

## **An analysis of challenges to ASIC's s 920A banning orders against financial services providers in the AAT and the courts**

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Section 920A of the *Corporations Act 2001* (Cth) provides ASIC with a flexible power to ban individuals from the Australian financial services industry on a number of grounds. The objective of this power is to protect consumers through upholding compliance with the law and adherence to professional standards. Banned individuals may apply to the Administrative Appeals Tribunal (AAT) to review the merits of such decisions, and on limited points of law such cases may be further appealed to the Federal Court of Australia (FCA). This article analyses the practice of the AAT and the FCA in determining challenges to s 920A banning orders. The 50 AAT cases examined in the article provide interesting examples of misconduct by financial advisers, stockbrokers and traders, insurance brokers and operators of investment schemes. The article shows that whilst the AAT has shown a flexible approach in considering the circumstances of each banning (setting aside four bans and varying the length of 15 bans), it has nevertheless exhibited a firm approach in the other 31 cases in affirming bans following serious misconduct. The article concludes by suggesting some minor reforms to further enhance the range of protective enforcement tools available to ASIC.

### **Introduction**

As Australia's regulator of companies, financial markets and services, and more recently consumer credit, the Australian Securities and Investments Commission (ASIC) has extensive powers to enforce compliance with the *Corporations Act 2001* (Cth) (the Act)<sup>2</sup> and the other legislation it administers. One of these significant enforcement tools is s 920A of the Act which enables ASIC to make banning orders prohibiting persons from providing financial services, with objectives of upholding compliance with the law, professional standards and protecting consumers and investors from such unsuitable persons within the financial services industry. A similar protective rationale underlies ASIC's other administrative powers to make banning orders against unsuitable persons in the consumer credit industry under s 80 of the *National Consumer Credit Protection Act 2009* (Cth) (the NCCP Act); its powers to disqualify persons who have been involved in the management of two or more failed corporations within a seven year period for up to five years under s 206F of the Act; and to apply for the cancellation or suspension of the registration of company auditors and liquidators.<sup>3</sup>

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<sup>1</sup> The author thanks the anonymous reviewers for their comments on earlier versions of this article

<sup>2</sup> All references to legislation in this article are to the *Corporations Act 2001* (Cth) unless otherwise specified - The law discussed in this article is current as at 1 April 2018

<sup>3</sup> *Corporations Act 2001* (Cth) s 1292 – which enables ASIC to apply to the Companies Auditors and Liquidators Disciplinary Board (CALDB). The *Insolvency Law Reform Act 2016* (Cth) will replace the jurisdiction of CALDB in respect of liquidator registration and discipline with committees comprising representatives of ASIC, the Australian Restructuring Insolvency and Turnaround Association and a Ministerial appointee

Since 1992 the corporate regulator's use of its administrative banning and disqualification powers have been subject to merits review by the Administrative Appeals Tribunal (AAT).<sup>4</sup> In reviewing the merits of decisions by government agencies, the AAT may affirm, vary or set aside the original decision,<sup>5</sup> to arrive at the correct or preferable decision based on the information before the Tribunal.<sup>6</sup> In limited circumstances on questions of law, the AAT's determinations may be subject to judicial review by the Federal Court of Australia (FCA).<sup>7</sup> This article analyses the 50 decisions by the AAT that have made final determinations<sup>8</sup> on the merits of ASIC's banning orders since the inception of 920A in July 2001, and the small number of FCA decisions which have considered appeals against these AAT decisions. These cases provide numerous interesting examples of misconduct by financial advisers, stockbrokers and traders, insurance brokers and operators of investment schemes.

Part I of this article overviews the legislative development of the s 920A banning power, including the 2012 Future of Financial Advice (FOFA) amendments to the provision through the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth), and the amendments which will take effect from 1 January 2019 pursuant to the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth). It also examines the key judicial guidance on the protective rationale of ASIC's banning and disqualification powers, which is reflected in ASIC's regulatory guidance on the use of s 920A and its other administrative powers against financial services providers.

Part II analyses the reasoning in the four cases where the AAT set aside four banning orders completely by taking a different interpretation of the applicable provisions of the Act to ASIC. In Part III the article examines the 15 Tribunal determinations which varied the duration of banning orders, based on differing assessments of the seriousness of the misconduct and/or the need for consumers to be protected against the likelihood of such misconduct being repeated. Part IV shows that for the 31 banning orders which were affirmed, the Tribunals have been mindful of the importance of protecting the investing public from potential repetitions of serious misconduct – particularly in cases involving fraud and serious breaches of the Act.

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<sup>4</sup> *Corporations Act 2001* (Cth) s 1317B, and previously *Corporations Law* (Cth) s 1317B

<sup>5</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 43

<sup>6</sup> *Shi v Migration Agents' Registration Authority* (2008) 235 CLR 286 at 298–299 and 314–315; (2008) 103 ALD 467 at 475–476 and 489; (2008) 248 ALR 390 at 398–399 and 412; (2008) 82 ALJR 1147 at 1154–1155 and 1165; (2008) 48 AAR 345 at 354–356 and 368–369; [2008] HCA 31 at [34] – [39] and [98] – [99]; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419; and *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 143

<sup>7</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 44

<sup>8</sup> The article does not examine “procedural” Tribunal decisions which have made interim directions about the conduct of such matters – for example the making of confidentiality orders or the extension of time to lodge challenges.

Part V draws together the key observations from the analysis of the AAT and FCA decisions which have helped in clarifying the practical meaning of several of the provisions of Chapter 7 of the Act. Overall the article concludes that the banning order regime is working well, with the AAT decisions ensuring the accountability of ASIC for its administrative enforcement decisions. The article concludes by proposing some relatively minor changes to the new provisions of the Act introduced by the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth) (which will come into operation on 1 January 2019) to further enhancing the range of ASIC’s enforcement options for maintaining professional standards within the Australian financial services industry.

## **I. Legislative development and ASIC’s use of the s 920A banning power**

### **A. Legislative development and overview of s 920A**

As comprehensively explained by Latimer,<sup>9</sup> and by Baxt, Black and Hanrahan,<sup>10</sup> legislative provisions enabling the suspension and cancellation of licences to operate within the securities industries existed in the various state-based Securities Industry Acts since the 1970s. Provisions enabling the corporate regulator to make banning orders against individuals were included in the *Corporations Act 1989* (Cth), which was passed by the Commonwealth to apply in the territories and mirrored by State legislation under the name of the *Corporations Law*. The former *Corporations Law* enabled the Australian Securities Commission (ASC), which assumed its present name of ASIC in 1998,<sup>11</sup> to make banning orders prohibiting natural persons from the securities<sup>12</sup> and futures industries.<sup>13</sup>

Section 920A was enacted through the *Financial Services Reform Act 2001* (Cth), which introduced the current Australian Financial Services (AFS) Licensing regime under Part 7.6 of the Act.<sup>14</sup> The present s 920A has enabled ASIC to make banning orders prohibiting a person from providing financial services on a number of grounds, which are discussed below. Significant amendments were made to s 920A through the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) (the 2012 FOFA

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<sup>9</sup> Paul Latimer ‘Providing financial services “efficiently, honestly and fairly” (2006) 24 *Company and Securities Law Journal* 362

<sup>10</sup> Robert Baxt, Ashley Black and Pamela Hanrahan *Securities and Financial Services Law* 9<sup>th</sup> Edition (LexisNexis Butterworths, 2017), 30 – 49

<sup>11</sup> As Nehme explains, with the passing of the *Financial Services Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth), the ASC’s responsibilities of regulating corporations and the securities industries expanded to also encompass consumer protection in the financial sector: Marina Nehme ‘Latest changes to the banning order regime: Were the amendments really necessary?’ (2013) 21 *Company and Securities Law Journal* 341

