CONFLICTS OF DUTIES IN STATUTORY CONTEXTS: MANAGED INVESTMENTS, SUPERANNUATION AND FINANCIAL SERVICES

Pamela Hanrahan*

Supreme Court of New South Wales Annual Commercial and Corporate Law Conference, Sydney, 15 November 2017

INTRODUCTION

In Australia, the financial intermediaries that provide wealth management services[1] to retail customers are often fiduciaries. This includes responsible entities of registered managed investment schemes, corporate trustees of registrable superannuation entities, asset managers, platform operators, custodians, brokers, and in many cases, financial planners and investment advisers.[2] As fiduciaries, they cannot put themselves in a position where there is a real and sensible possibility that their personal interest or duty to another person may conflict with their duty to act in the best interest of their client, or profit themselves or someone else from their position or from information or opportunity arising from it, unless they have the client's fully informed consent. These fiduciary proscriptions operate alongside various other duties arising at general law, including a duty of care, skill and diligence and (where relevant) their positive duties as trustees to get in trust property and to adhere to and carry out the terms of the trust.

* Professor and Deputy Head, School of Taxation and Business Law, UNSW Business School; Senior Fellow, Melbourne Law School; Member, Centre for Law, Markets and Regulation, UNSW Sydney; Associate, Centre for Corporate Law and Securities Regulation, University of Melbourne.

[1] Wealth management is the industry term used to describe 'various forms of funds management (superannuation, managed funds and life insurance) and financial advisory services': Theodore Golat, 'Banks' Wealth Management Activities in Australia', *Reserve Bank of Australia Bulletin*, September Quarter 2016, 53.

[2] For a discussion of the circumstances in which a fiduciary relationship is likely to arise between a financial intermediary and its client, see PF Hanrahan, 'The relationship between equitable and statutory "best interests" obligations in financial services law' (2013) *Journal of Equity* 46 at 48-53. See also M Scott Donald, 'Regulating for fiduciary qualities of conduct' (2013) 7 *Journal of Equity* 142; Simone Degeling and Jessica Hudson, 'Fiduciary obligations, financial advisers and FoFA' (2014) 32 *Company & Securities Law Journal* 527; Paul Latimer, 'Protecting the best interests of the client' (2014) 29 *Australian Journal of Corporate Law* 8; Simone Degeling and Jessica Hudson, 'Equitable monetary remedies against financial advisers who give "advice about advice"' (2015) 33 *Company & Securities Law Journal* 166.

Overlaying the intermediaries' general law duties to their clients is a complex web of regulation contained in various Commonwealth statutes and standards and overseen by the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA). This includes the ASIC-administered Australian financial service (AFS) licensing regime established under Pt 7.6 of the *Corporations Act 2001* (Cth) (Corporations Act), which covers all financial intermediaries in Australia. Trustees of public offer superannuation entities are also subject to the Registrable Superannuation Entity (RSE) licensing regime created by Pt 2A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) and administered by APRA.[3]

In addition to their obligations as licensees, a responsible entity of a registered scheme must comply with Ch 5C of the Corporations Act, and a trustee of a registrable superannuation entity must operate the fund or trust in accordance with the SIS Act and the prudential standards made by APRA under Pt 3A of that Act. A financial adviser that provides personal financial product advice to a retail client must comply with Pt 7.7A of the Corporations Act. All these intermediaries are also subject to various disclosure requirements relating to the financial products and services they provide, including under Pt 7.7 (financial services disclosure) and Pt 7.9 (financial product disclosure) of the Corporations Act. The legislation in labyrinthine. In the quarter-century since the introduction of compulsory superannuation in Australia, both the wealth management industry[4] and the rules that govern it have grown exponentially.

This paper is concerned with how these regulatory rules apply in situations where financial intermediaries or their officers face a potential conflict of duties. For financial intermediaries, conflicts of duty typically arise because they hold multiple appointments or retainers. A single AFS licensee may be responsible entity for several registered managed investment schemes and the operator of other wholesale investment trusts,[5] and most RSE licensees are trustee of more than one registrable superannuation entity.[6] Licensees that

[3] Most superannuation trustees are required to hold both an AFS licence and an RSE licence. For a discussion of the interaction between the two regimes, see Australian Securities and Investments Commission, *Information Sheet 86 - How do RSE and AFS licensing application processes work together* (July 2015).
[4] In June 1992, the total value of assets under management was $260,016 million. By June 2017 that had increased to $2,971,596 million. Source: Australian Bureau of Statistics *5655.0 - Managed Funds, Australia, June 2017*.
[5] As at June 2017, there were 466 responsible entities and 3,632 registered schemes: Australian Securities and Investments Commission, *Annual Report 2016-17*, 19.
[6] As at November 2017, there were 137 RSE licensees and 2,338 registrable superannuation entities: see http://www.apra.gov.au/rse/Pages/default.aspx.

provide financial advice to retails clients may have thousands of individual clients.[7] For directors and other officers of these licensees, conflicts of duty can arise where they serve more than one company, including in a corporate group. But they can also arise because the officer owes duties directly to the company's clients as well as to the company itself in connection with the provision of particular financial services.

Last year at this conference, Justice Beazley described conflicts of duties as 'the less well-developed emanation' of the fiduciary no-conflict rule. The other, more frequently encountered, is concerned with conflicts of interest and duty. The no-conflict rule was described by the Full Federal Court in *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453 at 477 (a case involving a conflict of duties faced by a bank giving financial advice to a customer) in the following terms:

> Not only must the fiduciary avoid, without informed consent, placing himself in a position of conflict between duty and personal interest, but he must eschew conflicting engagements. The reason is that, by reason of the multiple engagements, the fiduciary may be unable to discharge adequately the one without conflicting with his obligations to the other…

Although on occasion treated as distinct, the interest-duty and duty-duty conflicts are really 'separate but cognate' parts of the no-conflict rule.[8]

The duty-duty conflict most often arises when the person is required to act in the interests of two different principals and the principals' respective interests do not coincide.[9] It is not necessary to show that the fiduciary stands to gain personally from the transaction.[10] It has been observed that 'there is no need for the duties the fiduciary owes each principal to be actually in conflict; it is enough if the fiduciary "puts himself in a position where his duty

[7] As at June 2017, there were 4,185 entities licensed to provide personal financial product advice, and 25,379 individuals listed on the financial adviser registered maintained by ASIC under Div 9, Pt 7.6 of the *Corporations Act 2001* (Cth): Australian Securities and Investments Commission, *Annual Report 2016-17*, 19. About 20% of adult Australians use a financial planner or adviser: see *ANZ Survey of Adult Financial Literacy in Australia – Summary of Findings* (May 2015) [3.5.1].

