ASIC* [2024] AATA 2085).

Section 920A(1)(da) of the *Corporations Act 2001* provides that ASIC may make a banning order where ASIC has reason to believe that the person is not adequately trained, or is not competent, to provide financial services. The time to decide whether there is the requisite reason to believe is at the time of the hearing, rather than at some previous time (*Karamian v ASIC* [2024] AATA 2006).

In the context of the grounds that give rise to ASIC's power to make a banning order, there is some overlap between the fit and proper person requirement in s 920A(1)(d) of the *Corporations Act* and the adequate training and competence requirements in 920A(1)(da). This is because the requirements of adequate training and competence are also relevant to the requirements of knowledge and ability that form part of the assessment of whether a person is a fit and proper person. There are a number of provisions in the *Corporations Act 2001* which are designed to protect the public from inadequately trained or incompetent financial advisers/providers. For example, relevant financial providers are required to have an approved degree, pass an exam and undertake continuing professional development as prerequisites to being registered (ss 921B and 921BA of the *Corporations Act 2001*; and *Karamian v ASIC* [2024] AATA 2006). See **[9.103].**

Continuous disclosure

Listing Rule 3.1A provides that the obligation (under Listing Rule 3.1) to disclose price sensitive information does not apply where one or more of the following factors are satisfied:
(a) it is a contravention of the law to disclose the information;

(b) the information is about incomplete proposals or negotiations;

(c) the information is about matters of supposition or is not definite enough to require disclosure;

(d) the information was produced for the internal management of the entity; or

(e) the information constitutes a trade secret.

In addition to the above, the information must be confidential, the ASX must also view it as confidential, and a reasonable person would not require disclosure of the information (*Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd (No 5)* [2024] FCA 477.

The obligation to disclose price sensitive information includes information that the listed entity is actually or constructively "aware" of. The concept of "awareness" does not extend "to an awareness of unknown facts that are merely capable of discovery through a process of further investigation to ascertain their existence." In addition, "awareness" does not include "facts that are capable of discovery with the benefit of hindsight" (*Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd (No 5)* [2024] FCA 477).

A fall in the price of the corporation's shares immediately after the corrective disclosure is made is an indicator of materiality (*ASIC v Noumi Ltd (No 4)* [2024] FCA 1192).

Where the director's failure to exercise reasonable care and diligence caused or allowed the corporation to breach the continuous disclosure obligations, and exposed that corporation to financial harm including a pecuniary penalty, such failure constitutes a contravention of the director's duty of care in s 180(1) of the *Corporations Act 2001* (*ASIC v Noumi Ltd (No 4)* [2024] FCA 1192). See **[4.480]** and **[9.110].**

Freedom of Information Act 1982 (Cth)

The public interest in providing transparency in relation to how government agencies deal with investigations is given less weight when there has been a substantial passage of time between the original investigation and the current application for access to information about that investigation (*AKK v ASIC (Freedom of information)* [2024] AICmr 105).

Section 47E(d) of the *Freedom of Information Act 1982* (Cth) provides that documents are conditionally exempt if their disclosure would, or reasonably could, be expected to have a substantial adverse effect on the proper and efficient conduct of ASIC's operations. The manner in which ASIC deals with complaints about how ASIC administers and enforces the *Corporations Act 2001* are part of ASIC's "operations" for the purposes of s 47E(d). The public disclosure of evidence or information (provided by ASIC's personnel) about a workplace complaint could reasonably be expected to affect the willingness of ASIC's staff to provide evidence for future workplace investigations. This reluctance to provide evidence would have a substantial adverse effect on the management or assessment of ASIC's personnel. The public disclosure of such evidence or information would also prejudice ASIC's processes in the future about determining an appropriate course of action in response to workplace complaints. It would prejudice ASIC's ability to effectively conduct workplace investigations (*AKK v ASIC (Freedom of information)* [2024] AICmr 105). See **[11.1400].**

Telecommunications interception warrants

The purpose of the *Telecommunications (Interception and Access) Act 1979* (Cth) "is to strike a balance between, on the one hand, allowing law enforcement authorities to have access to important information and, on the other, protecting the privacy of members of the public. It does this by providing for a general prohibition on the interception of telecommunications and then providing narrow exceptions" (*Plutus Payroll Australia Pty Ltd (in liq) v Saikali* [2024] NSWSC 1093.

