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Update Summary

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ASIC CORPORATE INVESTIGATIONS AND HEARINGS

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Updated Commentary

Financial services

Section 766B(3) of the *Corporations Act 2001* provides that personal advice is financial product advice that is given to the client where the financial adviser has considered one or more of the client's objectives, financial situation and needs. The word “considered” in s 769B(3) is given its usual or ordinary meaning of “pay attention to, have regard to, view, think about with attention or scrutinise.” This means that the financial services provider is not required to undertake “an active and comprehensive process of evaluation” nor does it require “that the advice comprehensively considers each one of the customer’s objectives, financial situation and needs” (*ASIC v Union Standard International Group Pty Ltd (No 4)* [2024] FCA 1481).

In the context of personal advice, financial advisers “purport to tailor, their advice regarding a financial product to a customer’s individual circumstances.” For this reason, additional, more onerous and stricter obligations of disclosure and disinterestedness are imposed on financial advisers where personal advice (as opposed to general advice) is provided to retail clients (*ASIC v Union Standard International Group Pty Ltd (No 4)* [2024] FCA 1481).

Superannuation trustees

The higher standard of care of a prudent superannuation trustee in s 52(2)(b) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) does not impose a duty to avoid all losses. A prudent superannuation trustee can commit errors of judgement without being liable. The prudent superannuation trustee’s standard of care does not involve strict liability. In determining whether the superannuation has met the required standard of care under s 52 of the SIS Act, the court must consider all relevant circumstances including the scale of the superannuation trusts, the value of the superannuation funds at issue and the other tasks which the superannuation trustees and their directors must perform when managing the superannuation funds (*Brady v NULIS Nominees (Australia) Ltd (No 4)* [2024] FCA 1374).

The superannuation trustees’ duty in s 52(2)(c) of the SIS Act to act in the best interests of the beneficiaries requires the trustees to act in best interests of the present and future beneficiaries of the trust and to act impartially between any different classes of beneficiaries. Where the object of the trust is to provide financial benefits for the beneficiaries, the trustees must act in the beneficiaries’ best financial interests (in terms of income yield and capital growth). The best interests duty requires the trustees to act consistently with, and promote, the purposes for which the trusts are established. This duty does not involve strict liability and the trustees are only liable if they exercise their

powers improperly. The superannuation trustees' duty in s 52(2)(c) "corresponds with and does not materially enlarge the general law which recognises that a trustee's duty to act in the best interests of beneficiaries or members is an incident of its duty to observe and carry out the terms of the trust" (*Brady v NULIS Nominees (Australia) Ltd (No 4)* [2024] FCA 1374).

The superannuation trustees' duties and covenants in ss 52 and 52A of the SIS Act "correspond with and do not add materially to the Trustee's general law duty to act honestly, exercise reasonable care, give real and genuine consideration and form a fair and reasonable opinion based on the material before it and act in the best interests of the fund" (*Brady v NULIS Nominees (Australia) Ltd (No 4)* [2024] FCA 1374). See [2.770].

Directors' duty of due care and skill

In the context of the directors' duty of care and skill in s 180(1) of the *Corporations Act 2001*, the directors' non delegable duties include:

- (i) the irreducible duty to be involved in the corporation's management and to take all reasonable steps to be in a position to guide and monitor the corporation's affairs;
- (ii) ensuring that they understand the corporation's financial statements and making further enquiries if necessary;
- (iii) focusing their attention on important matters that fall within the responsibilities of the Board of Directors and not simply rely on the advice of management in relation to these matters; and
- (iv) ensuring that their reliance on the advice of others is reasonable and not simply blindly delegate their tasks to others.

(*ASIC v Healey* (2011) 196 FCR 291; [2011] FCA 717; *ASIC v GetSwift Ltd* [2021] FCA 1384; *Fitzgerald v Tully* [2024] FCA 391.) See [4.480].

Banning orders - efficiently, honestly and fairly

The limits and content of the expression "efficiently, honestly and fairly" in s 912A(1)(a) of the *Corporations Act 2001* or of "its various elements are incapable of clear or exhaustive definition" (*ASIC v Union Standard International Group Pty Ltd (No 4)* [2024] FCA 1481). The obligation in s 912A(1)(a) can apply to "an infinite variety of corporate delinquency and self-interested commerciality" (*ASIC v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57; [2020] FCA 208; and *ASIC v Union Standard International Group Pty Ltd (No 4)* [2024] FCA 1481).