[8] The Law Commission (UK) (Law Com No 350) *Fiduciary Duties of Investment Intermediaries* (June 2014) 39 referring to M Conaglen, 'Fiduciary regulation of conflicts between duties' (2009) 125 *Law Quarterly Review* 111 at 140. The Law Commission gives *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370 at [71] as an example of both the interest-duty and the duty-duty conflict as being treated as part of a single no-conflict rule.

[9] Of course, there must be an existing duty to act in the interests of the principal for the duty-duty conflict to arise. In financial services, this duty is created by or reflected in the relevant statutes: see *Corporations Act 2001* (Cth) ss 601FC and 601FD and s 961B of the Corporations Act and *Superannuation Industry (Supervision) Act 1993* (Cth) ss 52 and 52A. A company does not have a duty to act in the interests of its shareholders. Where the interests of the client diverge from the corporate interests of the financial intermediary, it gives rise to an interest-duty conflict, rather than a duty-duty conflict.

[10] *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453 at 477 (Davies, Sheppard and Gummow JJ).

to one principal may conflict with his duty to the other".'[11] This would occur if, for example, the two principals were directly or indirectly concerned in the same transaction.

If there is a real and sensible possibility that the duties will conflict, then the fiduciary can proceed only to the extent the terms of its appointment allow it,[12] or with the fully informed consent of its principals.[13]

Most trust deeds will contain provisions allowing the trustee to act as trustee of other trusts, which may be sufficient to allow the trustee to act despite the *potential* for the interests of the beneficiaries of those trusts to conflict. As Edelman J points out in *Australian Securities and Investments Commission v Drake (No 2)* (2016) 340 ALR 75; [2016] FCA 1552 at [354]:

> Fiduciary duties are shaped, and can be modified, by the trust instrument or an underlying contract. For instance, in *Kelly v Cooper* [1993] AC 205 at 215, the Privy Council held that no breach occurred since the contract of agency envisaged that the fiduciary might have a conflict of interest. The decision in *Kelly v Cooper* was applied by Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 206 where his Lordship said that "[a]lthough an agent is, in the absence of contractual provision, in breach of his fiduciary duties if he acts for another who is in competition with his principal, if the contract under which he is acting authorises him so to do, the normal fiduciary duties are modified accordingly".

However it is unlikely that it would be effective to allow the trustee to act in situations of *actual* conflict.[14] Even with consent, if there is an actual conflict between the interests of the two principals that the fiduciary is bound to serve, the fiduciary may be preventing from acting for either.[15] Unlike a conflict of interest and duty, where the fiduciary can choose to subordinate its interest to the principal's, a conflict of duty and duty cannot be resolved by

---

[11] Ibid, referring to *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18. See also *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 98 ACSR 615; [2014] WASC 102 at [263] – [275] (Edelman J).
[12] See, for example, the trust deed in *Everest Capital Ltd (as trustee of the EBI Income Fund) v Trust Company Ltd* (2010) 77 ACSR 371; [2010] NSWSC 231 at [101] (White J), which permitted the trustee to take other engagements.
[13] As Brennan CJ, Gaudron, McHugh and Gummow JJ point out in *Maguire v Makaronis* (1997) 188 CLR 449 at 467; 144 ALR 729; [1997] HCA 23, this is not a duty to obtain consent, rather the existence of an informed consent goes to negate what would otherwise be a breach of duty: see also *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1; 276 ALR 646; [2011] FCAFC 24; BC201100702 at [105] per Besanko J (Finkelstein and Jacobson JJ agreeing).
[14] See *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 98 ACSR 615; [2014] WASC 102 [281] – [282] (Edelman J).
[15] Law Commission, above n 8, [3.34]; John Glover, 'Conflicts of interest and duty for information professionals' (2002) 23 *Adelaide Law Review* 215 at 239. In *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1317] Lewison J observed that 'if the informed consent of both principals is obtained, there is no breach of fiduciary duty in acting for both, for as long as the conflict between the interests of the principals is *only a potential* one' (emphasis added).

sacrificing the interests of one principal to those of the other. The fiduciary must be loyal to both.[16]

The potential for conflicts of duties to arise in the financial services sector is significant. This is particularly the case in Australia, where the major financial institutions have expanded their operations into wealth management over recent decades.[17] The result is that clients and services overlap frequently. This expansion was motivated by 'the opportunity to cross-sell a broader range of financial services to their existing customer base and to gain exposure to the rapidly growing superannuation market'.[18] The products and services offered by a major financial institution in Australia may now include life insurance, general insurance, wholesale asset management services, custody, retail superannuation and collective investment products, stockbroking, margin lending, and wholesale and retail financial advice, along with traditional deposit-taking and lending activities and investment and institutional banking services.[19]

Where these different services are offered in large, vertically integrated financial institutions they are typically provided by separate subsidiaries, each with its own necessary licences, and often under separate brands.[20] The subsidiaries may have interlocking boards

[16] The UK Law Commission says, 'obtaining the principals' fully informed consent to continue acting is not the end of the issue. The fiduciary must act in good faith in the interests of each principal and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other. In addition, the fiduciary ''must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other". A fiduciary in this position will generally have to cease acting for one principal, and preferably both'. Ibid, citations omitted.

[17] The market share of the major financial conglomerates in financial planning and investment advice is: AMP Ltd 17%, Westpac Banking Corporation 9.6%, Commonwealth Bank of Australia 9%, Australia and New Zealand Banking Group Limited 7.9% and National Australia Bank Limited 4.8%. See IBISWorld *Industry Report K6419B Financial Planning and Investment Advice in Australia* (January 2017). In funds management (excluding superannuation) the major companies are: Macquarie Group Limited 33.8% and Commonwealth Bank of Australia 22.6%. See IBISWorld *Industry Report K6419A Funds Management Services in Australia* (October 2017). Superannuation is more fragmented, but two of the four major companies are Commonwealth Bank of Australia 4% and AMP Limited 3.2%. See IBISWorld *Industry Report K6630 Superannuation Funds in Australia* (February 2017).

[18] Golat, above n 1, 54.

[19] In its report on conflicts of interest in the funds management sector, released in 2016, ASIC classified businesses as 'vertically integrated' if their operations included at least two of the following functions: (a) investment management; (b) acting as a responsible entity or wholesale trustee; (c) acting as a trustee of a registrable superannuation entity; (d) operating a platform (e.g. investor directed portfolio services (IDPS) or IDPS-like structures); and (e) acting as custodian, which may also include an investment administration (back-office) function: Australian Securities and Investments Commission, *Report 474: Culture, conduct and conflicts of interest in vertically integrated businesses in the funds-management industry* (March 2016), 4.

