Chapter 1: Policy and Legal Framework

ASIC – Establishment and Functions

Regulation of consumer credit and finance broking

Chapter 3 of the National Consumer Credit Protection Act 2009 (Cth) imposes “responsible lending” obligations on credit licensees that are intended to ensure that they do not provide a credit contract that is unsuitable for the consumer. The credit licensee is required to make an informed assessment about whether the credit contract is unsuitable for the consumer by making reasonable inquiries about the consumer’s objectives, requirements and financial situation and taking reasonable steps to verify the consumer’s financial position (ss 115–117 of the National Consumer Credit Protection Act 2009 (Cth); ASIC v Cash Store Pty Ltd (in liq) [2014] FCA 926 at [15], [17] – [20], [45], [47] and [62]; and ASIC, “ASIC cancels credit licence of Victorian credit provider,” 26 September 2014). See [1.165].
The credit licensee must assess the credit contract as unsuitable if it is likely that the consumer would be unable to repay the loan without substantial hardship or if the contract does not meet the consumer’s requirements or objectives. In such a case the credit licensee is prohibited from providing the credit contract (ss 118–123 of the National Consumer Credit Protection Act 2009 (Cth); and ASIC v Cash Store Pty Ltd (in liq) [2014] FCA 926 at [15] and [21] – [28] and [62]).

A breach of these obligations by the credit licensee means that ASIC can apply for a civil penalty (ss 166 and 167 of the National Consumer Credit Protection Act 2009 (Cth); and ASIC v Cash Store Pty Ltd (in liq) [2014] FCA 926 at [15] and [76]).

ASIC has indicated that since the introduction of the responsible lending laws, “lenders have tightened their lending practices”. These laws have resulted in a “significant decline in the number of ‘low doc’ loans” (ASIC, “Low doc lenders tighten lending practices”, 23 September 2014).

A declaration of a contravention vindicates ASIC’s claim about a contravention of the National Consumer Credit Protection Act 2009 (Cth), provides clarity about the content of responsible lending practices under the regulatory framework and serves the public interest by promoting general deterrence (ASIC v Cash Store Pty Ltd (in liq) [2014] FCA 926 at [76]).

Corporate Regulation Objectives

ASIC's duty and liability

Malicious prosecution or misfeasance in public office

It is arguable that ASIC holds public office for the purposes of liability under the tort of malicious prosecution or misfeasance in public office.

The tort of malicious prosecution or misfeasance in public office is concerned with the acts and intentions of individuals and it cannot be established by the composite conduct of ASIC’s individual officers or by simply aggregating the acts of various ASIC officers. The tort of malicious prosecution or misfeasance in public office cannot be established by demonstrating a multiplicity of errors or by showing a course of conduct which is alleged to be improper or tainted in some way (Chapel Road Pty Ltd v ASIC (No 10) (2014) 285 FLR 14; 307 ALR 428; [2014] NSWSC 346 at [77] and [78] and the authorities cited therein). See [1.500].

Investigative and Enforcement Powers

Enforceable undertakings – administrative action/proceedings

Australian Financial Services Licence – conditions

ASIC has power under s 93AA of the ASIC Act to accept enforceable undertakings from Australian financial services licensees in relation to the conditions on their licence provided that such an undertaking is an appropriate
regulatory outcome in respect of the concerns ASIC identified in relation to that licensee having regard to ASIC’s public interest regulatory objectives (see [1.400]). ASIC could enforce any subsequent breach of the enforceable undertaking by taking immediate action in court. ASIC could also address any breach of the enforceable undertaking by conducting an administrative hearing for licence revocation or suspension (Chapel Road Pty Ltd v ASIC (No 10) (2014) 285 FLR 14; 307 ALR 428; [2014] NSWSC 346 at [46] and [378]). ASIC’s powers in relation to Australian Financial Services Licences are discussed at [9.102]. See [1.700].

ASIC and Foreign Jurisdictions

Co-operation with foreign regulators

ASIC has recently signed a Memorandum of Understanding with the Monetary Authority of Singapore to assist them to co-operate with each other to promote their respective regulatory responsibilities and “to allow trade repositories licensed in one jurisdiction to provide relevant data to the authority in the other jurisdiction” (ASIC, “ASIC and MAS sign MOU on authorities’ access to OTC derivatives trade repository data”, 17 September 2014). See [1.1100].