<sup>12</sup> *Corporations Law* (Cth) (repealed) s 829

<sup>13</sup> *Corporations Law* (Cth) (repealed) s 1193

<sup>14</sup> For a comprehensive overview of the workings of the Australian Financial Services (AFS) Licensing regime, see Robert Baxt, Ashley Black and Pamela Hanrahan *Securities and Financial Services Law* 9<sup>th</sup> Edition (LexisNexis Butterworths, 2017), 511 – 570

amendments),<sup>15</sup> which introduced new grounds for ASIC to make banning orders and amended several of its existing grounds, with effect from 1 July 2012. The background to, and content of, the 2012 FOFA amendments have been comprehensively analysed by Marina Nehme, who also provides a useful comparison of the wording of s 920A before and after the 2012 FOFA amendments.<sup>16</sup>

Section s 920A(1B) provides that a person ‘contravenes’ a financial services law if they fail to comply with a duty imposed under that law, even such failure is not an offence or a civil penalty provision. Banning orders made under s 920A may be permanent,<sup>17</sup> or for a specified period (unless ASIC has reason to believe that the person is not of good fame and character).<sup>18</sup> Section 921A also enables the court to make banning orders, although to date this power has not been directly applied.

Further amendments to s 920A will come into effect from 1 January 2019 through the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth) (the 2017 Professional Standards Amendments). With two major inquiries in 2014 noting concerns about professional standards within the Australian financial services industry (particularly amongst financial advisers),<sup>19</sup> the 2017 Professional Standards Amendments will introduce significant reforms for financial advisers who provide personal advice to retail clients (who will be referred to as ‘relevant providers’ these new provisions). These changes will include:

- raising the education requirements for financial advisers from Diploma level to Bachelor degree level or higher;
- the introduction of a common exam to enter the financial advice industry;
- supervision requirements for new financial advisers, who will be termed ‘provisional relevant providers’;

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<sup>15</sup> The 2012 FOFA reforms were based on the recommendations of the 2009 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Financial Products and Services (the 2009 PJC Inquiry). Following the collapses of Storm Financial and Opes Prime, the 2009 PJC Inquiry identified concerns about shortcomings in the regulation of financial advice (particularly the scope for conflicts of interest through commission-based remuneration, and insufficient requirements for financial advisers to prioritise the interests of clients over their own interests. For a comprehensive overview of the background to, and details of, the 2012 FOFA reforms to the provision of financial advice, see Andrew Serpell ‘The future of financial advice reforms’ (2012) 30 *Company and Securities Law Journal* 240

<sup>16</sup> Marina Nehme ‘Latest changes to the banning order regime: Were the amendments really necessary?’ (2013) 21 *Company and Securities Law Journal* 341

<sup>17</sup> *Corporations Act 2001* (Cth) s 920B(2)(a)

<sup>18</sup> *Corporations Act 2001* (Cth) s 920B(2)(b)

<sup>19</sup> These included first the Financial System Inquiry, *Financial System Inquiry Final Report* (Australian Government, 7 December 2014) <http://fsi.gov.au/publications/final-report/>; See also Improving Australia’s financial system Government response to the Financial System Inquiry (Commonwealth Treasury, 20 October 2015); and secondly the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into proposals to lift the professional, ethical and education standards in the financial services industry (Australian Government, 19 December 2014) [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/Financial\\_Adviser\\_Qualifications/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Financial_Adviser_Qualifications/Report)

- mandating ongoing professional development for financial advisors; and
- the introduction of a code of ethics for the industry.<sup>20</sup>

The final part of this article considers how these amendments, particularly the requirements for ‘provisional relevant providers’ to be supervised, might help to reduce the scope for misconduct in the financial services industry.

## **B. ASIC’s other administrative powers in relation to financial services misconduct**

In addition to its power to ban individuals under s 920A, ASIC may also suspend or cancel an AFS Licence under s 915C, with such decisions also being reviewable by the AAT. Additionally, as an alternative to pursuing administrative or civil sanctions, ASIC may also accept enforceable undertakings from companies, individuals and licensees under the various legislation it administers.<sup>21, 22</sup> ASIC’s policy on the use of enforceable undertakings is set out in its Regulatory Guide 100, which specifies the factors ASIC will consider when determining the appropriateness its response to identified misconduct or breaches of legislation.<sup>23</sup> Whilst the AAT has previously accepted two enforceable undertakings in lieu of banning orders made under s 829 of the former *Corporations Law*,<sup>24</sup> as Parts III and IV of this article note the Tribunals in nine cases rejected submissions for banning orders to be set aside and replaced by enforceable undertakings; and in one case where the Tribunal varied the s 920A ban to an enforceable undertaking, the original banning order was reinstated by the Tribunal following ASIC’s appeal to the FCA.<sup>25</sup>

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<sup>20</sup> For an overview of these changes see Robin Bowley ‘Regulating the financial advice profession: An examination of recent developments in Australia, New Zealand and the United Kingdom and recommendations for further reform’ (2017) 36 *University of Queensland Law Journal* 191 - 193

<sup>21</sup> *Australian Securities and Investments Commission Act 2001 (Cth)* s 93AA. ASIC may also accept Enforceable Undertakings from responsible entities of registered schemes under s 92A of the *ASIC Act 2001 (Cth)*, and under s 322 of the *National Consumer Credit Protection Act 2009 (Cth)* in relation to matters concerning consumer credit

<sup>22</sup> Enforceable undertakings are an administrative settlement which may provide ASIC with a more flexible regulatory response to misconduct it identifies, and ASIC’s use of this remedy has been comprehensively studied. See for example Helen Bird, George Gilligan and Ian Ramsay ‘The Who, Why and What of Enforceable Undertakings Accepted by the Australian Securities and Investments Commission’ (2016) 34 *Company and Securities Law Journal* 491; Marina Nehme ‘Enforceable Undertakings: Are they Procedurally Fair?’ (2010) 32 *Sydney Law Review* 471; ‘Enforceable Undertaking: A restorative Sanction’ (2010) 36 *Monash University Law Review* 108; ‘Monitoring Compliance with Enforceable Undertakings’ (2009) 23 *Australian Journal of Corporate Law* 76; and ‘Expansion of the Powers of the Administrative Appeals Tribunal in Relation to Enforceable Undertakings’ (2007) 25 *Company and Securities Law Journal* 116

<sup>23</sup> ASIC Regulatory Guide 100 Enforceable Undertakings – with Section C providing guidance on the circumstances under which ASIC may consider accepting an Enforceable Undertaking as an alternative to other enforcement action

<sup>24</sup> See for example *Re Donald and ASIC* (2001) 64 ALD 717; (2001) 38 ACSR 661; [2001] AATA 622 and *Daws and ASIC* (2006) 91 ALD 138; [2006] AATA 246. For commentary on these two decisions see Marina Nehme ‘Expansion of the Powers of the Administrative Appeals Tribunal in Relation to Enforceable Undertakings’ (2007) 25 *Company and Securities Law Journal* 116

<sup>25</sup> *Caines and ASIC* [2012] AATA 289, which is discussed in Part IV below

ASIC's practice is for administrative decisions such as s 920A banning orders and s 915C AFS Licence suspensions and cancellations to be made by an authorised delegate of the Commission (who has not previously been involved in investigating the matter), after providing the affected person with an opportunity for a hearing.<sup>26</sup> The constitutional validity of ASIC's administrative enforcement powers appears to be beyond challenge, following the 2007 High Court decision of *Visnic v ASIC*.<sup>27</sup> In *Visnic*, the High Court unanimously held that s 206F of the Act did not invalidly confer the judicial power of the Commonwealth upon ASIC, due to the disciplinary (rather than judicial) character of s 206F disqualification orders as a means of maintaining professional standards in the management of corporations. *Visnic v ASIC* (2007) was heard concurrently with *Albarran v Members of the Companies' Auditors and Liquidators Disciplinary Board; Gould v Magarey* (2007)<sup>28</sup> – where the High Court also unanimously dismissed similar arguments about s 1292 invalidly conferring the judicial powers of the Commonwealth on the Board through enabling it to suspend or cancel the registration of liquidators.