[20] In financial advice, the brands include AMP: AMP Financial Planning, Hillross Financial Services, Charter Financial Planning, Advice First, SMSF Advice, and ipac; ANZ: ANZ Financial Planning, Elders Financial Planning, Financial Services Partners, Millennium3 Financial Services, and Ri Advice Group; CBA: BW Financial Advice, Commonwealth Financial Planning, Commonwealth Private, Commonwealth Securities, Count Financial, and Financial Wisdom; NAB: Apogee Financial Planning, Garvan Financial Planning, Godfrey

comprising a mix of executive and non-executive directors, including independent directors. This is an important observation, to which we return below. They may share the group's human, technological and financial resources in operating the different businesses. And within the group, the group companies may purchase services from each other.

If a conflict of duties arises, a range of regulatory rules and requirements potentially apply both to the companies themselves and to their officers. These are:

- the obligations of AFS licensees contained in s 912A(1)(a) and (aa) of the Corporations Act;
- the statutory duties of responsible entities and their officers in ss 601FC and 601FD of the Corporations Act;
- the statutory covenants binding RSE licensees and their directors by operation of ss 52 and 52A of the SIS Act and the requirements imposed on RSE licensees by APRA's *Prudential Standard SPS 521*;
- the obligations of life insurers and their directors in relation to the management of the statutory fund, set out in ss 32(1)(b) and 48(2)(b) of the *Life Insurance Act 1995* (Cth) (Life Insurance Act); and
- the statutory duties of financial advisers in ss 961B and 961J of the Corporations Act.

As Justice Black has pointed out elsewhere, the financial services law in Australia is such that 'there can be situations where only a statutory duty applies, for example, where a relationship between an adviser and a client is not fiduciary, or a fiduciary duty is excluded, or the relevant conduct is not within the scope of any fiduciary duty. There can also be cases where both the fiduciary and statutory duties apply'.[21] The latter is common in the Australian financial sector; this is recognised by ASIC's observation that 'many [AFS] licensees have fiduciary obligations to their clients to whom they provide advice or for whom they act in a trustee capacity. These obligations operate in addition to the statutory requirements and should be taken into account when formulating conflicts management arrangements'.[22]

Pembroke, JBWere, Meritum Financial Group, MLC Financial Planning, NAB Financial Planning, and NAB Financial Planning Self Employed; Westpac: Magnitude Group, Securitor Financial Group, and Westpac Banking Corporation.

[21] Justice Ashley Black, 'Equitable and statutory regulation of conflicts of interests and duty'. Presentation at University of New South Wales Law School, 10 May 2016.

[22] Australian Securities and Investments Commission, *Regulatory Guide 181 – Licensing: Managing conflicts of interest* (August 2004), [RG181.19].

THE STATUTORY OBLIGATIONS

The statutory provisions dealing with conflicts in financial institutions are not uniform, however the pattern of regulation is generally to require them to:

- adopt processes and systems for identifying and resolving conflicts;
- act in the best interests of their clients; and
- give priority to the interests of their clients.

The precise obligations depend on the nature of the service provided and, in some cases, the identity of the clients.

The general obligations of AFS licensees

The first set of relevant statutory requirements is contained in s 912A(1) of the Corporations Act. It requires, among other things, that an AFS licensee must:

> (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and
>
> (aa) have in place adequate arrangements for the management of conflicts of interest that may arise, wholly or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative...

The specific obligation in s 912A(1)(aa) therefore operates in conjunction with the more general 'efficiently, honestly and fairly' standard contained in s 912A(1)(a) of the Corporations Act. In *Australian Securities and Investments Commission v Avestra Asset Management Ltd (In Liq)* (2017) 120 ACSR 247; [2017] FCA 497 (*Avestra*) at [191], Beach J summarised the standard in the following terms:

> The "efficiently, honestly and fairly" standard is applied as a single, composite concept, rather than three discrete behavioural norms. The following principles are not in doubt… First, the words "efficiently, honestly and fairly" entail that a person must go about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty. Second, the phrase connotes a requirement of competency in providing advice and in complying with relevant statutory obligations. Third, the word "efficient" entails that the person is adequate in performance and is competent. Fourth, the concept of honesty is

> looked at through the lens of commercial morality rather than through the lens of the criminal law.[23]

The obligation in s 912A(1)(aa) speaks directly to the management of 'conflicts of interest' in connection with the provision of financial services.[24] It applies whether or not the AFS licensee is a fiduciary. If the licensee is a fiduciary at general law, then s 912(1)(aa) requires it to discharge its (proscriptive) fiduciary duties in circumstances giving rise to a real and sensible possibility of a conflict. If it is not, then s 912(1)(aa) requires it to take appropriate steps to manage actual conflicts when they arise.

Section 912A(1)(aa) was introduced into the Corporations Act three years after the enactment of the *Financial Services Reform Act 2001* (Cth) (FSR), by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth). The view at the time was that the 'efficiently, honestly and fairly' standard introduced by FSR included a requirement to manage conflicts,[25] but that industry developments meant it should be made more explicit:

> Developments in the global financial services industry have given rise to conglomerate firms - which may achieve cost efficiencies by providing a full range of services, and using employees in different capacities across the firm. In seeking these cost efficiencies, it was widely acknowledged by the financial services industry that scope existed for conflicts of interest to arise. Firms responded to these concerns by developing policies and procedures (for example, the establishment of Chinese Walls between different areas of their financial services business) for managing these potential conflicts of interest.[26]

While the primary focus appears to be on interest-duty conflicts, the Explanatory Memorandum to the Bill also contemplates that duty-duty conflicts will be caught. It gives

---

[23] See also *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* (2012) 88 ACSR 206; [2012] FCA 414 at [69] and [70] (Foster J); *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 [2016] FCA 1023 at [674] (Edelman J).

[24] Financial service is defined for this purpose in *Corporations Act 2001* (Cth) Div 4, Pt 7.1. It does not include the provision of credit. See generally R Baxt, A Black and P Hanrahan, *Securities and Financial Services Law* (9th ed, LexisNexis, 2017) Ch 13.

[25] *Australian Securities and Investments Commission v Avestra Asset Management Ltd (In Liq)* (2017) 120 ACSR 247; [2017] FCA 497 at [192] (Beach J).