Chapter 2: Persons Affected by ASIC

Fiduciaries

Fiduciary – meaning

A person may be a fiduciary by virtue of a less formal arrangement than a contractual appointment such as where they voluntarily assume the relevant position (Polon v Dorian [2014] NSWSC 571 at [725] and the authorities cited therein). See [2.400].

Chapter 4: Investigations

ASIC’s Power to Investigate Suspected Contraventions

Contraventions of statutory duty of care and diligence

Delegation and reliance

The directors must closely engage in, and be familiar with, the major transactions of the corporation and exercise a sufficient degree of control over the corporation’s operations by supervising and overseeing the work performed by their delegates. It is not reasonable for directors to rely on the information or advice provided by delegates where they fail to make their own independent assessment of that information or advice (Gabay v ASIC [2014] AATA 425 at [69] and [75]). See [4.480].
Chapter 8: ASIC Proceedings on Investigations

CIVIL PROCEEDINGS

Proceedings for Orders Protecting Property

ASIC’s power to obtain orders under s 1323 of the Corporations Act

Where ASIC is conducting an investigation into whether a corporation and its directors have contravened the Corporations Act 2001 (Cth), that corporation and those directors are potentially liable to investors for any losses caused by those suspected contraventions and they are relevant persons for the purposes of asset preservation orders under s 1323 (ASIC v Sino Australia Oil & Gas Ltd [2014] FCA 565 at [12]).

A relevant person includes any person who may have potential liability to aggrieved persons. An asset preservation order may be made against a relevant person even if that person “is not a wealthy man” (ASIC v Rangwala and Go Markets Pty Ltd [2014] NSWSC 961 at [30]).

What is “necessary or desirable” is concerned with the protection of the interests of the aggrieved persons who have claims against the alleged contraveners. It is concerned with providing a means of securing or preserving the property which may represent the source for the vindication of the rights of the aggrieved persons. What is “necessary or desirable” is not concerned with the nature of the defendants’ alleged contraventions or with the ability or willingness of the aggrieved persons to pursue their claims (ASIC v Sino Australia Oil & Gas Ltd [2014] FCA 565 at [13] and the authorities cited therein).

To ensure that any asset preservation orders are proportionate, the court must balance the need to achieve ASIC’s public interest regulatory objectives (including the protection of investors – see [1.400]) against the private rights of the corporation to use its assets in the conduct of its business affairs and to meet debts and avoid liquidity or solvency problems. An asset preservation order will be made where the interests of preserving the corporation’s funds for the benefit of investors outweigh any potential detriment to that corporation. The court recognises that any asset preservation orders will intrude to some extent upon the private rights of the relevant persons (ASIC v Sino Australia Oil & Gas Ltd [2014] FCA 565 at [15] – [19] and the authorities cited therein).

Where ASIC’s investigation is not at an advanced stage, is ongoing and has detected suspected contraventions, an asset preservation order may be made particularly where the corporation has no substantial assets in Australia other than liquid funds (raised by an initial public offering) that may be easily transferred overseas (ASIC v Sino Australia Oil & Gas Ltd [2014] FCA 565 at [14]).

The court will refuse to make asset preservation orders where there is no real risk of those assets being disposed of before the matter comes back to court.
For example, where the defendant’s assets consist of real estate subject to mortgages, there is no serious risk of such assets being disposed of during a short period of time before the trial and the court would decline to make the asset preservation orders prior to that trial (ASIC v Pearson [2014] FCA 799 at [10]). See [8.800].

Orders to surrender passport or prohibiting a person from leaving jurisdiction

In deciding whether to make a passport surrender order, the court must weigh against the private rights of the defendant the public interest in ASIC being able to effectively conduct its investigation and the potential prejudice to any plaintiffs who have potential claims against the defendant if the defendant did not participate in ASIC’s investigation (ASIC v Pearson [2014] FCA 799 at [16]).

The court may find that there is no significant risk of flight and refuse to make a passport surrender order where the defendants are permanent residents of Australia, have a significant financial connection to Australia (such as ownership of Australian real estate), have family members in Australia, carry on business in Australia, have instructed lawyers to represent them in ASIC’s investigation and have previously returned to Australia knowing of ASIC’s investigation (ASIC v Pearson [2014] FCA 799 at [11] – [16]). See [8.920].

