

Indecent Exposure: Liability of Responsible Persons

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This morning

- Responsible persons: SPS 520 and SRS 520.0
- Are all responsible persons 'officers' of the RSE licensee for company law purposes?
- If they are officers, what are their duties?
- What consequences, if any, might flow from breach of those duties?

Responsible persons

SPS 520 para 11:

- (a) a director of the RSE licensee;
- (b) a secretary of the RSE licensee;
- (c) a senior manager of the RSE licensee;
- (d) an RSE auditor who is appointed to conduct any audit of an RSE for which the RSE licensee is trustee, or of any connected entity of the RSE licensee;
- (e) an RSE actuary who is appointed to perform an actuarial function under RSE licensee law; and
- (f) a person who performs activities for a connected entity of the RSE licensee where those activities could materially affect the whole, or a substantial part, of the RSE licensee's business operations, or its financial standing, either directly or indirectly.

Senior manager

SPS 520 para 16: A person other than a director who:

- (a) makes, or participates in making, decisions that affect the whole, or a substantial part, of the RSE licensee's business operations;
- (b) has the capacity to affect significantly the RSE licensee's business operations or its financial standing;
- (c) may materially affect the whole, or a substantial part, of the RSE licensee's business operations or its financial standing through their responsibility for enforcing policies and implementing strategies approved by the Board; the development and implementation of systems used to identify, assess, manage or monitor risks in relation to the RSE licensee's business operations; or monitoring the appropriateness, adequacy and effectiveness of risk management frameworks; or
- (d) is otherwise an executive officer of the RSE licensee.

Officer – Corporations Act

- (a) a director or secretary of the corporation; or
- (b) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation's financial standing; or
 - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation).

What's the overlap?

- Director, secretary and senior manager
- Note what 'participates in decision-making' means after *Shafron*
- But probably not para 11(d), (e) or (f) or 16(c) or (d) (executive officer) – depends on the facts

Duties

- RSE licensee directors are subject to the statutory covenants in SISA s 29VO and s 52A(2)
- Directors and other officers of a corporation are subject to CA ss 180 and 181
- All employees of a corporation are subject to CA ss 182 and 183

Duties of care

CA s 180 – directors and officers	Exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a company in the company's circumstances, and occupied the office held by, and had the same responsibilities within the company as, the director or officer
SISA s 52A(2)(b) - directors	Exercise, in relation to all matters affecting the fund, the same degree of care, skill and diligence as a prudent superannuation entity director would exercise in relation to an entity where he or she is a director of the trustee of the entity and that trustee makes investments on behalf of the entity's beneficiaries
SISA s 52(2)(f) - directors	Exercise a reasonable degree of care and diligence for the purposes of ensuring that the RSE licensee carries out the covenants referred to in section 52 of the SIS Act

Standard of care

- The Prime Retirement Trust matter (*ASIC v APCH Ltd*) per Murphy J (December 2013)
- ‘But I had legal advice ...’
- Matters involving conflicts of interest (the wisdom of Santow JA)



Liability for breach of duty

- Where the rubber hits the road
- Is SISA 'liability – lite'?
- CA certainly is not: criminal liability, civil pecuniary penalties, civil liability (to the company), disqualification

Stepping stones



A pathway to civil pecuniary penalties and disqualification where an officer's negligence results in the RSE licensee contravening the superannuation laws?

Stepping stones

- Not a duty on officers to conduct the affairs of the company in accordance with the law: see Brereton J, Gordon J
- But jeopardy to the interests of the RSE licensee clearly requires care
- No need to establish that the company itself suffered compensable loss

Knowing assistance

- *Bell Group*, the second limb of *Barnes v Addy*, and why we care about that here
- Is 'best interest' fiduciary? Is 'best interest' a foundation for knowing assistance claim? What about breach by the trustee of its duty of care?



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