[26] Explanatory Memorandum to the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003, para [5.592]. These developments can be traced back to the beginnings of financial deregulation in the 1980s. As early as 1990 there was a reference to the UK Law Commission to inquire into the relationship between fiduciary duties and regulatory rules; the Commission noted that 'Situations in which professionals and businesses appear to owe conflicting duties to different customers or in which there is a conflict between their own interests and those of their customers are not new. However, the potential for such conflicts increased as a result of the changes to the structure of the financial markets in the mid-l980s, in particular the abolition of the Stock Exchange's single capacity requirement and the development of financial conglomerates offering a wide range of services.' The Law Commission UK (Law Com No 236) *Fiduciary Duties and Regulatory Rules* (November 2995) [1.2].

'dealing on behalf of various clients' as an example of a conflict of interest within the financial services business (described as a 'Category 1' conflict).[27]

In its guidance on s 912A(1)(aa) of the Corporations Act, ASIC defines conflicts of interest as 'circumstances where some or all of the interests of people (clients) to whom a licensee (or its representative) provides financial services are inconsistent with, or diverge from, some or all of the interests of the licensee or its representatives. This includes actual, apparent and potential conflicts of interest'.[28] However as well as interest-duty conflicts the ASIC policy addresses duty-duty conflicts. Its view is that requirement to have in place adequate arrangements extends to managing 'conflicts between the interests of various clients (existing or potential clients) as well as conflicts between the licensee's own interests and those of their clients. Generally, [licensees] should not provide financial services in a manner calculated to advance one client's interests unfairly ahead of other clients' interests'.[29]

The nature of the statutory conflicts management obligation was considered at length by Jacobson J in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35; 241 ALR 705; 62 ACSR 427; [2007] FCA 963, a decision discussed elsewhere.[30] In *Avestra* at [193], Beach J adopted the *obiter dicta* observations of Jacobson J that:

> First, the effective management of conflicts of interest does not require that every possible conflict of interest must be eliminated, although that course is open to a financial services licensee. The reference to "management" of conflicts of interests assumes that some potential conflicts may be managed through implementing adequate arrangements that stop short of eliminating the conflict of interest. And even in a fiduciary situation, adequate arrangements for the management of conflicts of interest does not always require the elimination of conflicts of interest for which the beneficiaries' express consent has not been obtained. Second, whether particular arrangements are adequate is to be determined as a question of fact in each case. Third, adequate arrangements require more than a raft of written policies and procedures. They require a thorough understanding of the procedures by all employees

[27] Ibid, para [5.599]. The legislation is also intended to catch 'Category 2' conflicts, described as arising 'between something within the financial services business and something outside the financial services business … examples are where outside factors give rise to conflicts within the financial services business, such as a conflict of interest between the financial services licensee lending (as principal) to a particular enterprise and the financial services licensee underwriting a public offer for the same enterprise. Alternatively, a conflict may arise where the objectivity of research is compromised by the analyst's personal interests or relationships'.
[28] ASIC Regulatory Guide 181, above n 22, [181.15].
[29] Ibid, [181.41].
[30] Pamela Hanrahan, '*ASIC v Citigroup*: Investment Banks, Conflicts of Interest and Chinese Walls' in Justin O'Brien (ed) *Private Equity, Corporate Governance and the Dynamics of Capital Market Regulation* (Imperial College Press, London, 2007).

> and a willingness and ability to apply them to a host of possible conflicts. (References omitted).

Justice Beach goes on to add the following observations about the statutory conflicts management obligation (at [194]):

> (a) First, whether arrangements are adequate will depend upon the nature, scale and complexity of the licensee's business. Moreover, although s 912A(1)(aa) does not import the full stringency of equitable constraints upon a fiduciary acting in a conflict of interest situation, the fact that a financial services licensee is in a fiduciary position … will inform what arrangements are adequate.
>
> (b) Second, the obligation to manage conflicts of interest is more than simply an obligation of disclosure to clients or beneficiaries.
>
> (c) Third, the effective management of conflicts of interest will involve a combination of avoiding, controlling and disclosing conflicts of interest.
>
> (d) Fourth, controlling a conflict of interest requires a licensee to first identify, assess and evaluate a conflict of interest and then to decide on and implement an appropriate response. Moreover, any arrangement in response must be regularly monitored to ensure that its implementation is effective.
>
> (e) Fifth, in some cases, the potential impact on a licensee or third parties will be so serious that a conflict of interest cannot effectively be managed by disclosing it and imposing effective internal controls. In such cases, the only way to adequately manage such a conflict of interest may be to avoid it.
>
> (f) Sixth, where disclosure is used as a means of managing a conflict of interest, the disclosure must be made to the affected persons in a timely, prominent, specific and meaningful way. The concept of meaningful connotes something comprehensible to the expected reasonable reader or audience. It also connotes something targeted in terms of its usefulness to the reasonable reader or audience. Further, its informational content ought cover the probability of the conflict occurring and the likely magnitude of its consequences if it does occur in terms of the potential advantages and disadvantages to those who generated the conflict or are participants or beneficiaries therein, or those to whom the disclosure is made. And for those to whom the disclosure is being made, reference should be made to any realistic steps that such a person can take (if any) to ameliorate the conflict's effects.

His Honour's observations at (e) and (f) – that some conflicts cannot be managed by disclosure and internal controls and that if disclosure is to be effective it must be meaningful – are significant.

The managed investment scheme obligations

The statutory obligations in s 912A apply to all AFS licensees. These are supplemented, in the case of responsible entities of registered managed investment schemes and their officers,[31] by specific requirements contained in Ch 5C of the Corporations Act.

A responsible entity is a trustee[32] and therefore owes fiduciary duties to the members of each of its registered schemes.[33] As the New South Wales Court of Appeal recently observed, 'A responsible entity holding scheme property is, by [s601FC(2)], subjected to the general law duties of a trustee (with scheme members as beneficiaries) except, no doubt, to the extent, if any, to which such fiduciary duties may be modified by the statute itself'.[34] This means that:

> Except where a trust deed otherwise provides or the beneficiaries give their informed consent, a trustee may not put itself in a position where its interest or duty, or its duties to different beneficiaries, conflict, or where there is a significant possibility of conflict. A transaction entered into in breach of this principle is voidable, and equity will not enquire whether the transaction was as good or better a deal as that which the beneficiaries could obtain from other persons.[35]

The responsible entity's general law duties coexist with statutory duties relating to the operation of the scheme contained in s 601FC of the Corporations Act and with other applicable provisions, including for example the voting restrictions in s 253E[36] and the restrictions applying to related party transactions under Pt 5C.7 of the Corporations Act.