### **C. Factors in determining the justification and length of banning orders**

Whilst as Parts III and IV explain, determining the appropriate length of banning orders has proven challenging both for ASIC and for the AAT, the reasoning of Santow J in *ASIC v Adler* (2002) has provided valuable guidance. In considering the length of disqualifications to be imposed under ss 206C and 206E of the Act on former directors of HIH, his Honour summarised 15 key propositions from previous case law on the rationale for, and appropriate length of, disqualification orders against persons from managing companies. Whilst emphasising the primary focus of disqualification orders was the protection of stakeholders who deal with companies rather than the punishment of the disqualified individual, His Honour also reasoned that both general and personal deterrence, and preventing future misuse of the corporate structure, were relevant considerations in the imposition of a disqualification order. His Honour also identified factors which may be relevant in the decision to impose short periods of disqualification of up to three years, medium disqualification periods of between seven to twelve years, and lengthy periods of 25 years or more.<sup>29</sup>

Justice Santow's 15 propositions are well accepted in Australian corporate law, having been cited with approval by the Victorian Court of Appeal in *Elliott v ASIC* (2004),<sup>30</sup> and by McHugh J in his separate

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<sup>26</sup> ASIC's practice in relation to administrative hearings is set out in Regulatory Guide 8 'Hearings practice manual' (updated 1 March 2002) <http://download.asic.gov.au/media/1236863/rg8.pdf>

<sup>27</sup> *Visnic v ASIC* (2007) 231 CLR 381; (2007) 95 ALD 18; (2007) 234 ALR 413; (2007) 81 ALJR 1175; (2007) 61 ACSR 512; (2007) 25 ACLC 775; [2007] HCA 24

<sup>28</sup> *Albarran v Members of the CALDB; Gould v Magarey* (2007) 231 CLR 350; (2007) 95 ALD 220; (2007) 234 ALR 618; (2007) 81 ALJR 1155; (2007) 61 ACSR 487; (2007) 25 ACLC 756; [2007] HCA 23

<sup>29</sup> *ASIC v Adler* (2002) 42 ACSR 80 at 97 – 99; (2002) 20 ACLC 1146 at 1159 – 1160; [2002] NSWSC 483 at [56]

<sup>30</sup> *Elliott v ASIC; Plymin v ASIC* (2004) 10 VR 369 at 406 – 407; (2004) 205 ALR 594 at 630 – 631; (2004) 185 FLR 245; (2004) 48 ACSR 621 at 656 – 658; (2004) 22 ACLC 458 at 486 – 487; [2004] VSCA 54 at [135] – [136]

but concurring judgment in *Rich v ASIC* (2004).<sup>31</sup> The 15 propositions have also been incorporated into ASIC's Regulatory Guide 98 (RG 98),<sup>32</sup> which outlines ASIC's policy on administrative action against participants in the financial services industry – including both banning orders against individuals under s 920A and suspensions and/or cancellations of AFS licences under s 915C. With its additional responsibilities for regulating consumer credit since 2009, ASIC has published similar regulatory guidance on its approach to taking administrative action against participants in the consumer credit industry in its Regulatory Guide 218.<sup>33</sup> RG 98 explains that ASIC's decision to take administrative action will depend on the circumstances of each case. Table 1 of RG 98 lists the factors ASIC may consider when determining whether to take administrative action – either in conjunction with, or as an alternative to, pursuing civil or criminal remedies. These factors include:

- Nature and seriousness of the suspected misconduct;
- Internal controls;
- Conduct after the alleged contravention occurs;
- The expected level of public benefit;
- Likelihood that: (i) the person's or entity's behaviour will change in response to a particular action; and (ii) the business community is generally deterred from similar conduct through greater awareness of its consequences; and
- Mitigating factors.<sup>34</sup>

Table 2 of RG 98 draws upon the 15 propositions formulated by Santow J in *ASIC v Adler* (2002) to provide a non-exhaustive list of factors which ASIC may take into account in determining the appropriate length of banning orders. These factors (together with a number of indicative examples) are grouped into the circumstances warranting short periods of banning for less than three years; intermediate bans of between three to ten years; and lengthy bans for periods of ten years or more (including permanent bans).<sup>35</sup>

As Table A below shows, ASIC has consistently exercised its administrative banning and AFS Licence suspension and cancellation powers over the years since 2001.<sup>36</sup>

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<sup>31</sup> *Rich v ASIC* (2004) 220 CLR 129 at 152 –156; (2004) 209 ALR 271 at 287 – 289; (2004) 78 ALJR 1354 at 1365 – 1367; (2004) 50 ACSR 242 at 258 – 260; (2004) 22 ACLC 1198 at 1210 – 1211; [2004] HCA 42 at [48] – [52]

<sup>32</sup> ASIC Regulatory Guide 98 Licensing: Administrative action against financial services providers (30 July 2013)

<sup>33</sup> ASIC Regulatory Guide 218 *Licensing: Administrative action against persons engaging in credit activities* (November 2010)

<sup>34</sup> ASIC Regulatory Guide 98, 16 Table 1 'Key factors we consider in deciding to take administrative action'

<sup>35</sup> ASIC Regulatory Guide 98, 17 – 18 Table 2 'Factors and examples of conduct relating to specific periods of banning'

<sup>36</sup> ASIC's practice has been to report the total number of administrative actions against both individuals (including banning orders under s 920A) and against licensees (including AFS Licence suspensions and/or cancellations) collectively in its Annual Reports, rather than breaking these down. Exceptions include 2006-

**Table 1: ASIC's yearly administrative actions against financial services industry participants**

<b>Year</b>	<b>People / companies banned from providing financial services</b>	<b>ASIC Annual report page reference</b>
2016-2017	100	2016-2017 Annual Report p. 32
2015-2016	81	2015-2016 Annual Report p. 32
2014-2015	53	2014-2015 Annual Report p. 7
2013-2014	57	2013-2014 Annual Report p. 7
2012-2013	50	2012-2013 Annual Report p. 18
2011-2012	54	2011-2012 Annual Report p. 151
2010-2011	64	2010-2011 Annual Report p. 87
2009-2010	41	2009-2010 Annual Report p. 19
2008-2009	47	2008-2009 Annual Report p. 19
2007-2008	49	2007-2008 Annual Report p. 16
2006-2007	37	2006-2007 Annual Report p. 19
2005-2006	27	2005-2006 Annual Report p. 18
2004-2005	25	2004-2005 Annual Report p. 14
2003-2004	42	2003-2004 Annual Report p. 12
2002-2003	39	2002-2003 Annual Report p. 14
2001-2002	35	2001-2002 Annual Report p. 14

Whilst the Tribunal is at liberty to adopt whatever policy it chooses when reviewing the merits of decisions by government agencies,<sup>37</sup> Parts II to IV below explain that most of the Tribunal decisions on challenges to s 920A banning orders have considered the factors outlined in Table 2 of RG 98. Whilst in several instances the Tribunals have formed a different view to that of the original ASIC delegate, RG 98 has not been criticised by any of the Tribunals.

