

2015: Super Forever...



**Libby Slater Plenary Session
Trusts, Financial Services and Conflicts
19 February 2015**

**Justice Ashley Black
Supreme Court of New South Wales**

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The relevant duties

- Duty to avoid a conflict of interest – general law
- Duties to act efficiently honestly and fairly and manage conflicts of interest – Corporations Act s 912A(1)(a), (aa)
- Best interests duties – general law, SIS Act s 52(2)(c), Corporations Act s 961B (which may be very different in scope)
- Duty to prioritise client interests – SIS Act s 52(2)(d), Corporations Act s 961J, Life Insurance Act s 32

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When a fiduciary duty arises at general law

- Fiduciary duties in a traditional category – *Daly v Sydney Stock Exchange Ltd*
- Significance of undertaking to act in another's interests
- Fiduciary duties in an advisory setting - *ASIC v Citigroup Global Markets Australia Pty Ltd*; *Wingecarribee Shire Council v Lehman Bros Australia Ltd (in liq)*; *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)*

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The scope of the fiduciary duty

- The fiduciary duty is limited by the scope of the engagement and can be limited by contract
- The contract may authorise an act that would otherwise be a breach of fiduciary duty
- Effect of disclosure in a financial services guide or statement of advice – Degeling and Hudson (2014) 32 *C&SLJ* 527
- Exclusion of fiduciary duties and limiting a trustee's duties

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The no conflict rule

- Common formulation refers to a real or substantial possibility of a conflict
- When the rule is breached – Sir Frederick Jordan's view, *Hospital Products* per Mason J, *Re Colorado Products Pty Ltd, Agricultural Land Management Ltd v Jackson (No 2)*
- No inhibition rule

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Statutory obligations attaching to AFSL holders

- Duty to act efficiently, honestly and fairly – CA s 912A(1)(a)
- Duty to manage conflicts of interests – CA s 912A(1)(aa)
- *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)*
- ASIC RG 181 – focus on control, avoidance and disclosure

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Best interests duties in trust law and statute

- The best interests duty in trust law - *Cowan v Scargill*, *ASIC v Australian Property Custodian Holdings Ltd (No 3)*
- SIS Act s 52(2)(c) - *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd*, *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd*
- The “best interests” duty under CA s 961B may be very different – the effect of s 961B(2)
- Compliance with s 961B will not in itself comply with the general law duty in a conflicted setting

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Duty to prioritise interests of clients/beneficiaries

- Corporations Act s 961J – assumes the coexistence of two duties – does not require exclusive attention to client's interests - contrary to equity's approach of not permitting reliance on outcome in answer to breach of fiduciary duty
- Compliance with s 961J may not exclude breach of no conflict rule if fiduciary duty not effectively excluded
- SIS Act s 52(2)(d) – priority to interests of beneficiaries and control of conflicts – will the covenant narrow the general law duty?
- Life Insurance Act s 32 – priority to interests of policyholders
- Prudential Standard SPS 521

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Conclusion

- Significant areas of overlap and different formulations of duties may well lead to different results in a factual setting
- Fiduciary duties at general law are not always excluded, or effectively excluded, in the financial services industry.
- Will general law duties be breached by conduct that would not breach the statutory duties – specifically, where an adviser or trustee seeks to point to the content of advice given or action taken in a conflicted setting to claim that the conflict was “managed” or the client’s or beneficiaries’ interests were prioritised?