---

[31] 'Officer' is defined in *Corporations Act 2001* (Cth) s 9. See RP Austin and IM Ramsay, *Ford Austin and Ramsay's Principles of Corporations Law* (LexisNexis, online) [8.060]; J Farrar and PF Hanrahan, *Corporate Governance* (LexisNexis, 2017) [10.12] – [10.14]; TG Bednall and V Ngomba, 'The High Court and the C-Suite: Implications of *Shafron* for company executives below board level' (2013) 31 *Company & Securities Law Journal* 6. The definition includes receivers and administrators but not for the purposes of s 601FD: see e.g *Norman v FEA Plantations Ltd* (2010) 191 FCR 39; 80 ACSR 517; [2010] FCA 1274; PF Hanrahan, *Managed Investments Law and Practice* (CCH Australia, online) [45-500].

[32] *Corporations Act 2001* (Cth) s 601FC(2) provides that 'the responsible entity holds scheme property on trust for scheme members'.

[33] See generally Pamela Hanrahan, 'The responsible entity as trustee' in IM Ramsay (ed) *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002).

[34] *AMP Life Ltd v AMP Capital Funds Management Ltd (in its capacity as Responsible Entity of the AMP Capital China Growth Fund)* (2016) 115 ACSR 421; [2016] NSWCA 176 at [23] (Bathurst CJ, Meagher JA and Barrett AJA).

[35] *Everest Capital Ltd (as trustee of the EBI Income Fund) v Trust Company Ltd* (2010) 77 ACSR 371; [2010] NSWSC 231 at [100] (White J), referring to *Aberdeen Railway Co v Blaikie Brothers* [1843-60] All ER Rep 249 at 252–3.

[36] Section 253E provides that the responsible entity and its associates cannot vote their interests (other than on a resolution for the removal of the responsible entity of a listed scheme) if they have an interest in the resolution other than as a member of the scheme. The purpose of the provision is to remove the potential for a conflict of interest arising: see *Southern Wine Corporation Pty Ltd (in liq) v Perera* (2006) 33 WAR 174. This has been extended to include voting of units even though the effect is to disenfranchise other schemes that are

Section 601FC(1)(c) provides that 'in exercising its powers and carrying out its duties, the responsible entity of a registered scheme must… act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests'. The provision has been described as 'of foundational importance to the fiduciary obligations that are imposed on responsible entities of registered schemes under the Ch 5C framework'.[37] It has two limbs – an obligation to act in the interest of members, and an obligation to prefer the members' interests over its own in the event of a conflict. The first limb is relevant to both interest-duty conflicts and duty-duty conflicts. The 'test under the first limb is whether the responsible entity was acting with undivided loyalty in the best interests of the members'.[38] It 'mirrors, without qualification, a trustee's equitable obligation of undivided loyalty to its beneficiaries'.[39]

Also relevant in situations of conflicts of duty is s 601FC(1)(e), by which a responsible entity is prohibited from making use of 'information acquired through being the responsible entity in order to: (i) gain an improper advantage for itself or another person; or (ii) cause detriment to the members of the scheme'. Section 601FC(3) provides that 'a duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under Part 2D.1' of the Corporations Act.

The officers of a responsible entity owe duties to that company under Pt 2D.1 of the Corporations Act and at general law. While officers of a corporate trustee do not ordinarily owe duties to beneficiaries of a trust of which it is trustee,[40] s 601FD(1) alters this position.[41]

---

members: *Everest Capital Ltd (as trustee of the EBI Income Fund) v Trust Company Ltd* (2010) 77 ACSR 371 at [114]. See also *AMP Life Ltd v AMP Capital Funds Management Ltd (in its capacity as Responsible Entity of the AMP Capital China Growth Fund)* (2016) 115 ACSR 421; [2016] NSWCA 176; Takeovers Panel *Guidance Note 15 Trust Scheme Mergers* (May 2011) at fn 31.

[37] *Australian Securities and Investments Commission v Avestra Asset Management Ltd (In Liq)* (2017) 120 ACSR 247; [2017] FCA 497 at [183] (Beach J).

[38] *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)* [2013] FCA 1342 at [490] (Murphy J); undisturbed on appeal in *Lewski v Australian Securities and Investments Commission* [2016] FCAFC 96 at [187] (Greenwood, Middleton and Foster JJ).

[39] *Australian Securities and Investments Commission v Avestra Asset Management Ltd (In Liq)* (2017) 120 ACSR 247; [2017] FCA 497 at [184] (Beach J).

[40] There is nothing 'fiduciary in the trust company director-trust beneficiary relationship as such': *Australian Securities Commission v AS Nominees Ltd* (1995) 133 ALR 1 at 18; (1995) 18 ACSR 459; [1995] FCA 1663 (Finn J), discussed in Hanrahan, above n 31, [45-300].

[41] See generally, Pamela Hanrahan, *Funds Management in Australia: Officers' Duties and Liabilities* (LexisNexis, 2006) [5.85] – [5.95]. It may be that the duties are owed both to the responsible entity and to the scheme members directly. Because s 601FD is a civil penalty provision, it is also a duty owed to the state.

It provides, in relevant part, that an officer of the responsible entity of a registered scheme must:

> (c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and
>
> (d) not make use of information acquired through being an officer of the responsible entity in order to: (i) gain an improper advantage for the officer or another person; or (ii) cause detriment to the members of the scheme; and
>
> (e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme…

In *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 98 ACSR 615; [2014] WASC 102, the defendants were directors of a responsible entity and of a related company with which the responsible entity transacted. Justice Edelman held (at [275], [299]) that the directors breached their fiduciary duties to the responsible entity to avoid placing themselves in a position in which their duties to it conflicted with duties to the other company; however it was not argued that this also amounted to a breach of s 601FD.

Section 601FD(2) goes on to provide that 'a duty of an officer of a responsible entity under subsection (1) overrides any conflicting duty the officer has under Part 2D.1' of the Corporations Act. The section was included on the recommendation of the Australian Law Reform Commission and the Companies and Securities Advisory Committee in their *Report No 65 – Collective Investments: Other People's Money*. The Report recommended that 'officers should be given statutory protection from claims by the operator or its shareholders arising from any loss they suffered in consequences of the officers complying with their paramount duty to investors'.[42] Section 601FD(2) is enlivened only where there is a conflict between a duty owed by an officer to members of the scheme and a duty owed by a director to the responsible entity itself. In *Allco Funds Management Limited (Receivers and Managers Appointed) (In Liquidation)* v *Trust Company (RE Services) Limited (in its capacity as responsible entity and trustee of the Australian Wholesale Property Fund)* [2014] NSWSC 1251, Hammerschlag J confirmed at [189] that:

> The section does not permit or exonerate breaches of fiduciary duty committed against another party … The section provides that where there is a conflict between the interests of

[42] Australian Law Reform Commission and the Companies and Securities Advisory Committee, *Report No 65 – Collective Investments: Other People's Money* (1993) Vol 1, para [10.17].