The importance of a robust system of external merits review has been recognised by academic commentators as a means of ensuring the accountability of ASIC's use of its enforcement powers.<sup>38</sup> In

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2007 (where ASIC reported 35 s 920A banning orders) and 2008-2009 (where ASIC reported 42 s 920A banning orders). For a comprehensive review of ASIC's practice in imposing banning orders, see Jasper Hedges, George Gilligan and Ian Ramsay 'Banning Orders: An Empirical Analysis of the Dominant Mode of Corporate Law Enforcement in Australia' (2017) 39 *Sydney Law Review* 501

<sup>37</sup> *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* [1979] AATA 179; (1980) 2 ALD 634 at 642 per Brennan J.

<sup>38</sup> See for example Margaret Hyland 'Is ASIC sufficiently accountable for its administrative decisions? A question of review' (2010) 28 *Company and Securities Law Journal* 32, 52 (pointing out that external merits review can assist in enhancing the credibility and acceptance of ASIC's administrative determinations in cases where an independent body such as the AAT reaches the same conclusion to ASIC); and Joanna Bird 'Regulating the Regulators: Accountability of Australian Regulators' (2011) 35 *Melbourne University Law Review* 739, 748 (noting concerns about the possibility that in reviewing the merits of ASIC determinations, the AAT may not be best placed to take account of the broader regulatory objectives that ASIC is aiming to achieve).



reviewing the merits of banning orders made under s 920A, the Tribunal may exercise all of the powers and discretions conferred upon the ASIC delegate as the original decision-maker. Through standing in the shoes of the original decision-maker, the function of the Tribunal is to arrive at the correct or preferable decision based on the material before it, which may include the consideration of fresh material tendered by an applicant or by ASIC.<sup>39</sup>

The challenges of deriving generally-applicable principles on the justification for, and appropriate durations of disqualification from earlier cases in light of the variations in the circumstances of individual cases have been widely recognised.<sup>40</sup> As discussed in the sections below, these challenges are certainly applicable in the case of s 920A banning orders involving market misconduct – several of which have involved the Tribunals (and in several cases the courts) considering the preferable interpretation of the complex provisions of the applicable legislation. For each decision Table B at the end of this article summarises the relevant legislative provisions which ASIC found to have been breached, the s 920A grounds invoked by ASIC when imposing the ban, the original ban imposed by ASIC and the decision of the Tribunal.

## **II. Section 920A banning orders set aside**

Four s 920A banning orders have been set aside completely on account of the Tribunals either taking a different interpretation to ASIC about the meaning of the applicable legislation.

### **A. Misleading or deceptive conduct in the making of unsolicited offers to purchase shares**

In *Tweed and ASIC* (2008) 47 AAR 518; [2008] AATA 514, Deputy President Forgie set aside ASIC's permanent banning of Mr David Tweed – with this decision representing the most significant variation to ASIC's original banning order out of all the 50 Tribunal decisions examined in this article. Through his opportunistic and predatory practices of making unsolicited offers to acquire shares from financially unsophisticated shareholders, Mr Tweed's companies had previously been subject to civil actions by ASIC in the FCA. ASIC's delegate had imposed a permanent ban against Mr Tweed on the basis that as the sole director, secretary and responsible officer of Country Estate and Agency Company Pty Ltd

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<sup>39</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 143; *Shi v Migration Agents' Registration Authority* (2008) 235 CLR 286 at 298 – 299 and 314 – 315; (2008) 103 ALD 467 at 475 – 476 and 489; (2008) 248 ALR 390 at 398 – 399 and 412; (2008) 82 ALJR 1147 at 1154 – 1155 and 1165; (2008) 48 AAR 345 at 354 – 356 and 368 – 369; [2008] HCA 31 at [34] – [39] and [98] – [99]

<sup>40</sup> See for example *McCormack and ASIC* [2016] AATA 1021 at [60], citing the remarks of McHugh J in *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 155

(which held an AFS Licence), he had failed to comply with financial services laws through causing his associated company National Exchange Pty Ltd<sup>41</sup> to:

- Engage in misleading or deceptive conduct regarding the making of unsolicited offers to purchase shares in OneSteel Ltd in July 2003 (in breach of s 1041H);
- Fail to send offers in October 2004 to shareholders of Aevum Ltd as soon as practicable after the date of the offers (in breach of s 1019E(2)); and
- Make offers to shareholders of Aevum Ltd during October 2004 that were not expressed to remain open for at least one month (in breach of s 1019G(2)).<sup>42</sup>

Deputy President Forgie reasoned that whilst Mr Tweed's companies had been found to have contravened s 1041H<sup>43</sup> and ss 1019E(2) and 1019G(2),<sup>44</sup> it did not follow that Mr Tweed had *personally* breached these provisions.<sup>45</sup> She reasoned that in his capacity as the sole director and shareholder of National Exchange, Mr Tweed was not personally carrying on a financial services business.<sup>46</sup>

Noting that ASIC did not have the power to interfere with an AFS licensee's choice of a representative, Forgie DP concluded that a banning order would not prevent Mr Tweed (or one of his companies) from making unsolicited offers which complied with the procedural requirements of ss 1019E(2) and 1019G(2).<sup>47</sup> However as Austin and Black explain,<sup>48</sup> following a Treasury consultation process,<sup>49</sup> s 1019G(2) was amended in 2010 to require unsolicited offers to purchase financial products off-market to remain open for at least one month after the date of the offer.<sup>50</sup> It is also relevant to consider that by introducing the new grounds of being 'involved' in a financial services law contravention through ss 920A(1)(g) and (h), the 2012 amendments to s 920A (reviewed in IA above) might produce a different outcome in response to similar conduct in the future.

## **B. Misleading investment promotions**

In *De Souza and ASIC* [2009] AATA 725, the Tribunal set aside ASIC's two year banning of the former director of Finance Professionals Alliance Pty Ltd (FPA) (which held an AFS Licence), and of FPA's

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<sup>41</sup> The Tribunal noted that Mr Tweed was the sole director and shareholder of these companies, as well as several others: *Tweed and ASIC* (2008) 47 AAR 518; [2008] AATA 514 at [7] – [9].

<sup>42</sup> *Tweed and ASIC* (2008) 47 AAR 518; [2008] AATA 514 at [7] – [61]. Following this decision, s 1019G was amended by the *Corporations Amendment (No. 1) Act* 2010 (Cth), requiring such offers to be kept open for a minimum of one month.

<sup>43</sup> *ASIC v National Exchange Pty Ltd* (2003) 202 ALR 24; 47 ACSR 128; [2003] FCA 955

<sup>44</sup> *Aevum Pty Ltd v National Exchange Pty Ltd* (2004) 142 FCR 316; 23 ACLC 287; [2004] FCA 1781

<sup>45</sup> *Tweed and ASIC* (2008) 47 AAR 518; [2008] AATA 514 at [97] – [103]

<sup>46</sup> *Tweed and ASIC* (2008) 47 AAR 518; [2008] AATA 514 at [113]

<sup>47</sup> *Tweed and ASIC* (2008) 47 AAR 518; [2008] AATA 514 at [162] - [169]

<sup>48</sup> Robert Austin and Ashley Black *Austin & Black's Annotations to the Corporations Act* [7.1019C] – Annotations to sections 1019C-1019K (LexisNexis Online, 2017)

<sup>49</sup> Treasury *Access to Share Registers in the Regulation of Unsolicited Off-Market Offers* (May 2009)

<http://archive.treasury.gov.au/contentitem.asp?ContentID=1548>, which resulted from concerns expressed by Emmet J in *Aevum Pty Ltd v National Exchange Pty Ltd* (2004) 142 FCR 316; 23 ACLC 287; [2004] FCA 1781

