



Supreme Court of New South Wales

Commercial Law Association seminar
Fiduciary duties in the financial sector
20 September 2024
Justice Ashley Black

Outline

- Introduction
- Overlapping general law and statutory duties
- Application of general law fiduciary duties to financial intermediaries
- Efficiently, honestly and fairly and conflict management duties
- Best interest duty and related obligations
- Design and distribution obligations
- Quality of advice review
- ASIC's approach

Overlapping general law and statutory duties

- Overlap of general law and statutory frameworks recognised in UK
- The several tests and their sources

Nature of duty	Source
Duty to avoid a real and sensible conflict of interest	General law - often applies to financial advisers as fact-based fiduciaries, unless excluded
Duties to act efficiently, honestly and fairly and to manage conflicts of interests	Corporations Act ss 912A(1)(a), 912A(1)(aa) - applies to Australian financial services licence holders (but not directly to representatives or advice providers)
“Best interests” duties	Corporations Act s 961B - applies to providers of financial advice to retail clients
Duty to prioritise client interests	Corporations Act s 961J - applies to providers of financial advice to retail clients

Application of fiduciary duties to financial intermediaries

- Undertaking to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense
- A fiduciary has opportunity to exercise the power or discretion to the detriment of the principal
- A fiduciary must act in good faith; must not make a profit out of his or her position; and must not place himself or herself in a position where his duty and his interest may conflict without the informed consent of his or her principal
 - *Hospital Products Ltd v United States Surgical Corp* (1984)
 - *Bristol & West Building Society v Mothew* (1998)
 - *ASIC v Citigroup* (2007)
 - *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010)
 - *Grimaldi v Chameleon Mining NL (No 2)* (2012)
 - *Howard v Commissioner of Taxation* (2014)
- Narrowing of scope of duty – *Citigroup*

Efficiently, honestly and fairly and management of conflicts

- Section 912A(1)(a) of the Corporations Act requires a financial services licensee to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly
 - *ASIC v Camelot Derivatives Pty Ltd (in liq)* (2012)
 - *ASIC v Westpac Securities Administration Ltd* (2018)
 - *ASIC v AGM Markets Pty Ltd (in liq) (No 3)* (2020)
 - *ASIC v MLC Nominees Pty Ltd* (2020)
 - *ASIC v National Australia Bank Ltd* (2022)
 - *ASIC v Commonwealth Bank of Australia* (2022)
 - *ASIC v Diversa Trustees Ltd* (2023)
 - *ASIC v Lanterne Fund Services Pty Ltd* (2024)
 - *ASIC v Macquarie Bank Ltd* (2024)
- Management of conflicts - *Citigroup*

Best interests duty and related obligations

- Section 961B(1) - provider of personal advice to a retail client must act in the best interests of the client when giving the advice
- Section 961B(2) specifies several steps that an adviser may take in order to satisfy the best interests duty. Section 961B(2)(g) requires that an adviser must have:
 - “taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances.”
 - *ASIC v NSG Services Pty Ltd (2017)*; *ASIC v Westpac Securities Administration Ltd (2019)*
- Section 961G of the Corporations Act - financial adviser may only provide advice to a retail client if it would be reasonable to conclude that the advice would be appropriate to the client, had the provider satisfied the best interests obligation under s 961B
 - *NSG Services*; *ASIC v RI Advice Group Pty Ltd (No 2) (2021)*; *ASIC v Dixon Advisory & Superannuation Services Ltd (2022)*; *ASIC v DOD Bookkeeping Pty Ltd (in liq) (2023)*
- Conflicted remuneration and priority to client interests

Design and distribution obligations, product intervention orders and ASIC enforcement

- Design and distribution obligations
 - *ASIC v Bit Trade Pty Ltd (2024)*
 - *ASIC v American Express Australia Ltd (2024)*
 - *ASIC v Firstmac Ltd (2024)*
- Product intervention powers
- ASIC's approach to enforcement and increase in range and size of penalties by the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019
- The benefits of the Financial Accountability Regime
- The decline and fall of enforceable undertakings – are there signs of renewal?
- The Senate Economic References Committee's July 2024 Report
- Quality of Advice Review and ALRC Report