> the members and those of the RE, the interests of the members must take priority. Section 601FD(1)(c) involves only a contest between the members and the RE. It has no field of operation where there is a conflict of interest between the RE and some other entity of which the director of the RE is also a director. It also has no impact on their fiduciary duties at general law.

The operation of s 601FD(2) and its analogues – s 601FC(3) of the Corporations Act, and s 52A(2)(d) of the SIS Act and s 48(2) of the Life Insurance Act discussed below – is problematic. It is difficult to see that an officer could be liable to the responsible entity, or accountable to ASIC, for breach of a duty owed under Pt 2D.1 when he or she takes steps to ensure the responsible entity is discharging its duty to act in the interests of the scheme members. Indeed, if the officers of the responsible entity intentionally or negligently caused the company to breach its duties to scheme members they would likely contravene their duties as officers of that company.[43]

The real difficulty with the sections arises where the company itself has a duty-duty conflict. An officer of a responsible entity owes duties to the responsible entity in relation to the operation of each of its schemes. An officer acting in accordance with his or her duties under s 601FD in relation to scheme A cannot argue that this overrode any duty he or she had to the responsible entity in respect of the operation of scheme B. Indeed, this is exactly the problem alluded to by Douglas J in *Australian Securities and Investments Commission v ACN 101 634 146 Pty Ltd (in liq)* (2016) 112 ACSR 138; [2016] QSC 109 at [642], a case involving the failed Octavia mortgage funds. His Honour observed that, if the company is the responsible entity of multiple schemes, the officer 'owes duties to act in the best interests of the members of all the schemes. Neither the responsible entity nor the officer can escape their statutory duties by asserting they "have nothing to do with scheme B".'

When duty-duty conflicts arise for officers serving more than one member of a corporate group, it may be very difficult to resolve. While the idea of 'ringfencing' individual officers to look after the group's obligations to one group of beneficiaries but not others seems attractive, the observations of Douglas J confirm that this is unlikely to be effective to resolve the issue. An officer of a responsible entity that operates multiple

[43] An officer is liable if he or she failed to exercise reasonable care and diligence in circumstances that caused or failed to prevent the company from contravening the Act and where it was reasonably foreseeable that such contravention might harm the interests of the company: *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502; 327 ALR 95; 106 ACSR 343; [2015] FCA 589 at [448]–[452] (Beach J); see also Australian *Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 (Edelman J).

schemes cannot pick and choose and say that he or she is acting in that capacity in relation to one scheme and not the other.[44]

The superannuation obligations

Like responsible entities, RSE licensees are trustees at general law. Their general law obligations are supplemented by Pt 6 of the SIS Act, which contains covenants that are taken to be included in the governing rules of a registrable superannuation entity. The covenants contained in s 52(2) bind the trustee of a registrable superannuation entity; they require the trustee:

> (c) to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries;[45]
>
> (d) where there is a conflict between the duties of the trustee to the beneficiaries, or the interests of the beneficiaries, and the duties of the trustee to any other person or the interests of the trustee or an associate of the trustee:
>
> (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and
>
> (ii) to ensure that the duties to the beneficiaries are met despite the conflict; and
>
> (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and
>
> (iv) to comply with the prudential standards in relation to conflicts;
>
> ….
>
> (h) not to enter into any contract, or do anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers…

This formulation is wider than the equivalent obligation in ss 601FC(1)(c) and 601FD(1)(c) of the Corporations Act discussed above. Unlike the second limb of those sections (which only addresses interest-duty conflicts) s 52(2)(d)(i) purports to resolve duty-duty conflicts by

---

[44] In *Australian Securities and Investments Commission v ACN 101 634 146 Pty Ltd (in liq)* (2016) 112 ACSR 138; [2016] QSC 109 at [618] – [648], a defendant sought to argue that he was not an officer of a responsible entity for a particular scheme operated by the company of which he was an officer. This argument was rejected by Douglas J; see also *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 98 ACSR 615; [2014] WASC 102 (Edelman J).

[45] This covenant does not expand the general law duty of the trustees to act in the best interests of the fund: see *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* (2016) 334 ALR 692 at [136] per Bathurst CJ (with whom Macfarlane and Gleeson JJA relevantly agreed); *Manglicmot v Commonwealth ank Officers Superannuation Corporation Pty Ltd* (2011) 282 ALR 167 (Giles JA, Young and Wheally JJA agreeing).

imposing an obligation on a trustee to prioritise its duty to beneficiaries over its duty to 'any other person'. But what if the 'other person' mentioned in the covenant are the members of another registered superannuation entity of which the company is also trustee, with a trust deed that is deemed to include an identical covenant? Which duty should be prioritised then? This illustrates the fundamental difficulty raised by conflicts of duty.

The covenants in s 52A(2) apply to each director (but not other officer) of a corporate trustee of a registrable superannuation entity. They include:

> (c) to perform the director's duties and exercise the director's powers as director of the corporate trustee in the best interests of the beneficiaries;
>
> (d) where there is a conflict between the duties of the director to the beneficiaries, or the interests of the beneficiaries, and the duties of the director to any other person or the interests of the director, the corporate trustee or an associate of the director or corporate trustee:
>
> (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and
>
> (ii) to ensure that the duties to the beneficiaries are met despite the conflict; and
>
> (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and
>
> (iv) to comply with the prudential standards in relation to conflicts;
>
> (e) not to enter into any contract, or do anything else, that would:
>
> (i) prevent the director from, or hinder the director in, properly performing or exercising the director's functions and powers as director of the corporate trustee; or
>
> (ii) prevent the corporate trustee from, or hinder the corporate trustee in, properly performing or exercising the corporate trustee's functions and powers as trustee of the entity…

The obligations of the trustee under s 52(2)(d) are expressed by s 52(4) to override any conflicting obligations an executive officer or employee of the trustee has under Pt 2D.1 of the Corporations Act or Subdiv A, Div 3 of Pt 2-2 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act) which deals with general duties of government officials. By operation of s 52A(3), a director's duties under s 52A(2)(d) override any conflicting obligations the director has under Pt 2D.1 of the Corporations Act or Subdiv A, Div 3 of Pt 2-2 of the PGPA Act.