Banning orders – competence

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 (see s 920A(1)(da) of the *Corporations Act 2001*). Whether a person is competent does not depend solely on that person's qualifications. Qualifications are a reliable indicator of a minimum level of skill. Whether a person is competent also depends on a person's training and experience and "ability to think strategically, understand and navigate compliance and regulatory issues, and analyse financial information" (*Hawcroft v ASIC* [2024] AATA 3596). See [9.103].

Banning orders – fit and proper person

Section 920A(1)(d) of the *Corporations Act 2001* provides that ASIC may make a banning order where ASIC has reason to believe that a person is not a fit and proper person to provide financial services. Section 913BB(2)(k) of the *Corporations Act 2001* (and s 37B(2)(k) of the *National Consumer Credit Protection Act 2009* (Cth)) provides that in determining whether a person is a fit and proper person ASIC must have regard to "any other matters that ASIC considers are relevant." Examples of "any other matters that ASIC considers are relevant" can be ascertained by referring to the case law which discusses the "fit and proper person" test in a variety of contexts. For example, a person's competence (which includes an assessment of a person's qualifications, training and experience) is a relevant "other matter" to consider under s 913BB(2)(k) in relation to determining that person's fitness (*Hawcroft v ASIC* [2024] AATA 3596).

There is no temporal requirement under the *Corporations Act 2001* in relation to ASIC's assessment of whether a person is fit and proper. If ASIC has new grounds about a person's fitness that it wishes to adduce as evidence before the Administrative Review Tribunal (ART), the affected person must be given adequate notice of those new grounds and the affected person must be given a reasonable opportunity to present their case including further time to provide any additional evidence and submissions to address ASIC's new grounds (*Hawcroft v ASIC* [2024] AATA 3596).

Section 912C of the *Corporations Act 2001* provides that ASIC may give a written notice to a financial services licensee requiring that licensee to give ASIC a written statement about the financial services provided by that licensee or its representatives or the financial services business carried on by the licensee. That written statement may assist

ASIC to determine whether the fit and proper person test is satisfied in relation to that licensee and the licence (taking into account any of the matters listed in s 913BB).

The information received under a s 912C notice provides information to ASIC that is useful for “the routine monitoring of industry sectors or thematic reviews.” The information received “can also be used to support decisions to commence investigations, and are increasingly adduced as evidence of admissions by a licensee or its representatives in subsequent enforcement actions.” Any inconsistencies between the information received from a s 912C notice and other evidence may assist ASIC during cross-examination of relevant witnesses. See [9.103].

Section 912C can be utilised by ASIC irrespective of whether ASIC has commenced a formal investigation under s 13 of the ASIC Act. Similarly, ASIC’s power to issue a notice to produce books can be exercised irrespective of whether a formal investigation is in existence (see [3.300] and [6.420]). By contrast, ASIC can only exercise its oral examination power under s 19 of the ASIC Act in the context of ASIC’s formal investigation under s 13 of the ASIC Act (see [5.100]).

Administrative Review Tribunal

The Administrative Review Tribunal (ART) was established by the *Administrative Review Tribunal Act 2024* (Cth) (ART Act) and commenced operation on 14 October 2024. The ART replaced the *Administrative Appeals Tribunal* (AAT). See [16.100].

Appeals to the ART’s Guidance and Appeals Panel or the Federal Court - appeals on questions of law

One initiative of the ART Act is the introduction of the “Guidance and Appeals Panel” within the ART. The “Guidance and Appeals Panel” will sit to determine issues of significance relating to the ART’s administrative decision-making, or where it is alleged that the ART’s decision contains an error of fact or law that materially affects that decision. In some limited circumstances, regarding questions of law, the ART’s decisions may be reviewed by the Federal Court (ss 121-128 of the ART Act).

Section 272(1) of the ART Act (previously s 44 of the AAT Act) provides that a person may appeal from the ART to the Federal Court, on the ground of an error of law (a question of law). The Federal Court appeal is confined to questions of law. It does not involve a merits review or any type of rehearing.

Section 272(2) of the ART Act provides that the party's right of appeal to the Federal Court does not apply where the President of the ART decides (under s 128 of the ART Act) to refer the matter to the ART's Guidance and Appeals Panel.

Section 185 of the ART Act provides that the ART (with the agreement of the President of the ART) may refer a question of law arising in the ART's review proceeding to the Federal Court for a decision. The ART may refer the question of law to the Federal Court at the request of a party to the ART's review proceeding, or on its own initiative. See [16.1100].