<sup>50</sup> Corporations Amendment (No 1) Act 2010

corporate authorised representative Corporate Capital Securities Pty Ltd (CCS). CCS published an online subscription newsletter *The Active Investor*, which provided stock analysis recommendations and promoted investments through private placements. During early 2006 *The Active Investor* promoted an exclusive placement of shares in a mining company; however several investors who paid a \$595 membership to *The Active Investor* never received the promised allocation of shares. ASIC's investigation found CCS had breached ss 727 and 734 by offering shares in the mining company without providing its prospectus; that it made misleading claims on its website about its trading history and the scale of operations; and that FPA had failed to ensure that CCS complied with financial services laws. ASIC's delegate found these breaches indicated that Mr De Souza would not comply with financial services laws, and banned him for two years under s 920A(1)(f).<sup>51</sup> Whilst expressing concerns about his failure to effectively supervise CCS's operational activities, Member Frost held that according to (the pre-2012) wording of s 920A(1)(f), there were insufficient grounds for believing that Mr De Souza would 'not comply' with a financial services law in the future – reasoning that the provision focused on what the relevant person *would* do in the future, rather than what he or she *might* do.<sup>52</sup>

### **C. Unauthorised share trading by employees of AFS licensees**

In *XTWK and ASIC* (2008) 105 ALD 596; [2008] AATA 703, the Tribunal set aside ASIC's three year banning of a stockbroker. The stockbroker XTWK<sup>53</sup> had been employed in a corporate group by Company A, which was a subsidiary and authorised representative of Company B (which held an AFS Licence). An internal investigation found XTWK had caused Company B to enter into an ASX transaction without disclosing to the buyer that Company B was acting on its own behalf. The internal investigation also found XTWK had breached internal staff rules through his unapproved personal share trading, for which his employment was terminated. ASIC's delegate found XTWK's trading had contravened s 991F(3) and the former ASX Market Rule 7.8.2,<sup>54</sup> and imposed a three year ban under ss 920A(1)(e) and 920A(1)(f).<sup>55</sup>

However after finding XTWK to be an employee of Company A, and that it was Company B as a market participant (not XTWK as an individual) that breached s 991F(3) and ASX Market Rule 7.8.2, Member Fice concluded that XTWK had not breached a 'financial services law' as contended by ASIC.<sup>56</sup> Rather,

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<sup>51</sup> *De Souza and ASIC* [2009] AATA 725 at [1] – [27]; ASIC Media Release 07-97 'ASIC bans three NSW finance professionals' (13 April 2007)

<sup>52</sup> *De Souza and ASIC* [2009] AATA 725 at [30] – [35]

<sup>53</sup> Under s 35 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal may make directions in relation to hearings which may include suppressing the identity of the applicants

<sup>54</sup> ASX Market Rule 7.8.2 detailed the requirements for employees of ASX Market Participants to gain consent for their personal trading. As a result of the *Corporations Amendment (Financial Market Supervision) Act 2010* (Cth), the ASX Market Rules were replaced by the ASIC Market Integrity Rules

<sup>55</sup> *XTWK and ASIC* (2008) 105 ALD 596; [2008] AATA 703 at [1] – 10]

<sup>56</sup> *XTWK and ASIC* (2008) 105 ALD 596; [2008] AATA 703 at [42] – [48]

the only breach he found to be substantiated was XTWK's breach of internal staff dealing rules.<sup>57</sup> The Tribunal then noted that since leaving Company A, XTWK had gained employment with another market participant (Company C) after disclosing the reasons for his departure from Company A, and having transferred his personal share account to a stockbroker approved by Company C, in accordance with its staff dealing rules. In finding XTWK had 'learnt his lesson' from his earlier conduct; that the grounds to ban him under s 920A(1)(f) had not been established;<sup>58</sup> and that XTWK's trading had not caused any detriment, the Tribunal concluded the ban was not necessary to protect the public, and that XTWK's dismissal from Company A would have a sufficient effect of general deterrence.<sup>59</sup>

#### **D. Market manipulation**

The market manipulation provisions of the Act in ss 1041A and 1041B have been noted for their legal complexity.<sup>60</sup> Both the following case, and the cases discussed in Part IVE of this article, illustrate the challenges of interpreting these complex provisions.

In *Rosenberg and ASIC* [2010] AATA 654; (2010) 117 ALD 582, Handley DP set aside ASIC's four year banning of the Managing Director the Tricom group of companies which included the stockbroking firm Tricom Equities Ltd. Tricom's stockbroking business had involved its clients lending securities to Tricom as collateral for cash loans. During the market volatility of early 2008, Tricom's Managing Director Mr Rosenberg became aware that Opes Prime (one of Tricom's corporate lenders) was experiencing significant financial difficulties, and was concerned to manage the impact of this on Tricom's business. Acting on expert advice, he authorised the selling of the on-lent securities by Opes Prime through 12 special crossing trades on the ASX between Tricom Equities as the seller and Tricom Holdings Ltd as the purchaser. However three days after placing these trades, having obtained the necessary finance from other lenders to purchase the on-lent securities, Mr Rosenberg advised the ASX that the 12 special crossings would be cancelled the next day.<sup>61</sup> ASIC determined that through placing the buy and sell instructions for the 12 special crossings, Mr Rosenberg had breached s 1041B(1) through creating a false or misleading appearance of active trading. ASIC's delegate characterised Mr Rosenberg's decision to proceed with the special crossings as a 'contrivance entered into for the primary purpose of stimulating a response that might have resulted in the recall of Tricom stock',<sup>62</sup> and found

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<sup>57</sup> *XTWK and ASIC* (2008) 105 ALD 596; [2008] AATA 703 at [69]

<sup>58</sup> *XTWK and ASIC* (2008) 105 ALD 596; [2008] AATA 703 at [71]

<sup>59</sup> *XTWK and ASIC* (2008) 105 ALD 596; [2008] AATA 703 at [74] – [75]

<sup>60</sup> See for example Ashley Black 'Insider trading and market misconduct' (2011) 29 *Company and Securities Law Journal* 313; Robert Baxt, Ashley Black and Pamela Hanrahan *Securities and Financial Services Law* 9<sup>th</sup> Edition (LexisNexis Butterworths, 2017), 665 – 702; Paul Constable 'Ferocious beast or toothless tiger? The regulation of stock market manipulation in Australia' (2011) 8 *Macquarie Journal of Business Law* 54; Hui Huang 'Redefining market manipulation in Australia: The role of an implied intent element' (2009) 27 *Company and Securities Law Journal* 8

<sup>61</sup> *Rosenberg and ASIC* (2010) 117 ALD 582; [2010] AATA 654 at [1] – [18]

<sup>62</sup> *Rosenberg and ASIC* (2010) 117 ALD 582; [2010] AATA 654 at [22]

his decision to proceed with these trades demonstrated recklessness as to whether Tricom would be in a position to settle these trades three business days after the transaction was entered into, as required by the ASX Market Rules at the time.<sup>63</sup> In determining this trading to be manipulative, ASIC's delegate imposed a four year ban.<sup>64</sup>

However the Tribunal took a different view of these transactions, noting that s 1041B(1)(a) focused on appearance of active trading *on a financial market* – in contrast to the special crossings which were transacted off-market.<sup>65</sup> The Tribunal noted that the special crossings were transacted at prices which markedly differed from the market price at the close of the previous day's trading, and that the change in market price on the next trading day was relatively insignificant and attributable to news regarding the appointment of receivers to Opes Prime.<sup>66</sup> In also noting that Mr Rosenberg sought expert advice before placing the instructions for these trades in the urgent circumstances at the time,<sup>67</sup> Handley DP set aside ASIC's banning order.