For RSE licensees, APRA's prudential standards are also relevant. They directly with both interest-duty conflicts and duty-duty conflicts. APRA's *Prudential Standard SPS 521 Conflicts of Interest*, which commenced on 1 July 2013, contains detailed requirements for the identification, avoidance and management of conflicts of duty and interest by an RSE licensee. It covers conflicts:

- between the duties owed by an RSE licensee, or a responsible person of an RSE licensee,[46] to beneficiaries[47] and the duties owed by them to any other person;
- between the interests of beneficiaries and the duties owed by an RSE licensee, or a responsible person of the RSE licensee, to any other person;
- between an interest of an RSE licensee, an associate of an RSE licensee or a responsible person or an employee of an RSE licensee, and the RSE licensee's duties to beneficiaries; and
- between an interest of an RSE licensee, an associate of an RSE licensee or a responsible person or an employee of an RSE licensee and the interests of beneficiaries.[48]

The RSE licensee's conflicts management policy must include 'controls and processes applying to all responsible persons and all employees of the RSE licensee' for, among other things, identifying and recording relevant conflicts, 'avoiding conflicts where required to do so' and 'where there is a conflict, managing that conflict, or ensuring that the conflict is managed in accordance with the requirements to give priority to the duties to, and interests of, beneficiaries in sections 52(2)(d) and 52A(2)(d) of the SIS Act'. A footnote to the requirement states that 'Nothing in this Prudential Standard authorises a person to manage a conflict if the general law requires the person to avoid it'.[49]

The life insurance obligations

[46] A 'responsible person' is defined for this purpose in *Prudential Standard SPS 520 Fit and Proper* [11] – [17]. It includes quite a wide group of people, including directors and 'senior managers', and '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'.
[47] According to *SPS 521*, the reference to 'beneficiaries' is a reference to 'beneficiaries of an RSE within the RSE licensee's business operations' and an **'**RSE licensee's business operations' includes all activities as an RSE licensee (including the activities of each RSE of which it is the licensee), and all other activities of the RSE licensee to the extent that they are relevant to, or may impact on, its activities as an RSE licensee.
[48] Australian Prudential Regulation Authority, *Prudential Standard SPS 521 Conflicts of Interest* para [7].
[49] Ibid, fn 6.

Unlike a responsible entity or RSE licensee, the life company is not a trustee of the statutory fund.[50] The general law fiduciary proscriptions do not apply. However, the Life Insurance Act imposes on life companies and their directors an obligation to prioritise the interests of policy holders in the management of the company's statutory funds, so it is worth mentioning here.

Part 4 of the Life Insurance Act imposes obligations on the life company and its directors in relation to a statutory fund; they include an obligation on the life company, contained in s 32(1)(b), to 'give priority to the interests of owners and prospective owners of policies referable to the fund' in the investment, administration and management of the assets of the statutory fund. Section 32(2) says that 'an act or decision of a life company in relation to a statutory fund does not contravene paragraph (1)(b) if, having regard to the circumstances existing at the time of the act or decision, it is reasonable to believe that the act or decision gives priority to the interests of owners and prospective owners of policies referable to the fund'.

Under s 48(2) of the Life Insurance Act, a director of a life company has a duty to the owners of policies referable to a statutory fund of the company. The duty is 'to take reasonable care, and use due diligence, to see that, in the investment, administration and management of the assets of the fund, the life company … gives priority to the interests of owners and prospective owners of policies referable to the fund'. Section 48(3) says, 'In order to avoid doubt, it is declared that, in the event of conflict between the interests of owners and prospective owners of policies referable to a statutory fund and the interests of shareholders of a life company, a director's duty is to take reasonable care, and use due diligence, to see that the company gives priority to the interests of owners and prospective owners of those policies over the interests of shareholders'.

The financial advice obligations

The final set of relevant statutory obligations applies in relation to the provision of personal financial product advice[51] to retail clients.[52]

[50] *Life Insurance Act 1995* (Cth) s 34(5) says that, 'In order to avoid doubt, it is declared that nothing in this Act is intended to constitute a life company or the directors of a life company a trustee or trustees of the assets of the statutory funds of the company'.
[51] *Corporations Act 2001* (Cth) s 766B.
[52] *Corporations Act 2001* (Cth) ss 761G and 761GA.

These obligations were introduced by the Future of Financial Advice (FoFA) reforms made in 2012. The FoFA reforms replaced the suitability and warning requirements previously contained in ss 945A and 945B of the Corporations Act with four new operative provisions contained in the new Div 2, Pt 7.7A.[53] These are expressed to apply to the 'provider' of the advice – that is, the individual or individuals who provide the advice,[54] although liability for contravening the requirements will sit with the AFS licensee in some cases.[55]

Two of these new obligations are potentially relevant to conflicts of duty. The first is s 961B. Section 961B(1) says that the provider 'must act in the best interests of the client in relation to the advice'. However section 961B(2) goes on to say that the provider 'satisfies the duty in subsection (1), if the provider proves that the provider has done each of' the things set out in paragraphs (a) to (g).[56] These include requirements to obtain instructions and conduct inquiries, and to take 'any other step' that would reasonably be regarded as being in the client's best interest.[57] None of the steps expressly requires the provider to identify or resolve interest-duty or duty-duty conflicts, although perhaps this is contemplated by s 961B(2)(g).

---

[53] These are *Corporations Act 2001* (Cth) ss 961B (best interests), 961G (appropriate advice), 961H (warning for advice based on incomplete instructions) and 961J (prioritising client interests).
[54] *Corporations Act 2001* (Cth) s 961.
[55] The liability structure for Div 2, Pt 7.7A is complicated. If the provider is a representative other than an authorised representative, and he or she contravenes an operative provision, the AFS licensee contravenes s 961K(2), which is a civil penalty provision. If the provider is an authorised representative, he or she contravenes s 961Q, which is a civil penalty provision. Authorised representatives are individuals authorised to provide financial services on behalf of the licensee under Div 5, Pt 7.6 of the *Corporations Act 2001* (Cth). Providers who are employees or officers of the AFS licensee or a related body corporate are representatives but not authorised representatives of the licensee: see *Corporations Act 2001* (Cth) ss 910A and 960.
[56] These are that the provider has (a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions; (b) identified: (i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and (ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the client's relevant circumstances); (c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information; (d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice; (e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product: (i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and (ii) assessed the information gathered in the investigation; (f) based all judgements in advising the client on the client's relevant circumstances; (g) 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.
[57] This is defined in s 961E, which provides that: 'It would reasonably be regarded as in the best interests of the client to take a step, if a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, exercising care and objectively assessing the client's relevant circumstances, would regard it as in the best interests of the client, given the client's relevant circumstances, to take that step'.

The second is the priority provision in s 961J of the Corporations Act. It says that 'if the provider knows, or reasonably ought to know, that there is a conflict' between the interests of the client and the interests of the provider, an associate of the provider, an AFS licensee of whom the provider is a representative, an associate of a AFS licensee of whom the provider is a representative, an authorised representative who has authorised the provider under s 916B(3), or an associate of such an authorised representative, then 'the provider must give priority to the client's interests when giving the advice'.