Injunctions under the Corporations Act and ASIC Act

Prohibitory or mandatory injunctions

Where a person provides financial services advice without a licence in contravention of ss 911A and 911B of the Corporations Act 2001, the plaintiff may seek an injunction under s 1324 of the Corporations Act 2001 to prevent a continuation of such contraventions (Polon v Dorian [2014] NSWSC 571 at [472], [480], [789], [792], [797] and [800] and the authorities cited therein). See [8.980].

Discretionary factors

Where the court is asked to make a declaration and grant an injunction in relation to matters which are the subject of a brief to the Commonwealth DPP, the court is required to consider two competing public interests. There is the public interest in declaring that the relevant conduct of the defendant is unlawful and issuing an injunction to prevent that defendant from continuing that conduct. There is also the public interest in ensuring that the defendant has a fair trial. The court is reluctant to make civil orders that may impact upon the fairness of the criminal trial (ASIC v Investment Intelligence Corporation Pty Ltd (in liq) [2014] QSC 211). Declarations are discussed at [8.1460], See [8.1020].

Damages in addition to, or in substitution for, an injunction

Where a person provides financial services advice without a licence (in contravention of ss 911A and 911B of the Corporations Act 2001), the plaintiff may claim damages under s 1324(10) of the Corporations Act 2001 provided
the plaintiff actually sought an injunction (Polon v Dorian [2014] NSWSC 517 at [472], [480], [789], [792], [797] and [800] and the authorities cited therein).

There is no case authority on the question of whether discretionary apportionment principles apply to a claim for damages under s 1324(10) (Polon v Dorian [2014] NSWSC 517 at [481]). See [8.1100].

Proceedings for Contravention of Civil Penalty Provisions – Civil Penalty Orders

Pecuniary penalty order

The fact that the defendant has co-operated with ASIC and admitted the contraventions may be taken into account by the court in assessing the need for personal deterrence and determining the level of the pecuniary penalty. Such co-operation and admissions save ASIC’s and the court’s resources and free up those resources for redeployment to other regulatory actions (ASIC v Newcrest Mining Ltd [2014] FCA 698 at [61]). See [8.1500].

Civil evidence and procedure rules for declarations of contravention and pecuniary penalty orders

Standard of proof

The Briginshaw rule reflects the concepts of common sense, fairness and reliability (Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93 at [93] and [99]). See Rule in Jones v Dunkel

The rule in Jones v Dunkel means that the decision-maker may draw with greater confidence an inference unfavourable to the party who failed to adduce the evidence provided that such an unfavourable inference is available on the evidence that has been admitted (Chapel Road Pty Ltd v ASIC [2014] NSWSC 346 at [128]).

Where ASIC’s officer is not called by ASIC to give evidence about why ASIC’s power was or was not exercised, a Jones v Dunkel inference may be drawn against ASIC about the validity of ASIC’s decision. However, such an inference would not be drawn where documents are in evidence at the trial, such as the reasons for ASIC’s decision, that “throw light on the matter” (Chapel Road Pty Ltd v ASIC [2014] NSWSC 346 at [120]). See [8.1520].

CRIMINAL PROCEEDINGS

ASIC’s power to commence criminal proceedings

There are a number of examples in the case law where ASIC has referred a matter to the Commonwealth DPP for prosecution and the Commonwealth DPP has disagreed with ASIC’s recommendation to prosecute on the ground that the Commonwealth DPP formed the view that there were no reasonable prospects

Matters relevant to level of criminal penalty

The element of general deterrence is an important sentencing consideration in white collar crimes because such crimes cause a loss of confidence in the honesty and integrity of, and damage to, the financial markets, may have a significant effect on the efficient operation of those markets and on the economy and “are difficult to detect, investigate and prosecute successfully” (R v Moylan [2014] NSWSC 944 at [55] and [56]; and R v Johnson [2014] VSC 175 at [87]).

An unduly short non-parole period, in comparison to a relatively lengthy “head” sentence is subversive to the purpose of general deterrence (R v Johnson [2014] VSC 175 at [87]).

Directors must understand that they are required to act honestly, with integrity and honourably when they perform their functions and duties. When there is a serious breach of the directors’ duties, factors such as denunciation of their conduct, just punishment and personal and general deterrence must carry significant weight in determining the appropriate sentence (DPP v Katsabis [2014] VCC 1101 at [55] and [56]; and R v Johnson [2014] VSC 175 at [87] – [88]).