### **III. Variations to s 920A banning orders**

In the following cases the lengths of s 920A banning orders were varied after the Tribunals differed in their assessment of the seriousness of the misconduct and/or the need for consumer protection.

#### **A. Minimal need of protecting the consumers from isolated transgressions**

Firstly, in *Dollas-Ford and ASIC* (2006) 91 ALD 747; [2006] AATA 704 a financial advisor who had worked in the life and superannuation industries since 1979 forged the signatures of a couple who were her clients whilst they were uncontactable overseas, in order to preserve their positions in a superannuation fund pending discussions with them. ASIC considered Ms Dollas-Ford's actions amounted to dishonest conduct under s 1041G, and that she was not of 'good fame and character' for the purposes of s 920B(2). Whilst Senior Member Penglis agreed Ms Dollas-Ford's misconduct had been dishonest, he found her actions did not involve any intent to defraud, and that no losses were experienced by her clients. After noting Ms Dollas-Ford's numerous character references her otherwise unblemished record, and her acceptance of responsibility for her actions, the Tribunal determined there

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<sup>63</sup> The Tribunal noted that: 'Section 5.7.3 of the ASX Market Rules imposes an obligation on the parties to settle the transaction at a settlement date that is three business days after the transaction was entered into, referred to as T + 3. On this date, the buyer must be in a position to deliver the agreed price for the securities and the seller must be in a position to deliver the beneficial ownership of the securities: *Rosenberg and ASIC* (2010) 117 ALD 582; [2010] AATA 654 at [13]

<sup>64</sup> *Rosenberg and ASIC* (2010) 117 ALD 582; [2010] AATA 654 at [19] – [25]

<sup>65</sup> *Rosenberg and ASIC* (2010) 117 ALD 582; [2010] AATA 654 at [38], [95]

<sup>66</sup> *Rosenberg and ASIC* (2010) 117 ALD 582; [2010] AATA 654 at [96], [98] – [99]

<sup>67</sup> *Rosenberg and ASIC* (2010) 117 ALD 582; [2010] AATA 654 at [101] – [102]

was no risk of her engaging in similar misconduct in the future and concluded a reduced ban of four years was appropriate in the circumstances.<sup>68</sup>

Secondly in *JTMJ and ASIC* [2010] AATA 350, originated from ASIC's ten year banning of a stockbroker. ASIC's delegate had determined that the stockbroker had breached s 1041A through two transactions executed on behalf of a client over two days, which were well outside the high and low limits of the trading in the shares concerned.<sup>69</sup> Deputy President Forgie also expressed concerns about the adequacy of JTMJ's recording of instructions for the transactions he executed,<sup>70</sup> and indeed found he had breached s 1101F(1A) through not recording instructions from a client to place the trades which were found to be manipulative.<sup>71</sup> Forgie DP determined JTMJ's failure to maintain the required records for his trades demonstrated a lack of concern for financial services laws, thus engaging s 920A(1)(f).<sup>72</sup> After rejecting JTMJ's arguments about the alternative option of an enforceable undertaking,<sup>73</sup> the Tribunal concluded a banning order was warranted to protect the public from a repetition of such misconduct. However, after noting that JTMJ's manipulative trading involved only two breaches and one client, his lack of previous contraventions and good community standing, Forgie DP concluded ASIC's ten year ban would have a punitive effect by effectively precluding JTMJ from resuming his career in the financial services industry, and varied the ban to three years.<sup>74</sup>

Thirdly, in *George and ASIC* [2014] AATA 167, ASIC had permanently banned a mortgage broker who had falsified loan approval documentation for five of his clients. ASIC determined Mr George was not of good fame and character under s 920A(1)(d), and that he was also not a fit and proper person to engage in credit activities under s 80(1)(f) of the NCCP Act.<sup>75</sup> Mr George submitted that his misconduct in falsifying employment documentation relating to applications for "deposit guarantees" (a substitute for a cash deposit for purchases of homes) took place between late 2010 and mid-2011, when he had experienced two deaths in his family.<sup>76</sup> Deputy President Handley noted the Mortgage and Finance Association of Australia (MFAA) Tribunal had suspended Mr George's membership for two years,<sup>77</sup> and favourable character references from former colleagues with full knowledge of the MFAA suspension and of ASIC's investigation.<sup>78</sup> After noting Mr George's submission that under s

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<sup>68</sup> *Dollas-Ford and ASIC* [2006] AATA 704 at [23] – [33]

<sup>69</sup> *JTMJ and ASIC* [2010] AATA 350 at [190]

<sup>70</sup> *JTMJ and ASIC* [2010] AATA 350 at [191] – [211]

<sup>71</sup> *JTMJ and ASIC* [2010] AATA 350 at [212] – [215]

<sup>72</sup> *JTMJ and ASIC* [2010] AATA 350 at [223] – [228]

<sup>73</sup> *JTMJ and ASIC* [2010] AATA 350 at [248] – however no specific details of the content of JTMJ's proposed undertaking were noted in the Tribunal's decision

<sup>74</sup> *JTMJ and ASIC* [2010] AATA 350 at [253] – [258]

<sup>75</sup> *George and ASIC* [2014] AATA 167 at [1] – [6]; ASIC Media Release 14-073 MR 'AAT varies banning period of Edward Richard George' (9 April 2004)

<sup>76</sup> *George and ASIC* [2014] AATA 167 at [15]

<sup>77</sup> *George and ASIC* [2014] AATA 167 at [19]

<sup>78</sup> *George and ASIC* [2014] AATA 167 at [44]

920A(1)(da), a reduced ban could include a condition that he undertake further training and/or that he be supervised,<sup>79</sup> the Tribunal noted he had worked in mortgage broking for 15 years without incidents, and that he had demonstrated genuine remorse for his misconduct.<sup>80</sup> After also noting Mr George's cooperation with ASIC's investigation, and that aside from increasing his clientele he received no direct benefit from his misconduct, the Tribunal determined that whilst dishonest, Mr George's conduct was out of character, and varied both the s 920A and the *National Consumer Credit Protection Act 2009* (Cth) (NCCP Act) s 80 bans to three years.<sup>81</sup>

Whilst these three bans were varied, as Part IVA explains in other cases where the contraventions were serious and/or repeated, the Tribunals took a much firmer approach in affirming banning orders.

### **B. Reduced need for personal and general deterrence following criminal convictions**

Two interesting AAT cases considered the interplay between criminal convictions and administrative banning orders. The first of these cases was *Musumeci and ASIC* (2009) 109 ALD 677; [2009] AATA 524. During 2006 one of Mr Musumeci's clients, Dr Mervyn Jacobsen who was then the CEO of ASX-listed Genetic Technologies Ltd (GTG), instructed him to purchase \$USD500,000 worth of GTG shares. Dr Jacobsen instructed Mr Musumeci of his desire to ensure that GTG's closing price remained at or above \$0.35, which he duly followed. Dr Jacobsen was subsequently convicted of market manipulation under s 1041A and sentenced to a term of imprisonment.<sup>82</sup> In early 2009 Mr Musumeci was convicted of market manipulation in the Victorian County Court and sentenced to seven months imprisonment, fully suspended on account of his cooperation with ASIC's investigation.<sup>83</sup> Before this conviction in early 2008 an ASIC delegate had banned Mr Musumeci for four years, determining his facilitation of the manipulative trading in GTG shares indicated he 'would not comply with financial services laws in the future' under s 920A(1)(f).