Section 961J is narrower than the fiduciary standard at general law. It only applies if the provider knew or ought reasonably to know of the existence of the conflict. It does not require the adviser to avoid the conflict or to obtain the client's fully informed consent to it acting as the client's adviser despite the existence of the conflict. It does not require client's fully informed consent before the adviser or any other person (including the associates listed in the section) profits from the relationship between the client and the adviser.

STATUTORY DISCLOSURE AND CONSENT

It is a defence to a claim of breach of fiduciary duty that the person to whom the duty is owed was fully informed as to the nature and impact of the conflict and consented to the fiduciary's continuing to act despite the conflict.[58] Both disclosure and consent are required: 'it is not enough that there be disclosure, there must be consent. Disclosure is part of a defence'.[59] The consent may be express or implied.[60] What amounts to adequate disclosure depends on the circumstances.[61] As Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ observed in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 ; 236 ALR 209 ; [2007] HCA 22 at [107] the sufficiency of disclosure can depend on the sophistication and intelligence of the persons to whom disclosure must be made.

Chapter 7 of the Corporations Act imposes a raft of disclosure obligations on financial intermediaries who provide financial products or financial services to retail clients.

---

[58] See e.g. *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1; [2012] FCA 1028 at [742] (Rares J); *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1; 276 ALR 646; [2011] FCAFC 24at [105]–[108] per Besanko J (Finkelstein and Jacobson JJ agreeing).
[59] *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1; 276 ALR 646; [2011] FCAFC 24 at [108].
[60] *Kelly v Cooper* [1993] AC 205.
[61] 'What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given. The circumstances of the case may include (as they would have here) the importance of obtaining independent and skilled advice from a third party.' *Maguire v Makaronis* (1997) 188 CLR 449 at 466; 144 ALR 729; [1997] HCA 23.

Depending on the circumstances, the intermediary may be required to provide one or more of a Financial Services Guide (FSG), a Statement of Advice (SoA) or a Product Disclosure Statement (PDS), drafted to comply with Pts 7.7 and 7.9 of the Corporations Act and the myriad Regulations and ASIC requirements made pursuant to them. These documents will typically disclose whether the financial intermediary is a member of a corporate group that includes other financial services providers, and if it is a trustee of more than one trust. However, they usually do not include detailed disclosure of conflicting duties owed by the financial intermediary or (where relevant) its officers, and the implications of those conflicts for clients. The statutory disclosure (if it is made, and if it is read by the client) may alert the client to the existences of circumstances that could give rise to a conflict of duties, but will leave it to the client to draw that conclusion. It is unlikely that this type of disclosure is 'meaningful' in the sense required by Beach J in *Avestra*, discussed above.[62]

In practice, if a real and sensible possibility of a duty-duty conflict arises that is not permitted under the terms of the relevant trust deed or retainer, the fiduciary must provide full and frank disclosure of the nature and impact of the conflict and seek the consent of the persons to whom the duty is owed. The level of disclosure provided (for a different purpose) in the FSG, SoA or PDS may not suffice. If the fiduciary is a responsible entity or superannuation trustee, this raises the interesting question of whether the consent of all, or only a majority, of members of an affected trust would be required; it may be that this turns on the wording of the relevant deed. If the fiduciary is an officer of one of those companies, the question is whether the consent of the company would be sufficient or whether, again, the members' consent must be obtained. Again, this may turn on the terms of the particular deed.

CONCLUSION

This discussion points to the significant difficulties faced by financial institutions and their officers when the duties owed to one set of clients conflict or potentially conflict with the duties owed to another. The statutory provisions do not really assist in resolving these difficulties. The following principles emerge:

1. The obligation imposed by s 912A of the Corporations Act on AFS licensees to 'have in place adequate arrangements for the management of conflicts of interest' extends the management of duty-duty conflicts, as does an RSE licensee's obligations to

[62] *Australian Securities and Investments Commission v Avestra Asset Management Ltd (In Liq)* (2017) 120 ACSR 247; [2017] FCA 497 at [194(f)].

identify, avoid and manage conflicts under *Prudential Standard SPS 521*. If the relevant licensee is a fiduciary (as is the case with responsible entities, superannuation trustees and many financial advisers), the arrangements must be adequate to satisfy the no-conflicts rule at general law. In other words, the statutory obligations incorporate the fiduciary standard.

2. For responsible entities and superannuation trustees, the statutory obligations to act in the best interests of members contained in, respectively, s 601FC(1)(c) of the Corporations Act and s 52(2)(c) of the SIS Act probably encompass an 'equitable obligation of undivided loyalty' which would trigger the no-conflicts rule. The best interest obligations cannot be excluded, including by the trust deed. However, it is less clear that the 'best interests' duty in s 961B of the Corporations Act encompasses this obligation of loyalty if the financial adviser is not otherwise a fiduciary.

3. Similarly, for officers of responsible entities and directors of superannuation trustees, the statutory best interest obligations in s 601FD(1)(c) and s 52A(2)(c) probably incorporate an obligation of loyalty. In both cases their duty to act in the best interests of the beneficiaries is expressed to override any conflicting duty owed under Pt 2D.1 of the Corporations Act, however it is not clear how this would assist in circumstances where the company has a conflict of duties and the officer cannot simultaneously serve the company's interests in discharging both.

4. The various statutory provisions requiring financial intermediaries and their officers to prioritise the interests of clients, contained in s 601FC(1)(c, 601FD(1)c and 961J of the Corporations Act and ss 32 and 48 of the Life Insurance Act, do not assist in resolving duty-duty (as distinct from interest-duty) conflicts, because they do not allow for the fiduciary to sacrifice the interests of one principal to another's. Although ss 52(2)(d)(i) and 52A(2)(d)(i) purport to deal with both interest-duty and duty-duty conflicts, they do not assist in resolving the latter because of their circularity when the RSE licensee is trustee of more than one registrable superannuation entity.

The statutory obligations relating to the management of conflicts are primarily directed at the identification and management of interest-duty conflicts. In cases where a financial intermediary owes fiduciary duties to its clients, it may act despite having a personal interest that potentially conflicts with its duty to act in the best interests of the client, if that is

permitted by the terms of appointment or retainer or the client has given its fully informed consent and the fiduciary satisfies the statutory requirement to give priority to the client's interest. However, the position in relation to duty-duty conflicts is more complicated. While a fiduciary may be able to act despite a *potential* duty-duty conflict if that is permitted by the terms of appointment or retainer or the client has given its fully informed consent, it is unlikely that it can continue to do so in the face of an *actual* duty-duty conflict. In that respect it appears the fiduciary no-conflict rule is undisturbed.