In determining the willingness of the accused to facilitate the course of justice (by making an early guilty plea) the court will consider the strength of the prosecution’s case (DPP v Katsabis [2014] VCC 1101 at [93]). In some cases, an early guilty plea is not evidence of contrition or remorse such as where the defendant had no real alternative but to take the plea offered. In other cases, the failure to enter an early guilty plea should not be taken by the court as evidence of a lack of contrition such as where the reason for the delay related to resolving a serious legal question about the interpretation of the relevant law (DPP v Katsabis [2014] VCC 1101 at [92]).

The parity principle requires that there should be consistency when sentencing co-offenders (R v Johnson [2014] VSC 175 at [129]). This matter is discussed at [8.1500] in the context of civil pecuniary penalties and at [8.1560] in the context of disqualification orders. See [8.2965].

REGULATORS’ POWERS TO ASSIST VICTIMS

The regulators’ powers to commence equitable proceedings, obtain disgorgement orders and statutory compensation funds

Disgorgement order

A disgorgement order is not the same as compensation orders under s 1317H (see [8.1800]) or s 1317HA (see [8.1840]) of the Corporations Act 2001. A compensation order involves identifying the party who has suffered the loss, quantifying the loss and ordering the payment of that amount to the injured person.
By contrast, disgorgement orders involve removing the illegal profits made, or losses avoided, from the contravener.

The disgorgement remedy prevents unjust enrichment. It also promotes personal and general deterrence and may reduce the contravener’s perception that any penalties imposed are “merely a business cost”.

The moneys obtained by the disgorgement remedy are either paid into government consolidated revenue (see, for example Canada and Hong Kong) or paid to compensation funds for victims or used for investor education or advocacy (see, for example, Canada, the United Kingdom and the United States).

In Canada, where a person has contravened a securities law, the Ontario Securities Commission (OSC) may compel that person to disgorge to the OSC any amounts obtained from that contravention.

In Hong Kong, the Market Misconduct Tribunal may order a person, who has engaged in market misconduct, to disgorge any profit gained, or loss avoided, by that person as a result of that misconduct.

In the United Kingdom, the Financial Conduct Authority may order persons to disgorge any financial benefit they have derived from a contravention (including any profit made or loss avoided – where it is practicable to quantify these amounts).

The United States' courts have recognised the right of the regulators, like the SEC, to bring an equitable “disgorgement” action. The purpose of this remedy is to compel the defendant to give back, or disgorge, the profits made from the unlawful conduct. The SEC will deposit the moneys retrieved from such an action into a fund which is used to compensate the victims of the fraud. The remedy of disgorgement is not restricted to being used for the purpose of compensating victims and, in some cases, there may be no identifiable victims of the contravention. The remedy of disgorgement is also used by the SEC to prevent unjust enrichment. The case law in the United States indicates that the disgorgement remedy is designed to maintain market integrity and to deter unlawful actions by making such actions unprofitable. Recent amendments to the legislation in the United States now allow the SEC to obtain the disgorgement remedy by way of an administrative proceeding before the SEC, rather than by way of a court order.

It is argued that giving the regulators the option of seeking the disgorgement remedy increases the flexibility of those regulators to deal with contraventions more efficiently and effectively.

In contrast to the regulators referred to above, ASIC does not have the power to obtain the disgorgement remedy.
Corporations Regulations 2001

Numerous regulations extracted, previously amended by SLI 102 of 2014 with effect from 1 July 2014, were disallowed by the Senate on 19 November 2014.

Crimes Act 1914

The Crimes Act 1914 (Cth) has been amended by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2001 (Cth). The amending Act commences, for our purposes, on 1 December 2014.

According to the Explanatory Memorandum which accompanied the Bill, the amendments will provide additional powers for security agencies to deal with the threat of terrorism within Australia and that posed by Australians who participate in terrorist activities overseas. It will further counter terrorism through improving border security measures and by cancelling welfare payments for persons involved in terrorism. It also implements those recommendations of the Independent National Security Legislation Monitor's (INSLM) second and fourth Annual Reports and the Final Report of the Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation that will assist to address the most pressing gaps in our counter-terrorism framework.