The Tribunal noted that RG 98 did not discuss the interplay between ASIC's complementary criminal and civil enforcement powers;<sup>84</sup> that Santow J's 15 propositions in *Adler* (2002) had emphasised the protective rather than punitive focus of banning orders;<sup>85</sup> and that the High Court in *Rich v ASIC* (2004) 220 CLR 129 had held the concepts of public protection and personal punishment to not be mutually exclusive fields of discourse.<sup>86</sup> Noting that the sentencing judge was satisfied of the unlikelihood of Mr

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<sup>79</sup> *George and ASIC* [2014] AATA 167 at [57]

<sup>80</sup> *George and ASIC* [2014] AATA 167 at [58]

<sup>81</sup> *George and ASIC* [2014] AATA 167 at [77] – [80]

<sup>82</sup> ASIC Media Release 14-320MR 'Former Genetic Technologies CEO jailed for market manipulation' (28 November 2014)

<sup>83</sup> ASIC Media Release AD09-19 'Brokers sentenced over market manipulation' (16 February 2009); *Musumeci and ASIC* (2009) 109 ALD 677; [2009] AATA 524 at [20] – [37]

<sup>84</sup> *Musumeci and ASIC* (2009) 109 ALD 677; [2009] AATA 524 at [58]

<sup>85</sup> *Musumeci and ASIC* (2009) 109 ALD 677; [2009] AATA 524 at [63] – [65]; [72] – [77]

<sup>86</sup> *Musumeci and ASIC* (2009) 109 ALD 677; [2009] AATA 524 at [68] – [69]

Musumeci re-offending, the Tribunal concluded that neither personal nor general deterrence warranted ASIC's four year ban.<sup>87</sup> SM Taylor therefore varied the ban to two years on account of Mr Musumeci's criminal conviction and suspended sentence, which had not yet been imposed when the ASIC delegate made the original four year ban.<sup>88</sup>

Similar reasoning was applied in *Fraser and ASIC* [2011] AATA 944; (2011) 125 ALD 121. As a former Authorised Representative of Bridges Personal Investment Services (Bridges), Mr Fraser had prepared financial plans for customers of Heritage Building Society (Heritage). Under an arrangement with Bridges, he was entitled to retain approximately 70 per cent of the fees paid by Heritage customers and was required to remit the remaining 30 per cent to Heritage and Bridges. However, on at least 37 occasions he failed to account to Heritage and Bridges for these amounts, thereby receiving a total of \$3,487.50 to which he was not entitled. Over a year after leaving Bridges, he was convicted in the Queensland Magistrates Court on 37 charges of misappropriating money owed to his employer (to which he pleaded guilty) and was fined \$2,500 without a conviction being recorded. He also paid the \$3,487.50 in restitution. Following a further investigation, ASIC permanently banned Mr Fraser after determining that he was not of good fame and character.<sup>89</sup> However in noting the amounts Mr Fraser received to be modest; that he had been new to the industry at the time of his misconduct; that Bridges had initially appeared to be unconcerned with following up the \$3,487.50; and that he had an otherwise unblemished record before and following his misconduct, the Tribunal found no reason to conclude he was not of good fame and character.<sup>90</sup> Noting his cooperation with the authorities, his guilty plea, and his otherwise unblemished record, the Tribunal varied his permanent ban to six months.<sup>91</sup>

Whilst these two banning orders were varied, as Part IVB discusses, in other cases the Tribunals have taken a much stricter approach in affirming bans imposed by ASIC for fraudulent and/or dishonest conduct involving client monies.

### **C. Breaches of financial advice standards**

Breaches of the Act's requirements governing the provision of financial advice provided the grounds for ASIC to impose the seven banning orders discussed below. These breaches included failures to comply with the 'appropriate advice' requirement under the (pre-2012) s 945A, which was replaced by the obligations for advisers to act in the 'best interests' of their clients under s 961B in 2012; and failures to provide clients with Statements of Advice (SOAs) to the standard and/or within the timeframes

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<sup>87</sup> *Musumeci and ASIC* (2009) 109 ALD 677; [2009] AATA 524 at [80] – [86]

<sup>88</sup> *Musumeci and ASIC* (2009) 109 ALD 677; [2009] AATA 524 at [90]

<sup>89</sup> *Fraser and ASIC* (2011) 125 ALD 121; [2011] AATA 944 at [8] – [19]

<sup>90</sup> *Fraser and ASIC* (2011) 125 ALD 121; [2011] AATA 944 at [33] – [34]

<sup>91</sup> *Fraser and ASIC* (2011) 125 ALD 121; [2011] AATA 944 at [35] – [42]



required by s 947C.<sup>92</sup> In the cases discussed below, the reasons for the Tribunals varying the original bans included the findings of little or no adverse effect from the breaches; the contrition of the applicants; and the assessment of the risk of future breaches being low or non-existent.

In *Hayes and ASIC* [2006] AATA 1506; (2006) 93 ALD 494, the Tribunal varied ASIC's three year ban of a para-planner to one year. ASIC's investigation found that when advising clients about changes to their superannuation arrangements, Mr Hayes had breached ss 946D and 947D by failing to provide SOAs within the required five days (instead taking up to two months), and that he had breached the former s 945A through not adequately investigating their financial objectives.<sup>93</sup> The Tribunal accepted ASIC's expert evidence that Mr Hayes' financial advice fell short of industry standards.<sup>94</sup> After rejecting Mr Hayes' proposed enforceable undertaking<sup>95</sup> and noting that many affected clients were his friends and relatives, Deputy President Purvis attributed Mr Hayes' breaches to his 'misguided enthusiasm to assist [his] clients and develop a client base of his own'. Whilst concluding a ban was warranted, Purvis DP considered the three year ban against Mr Hayes, who was at the early stage of his career, as excessive.<sup>96</sup>

In two cases ASIC banned financial advisors who had recommended their clients to invest in the Westpoint Group, which collapsed in 2006 owing around \$388 million to investors.<sup>97</sup> In both cases ASIC found the financial advisors had breached the former s 945A through inadequately investigating their clients' objectives, and their failure to make their own inquiries about the Westpoint investments.

The first of these Westpoint banning cases was *Eikelboom and ASIC* [2009] AATA 474. Nine of Mr Eikelboom's clients had sustained major losses from their investments in Westpoint, with two clients losing all of the \$150,000 they invested following his recommendations. Concurring with ASIC's

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<sup>92</sup> For an overview of these provisions, and ASIC's expectations about the standards that financial advice should meet to comply with these requirements, see ASIC Regulatory Guide 175 'Licensing: Financial product advisers - Conduct and Disclosure' (ASIC, March 2017)

<sup>93</sup> *Hayes and ASIC* [2006] AATA 1506 at [16] – [31]

<sup>94</sup> The expert's report had noted that from her review of Mr Hayes' client files, 'There is no attention paid to data collection, needs analysis or risk management issues. I did not see a discussion of binding nominations which should accompany any recommendation to switch into a superannuation fund. There was no financial modelling to show the long-term impact of the switch or that the new fund would better achieve the client's retirement savings amount they required ... As there is no basis for the advice being given, no adequate assessment of existing superannuation funds and no matching of a clients preferred portfolio to the investment recommendations, these clients have been put at risk of suffering a loss or not achieving the results they might have achieved had they not switched ...': *Hayes and ASIC* [2006] AATA 1506 at [37] – [38]

<sup>95</sup> *Hayes and ASIC* [2006] AATA 1506 at [48] – [50] – although no specific details of the content of Mr Hayes' proposed undertaking were noted in the Tribunal's decision

<sup>96</sup> *Hayes and ASIC* [2006] AATA 1506 at [65] – [66]. A similar assessment of the limited number of affected clients was evident in *Lelliot and ASIC* [2009] AATA 110 (involving the promotion of a company that was promoting horse racing and gaming in Lithuania)