Section 75A of the *Telecommunications (Interception and Access) Act 1979* (Cth) provides that once lawfully intercepted information and interception warrant information have been given in evidence in an exempt proceeding (under s 74 or s 75), that information may later be given in evidence in any proceeding. Unlike s 74 or s 75 of the *Telecommunications (Interception and Access) Act 1979* (Cth), s 75A does not require any enquiry to be made about whether the relevant "information" was obtained by an interception that contravened s 7(1). Section 75A allows the intercepted information to be given in evidence in any subsequent proceeding where it has been shown that it has previously been given in evidence in an "exempt proceeding" (under either s 74 or s 75) regardless of whether the warrants were given in evidence in the exempt proceeding (*Plutus Payroll Australia Pty Ltd (in liq) v Saikali* [2024] NSWSC 1093. See **[12.1830].**

False oral statements and documents

In the context of s 1309(2) of the *Corporations Act 2001,* information is false or misleading in a material particular "where it is of some significance and is not inconsequential and that the matter that is said to make the statement or information

misleading must be relevant to the purpose for which it was supplied" (*ASIC v Noumi Ltd (No 4)* [2024] FCA 1192. See **[12.2200].**

Review of ASIC's decisions by the Administrative Appeals Tribunal

The AAT may exercise not only the powers upon which ASIC relied but also any other relevant power or discretion conferred upon ASIC by the relevant statute. However, the AAT cannot exercise all of ASIC's powers. The AAT can only exercise those powers that are relevant to the reviewable decision (*Rogers v ASIC* [2024] AATA 3161.

The AAT must consider the whole matter afresh and reach its own conclusion by an independent assessment and determination of the issues while dealing with the same questions that were before ASIC. The determination of whether the same question is being addressed by the AAT requires a careful consideration of the relevant statute. This involves the identification of the precise question raised by the statute and the "elements of the question necessary to be addressed in reaching a decision" (*Rogers v ASIC* [2024] AATA 3161.

The AAT may not rely on new or additional material which was not available to ASIC where the statute under which ASIC's decision was made contains a temporal limitation that operates by reference to a fixed historical point in time (*Rogers v ASIC* [2024] AATA 3161). See **[16.100], [16.150]** and **[16.950].**

Banning orders – ASIC's policy - review by the Administrative Appeals Tribunal

In *Karamian v ASIC* [2024] AATA 2006 at [284] the AAT indicated that ASIC's Regulatory Guide 98 "*Licensing: Administrative action against financial services providers*" sets out some of the considerations that the AAT and the courts have considered when making decisions about banning orders. The AAT indicated that the previous AAT and judicial decisions (from which the considerations in Regulatory Guide 98 are derived) are more reliable than Regulatory Guide 98. This is because Regulatory Guide 98 does not set out the "precise legal principles or criteria" to be applied by the AAT when making the correct or preferable decision in the particular case before it. The three distinct banning periods in Table 3 of Regulatory Guide 98 are not "exhaustive or mutually exclusive" and they "create a risk of a formulaic 'tick box' approach to decision-making." Regulatory Guide 98 gives the "false impression" that the length of a banning order can be determined by applying established "tariffs or assessed with scientific precision." Regulatory Guide 98 is "fundamentally at odds with a case by case merits review, which must necessarily be governed by the facts and circumstances of each proceeding."

According to the AAT, while consistency in decision-making for similar cases is desirable, previous AAT decisions about the length of a banning order have each turned on their own facts and circumstances. This means that the previous decisions of the AAT about the appropriate length of a banning order are of limited assistance in a current matter. The AAT's previous decisions about the length of a banning order are not precedents to be applied, or distinguished, in the same way as occurs for judicial decisions. The AAT's previous decisions do not establish "tariffs" which determine the outcome of the current

matter or future decisions of the AAT (*Karamian v ASIC* [2024] AATA 2006). See **[9.103]** and **[16.700].**