<sup>97</sup> ASIC Media centre – Key matters – Westpoint <http://asic.gov.au/about-asic/media-centre/key-matters/westpoint/>

finding that Mr Eikelboom's advice to his clients fell short of the standards expected of financial advisors, Nicholson DP determined that through being new to his role of being an Authorised Representative, Mr Eikelboom had paid inadequate attention to ascertaining his clients' financial objectives and the risk profiles of the Westpoint investments.<sup>98</sup> He therefore determined that s 920A(1)(e) justified Mr Eikelboom's banning.<sup>99</sup> After reviewing RG 98, and noting Mr Eikelboom had not enriched himself through advising his clients to invest in Westpoint, the Tribunal attributed his clients' losses to his carelessness rather than his dishonesty. After noting his cooperation with ASIC's investigation, his lack of any prior contraventions and his voluntary ceasing of working in the financial services industry, the Tribunal varied his three year ban to two years.<sup>100</sup>

Secondly, in *Kofkin and ASIC* [2009] AATA 660, Deputy President McDonald varied ASIC's ten year ban of a financial planner whose approximately 80 clients had suffered major losses from the collapse of Westpoint to three years. McDonald DP regarded with concern that rather than requesting written information about the Westpoint investment products, Mr Kofkin had relied upon verbal assurances from the Westpoint promoters.<sup>101</sup> He concluded that Mr Kofkin, and others in his firm Glenhurst Corporation, had failed to properly scrutinise Westpoint's investment products for inclusion on Glenhurst's Approved Products List for promotion to the firm's clients,<sup>102</sup> and that the clients' losses were attributable to these omissions.<sup>103</sup> The Tribunal weighed up Mr Kofkin's proposed enforceable undertaking (involving him being supervised and mentored, and no longer recommending mezzanine finance products similar to those issued by Westpoint),<sup>104</sup> with the factors in favour of a banning order – particularly the significant losses by his clients and the numerous failings in his duties under the former s 945A of the Act.<sup>105</sup> He also noted several clients had remained with Mr Kofkin despite their Westpoint losses; that several character references had shown his otherwise unblemished record and good reputation; that he had taken steps to improve the financial advisory processes at Glenhurst following the collapse of Westpoint; and that he 'was not the only advisor to be caught by the irregular undertakings given by the promoters of the Westpoint products'.<sup>106</sup> After considering the RG 98 guidelines,<sup>107</sup> and acknowledging the financial impact of the ban on Mr Kofkin, and his recognition of

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<sup>98</sup> *Eikelboom and ASIC* [2009] AATA 474 at [56] – [62]

<sup>99</sup> *Eikelboom and ASIC* [2009] AATA 474 at [64] – [65]

<sup>100</sup> *Eikelboom and ASIC* [2009] AATA 474 at [67] – [69]

<sup>101</sup> *Kofkin and ASIC* [2009] AATA 660 at [62]

<sup>102</sup> *Kofkin and ASIC* [2009] AATA 660 at [65] – [68]

<sup>103</sup> *Kofkin and ASIC* [2009] AATA 660 at [87] – [90]

<sup>104</sup> *Kofkin and ASIC* [2009] AATA 660 at [91]

<sup>105</sup> *Kofkin and ASIC* [2009] AATA 660 at [92]

<sup>106</sup> *Kofkin and ASIC* [2009] AATA 660 at [93]

<sup>107</sup> *Kofkin and ASIC* [2009] AATA 660 at [95] – Relevantly, from Table 1 ('Factors ASIC will consider re whether to take administrative action') these included the nature and seriousness of the suspected misconduct; the internal controls on the licensee or person; the conduct of the licensee or person after the misconduct occurs; and the previous regulatory record of the licensee or person; and from Table 2 ('Factors and examples of conduct relating

his errors, the Tribunal determined the ban should not be so long to ‘irrevocably destroy his career’, and varied the ban to three years.<sup>108</sup>

A major crisis confronted ASIC in late 2009 following the collapse of Trio Capital. Having fraudulently misappropriated around \$176 million in Australian superannuation funds, the collapse of Trio Capital prompted a Parliamentary Joint Committee inquiry, which characterised Trio as ‘the largest superannuation fraud in Australia’s history’.<sup>109</sup> ASIC took enforcement action against a range of persons and entities that were involved in the operation of, and promotion of investment in entities controlled by Trio Capital.<sup>110</sup> This included issuing a three year ban to financial advisors Mr Peter and Mrs Anne-Marie Seagrim, who had transferred 972 clients (with funds totalling \$210 million) to funds managed by Trio-controlled Astarra Capital Ltd in an effort to protect their clients’ financial investments from market volatility during the Global Financial Crisis. ASIC’s delegate identified six areas of concern in the Seagrims’ advice to their clients, and determined these breaches to warrant a three year ban.<sup>111</sup>

However in *Seagrim and ASIC* [2012] AATA 583, the Seagrims successfully challenged the merits of ASIC’s three year ban, with Deputy President Jarvis differing in his view the seriousness of the Seagrims breaches. He first determined that the Seagrims’ breach of the base level financial requirements of its AFS Licence (which required Seagrims to maintain a specified surplus of assets over liabilities) was attributable to the unexpected loss of the client base of another financial services business which Seagrims had acquired in 2007, and noted no clients had been prejudiced by this breach.<sup>112</sup> Secondly, he regarded the Seagrims’ failure to disclose commissions and other benefits received from Astarra in its Financial Services Guides ‘as a technical matter’, given that the SOAs provided to clients disclosed these details.<sup>113</sup> In relation to ASIC’s third concern that Seagrims had breached his duties under the former s 945A of the Act through failing to adequately determine their clients’ personal circumstances before advising them to migrate their investments into Astarra funds, he noted that many of these individuals were long-standing clients; that the Seagrims were unaware of the fraudulent operation of the Astarra funds at the time; and that they did not gain financially through these alleged breaches.<sup>114</sup>

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to specific periods of banning’), that Mr Kofkin’s clients’ losses had been brought about by ‘not having a reasonable basis for the advice provided – eg recommendations in high risk schemes’

<sup>108</sup> *Kofkin and ASIC* [2009] AATA 660 at [97] – [99]

<sup>109</sup> Parliamentary Joint Committee on Corporations and Financial Services ‘Inquiry into the collapse of Trio Capital’ (May 2012), 1

<sup>110</sup> ASIC ‘Key matters – Trio and Astarra’ <http://www.asic.gov.au/about-asic/media-centre/key-matters/trio-and-astarra/>

<sup>111</sup> *Seagrim and ASIC* [2012] AATA 583 at [26]

<sup>112</sup> *Seagrim and ASIC* [2012] AATA 583 at [35]

<sup>113</sup> *Seagrim and ASIC* [2012] AATA 583 at [59]

<sup>114</sup> *Seagrim and ASIC* [2012] AATA 583 at [64] – [68]

In concluding the Seagrims to have learnt from their experiences, Jarvis DP disagreed with ASIC's contention that they would not comply with financial services laws in the future, and hence found the s 920A(1)(f) banning ground was not established.<sup>115</sup> Taking account of the considerations outlined in *Adler* (2002) and RG 98, he determined their breaches were not intentional; the benefits they had received were inconsequential, and that the seriousness of the breaches was grossly disproportionate to the costs they had incurred in assisting their clients.<sup>116</sup> Jarvis DP therefore varied ASIC's ban to six months.<sup>117</sup>

The first Tribunal decision to apply the s 961A (which was introduced by the 2012 FOFA reforms) was *Prasad and ASIC* [2016] AATA 384. ASIC's review of financial advisor Mr Prasad found he had failed to have a reasonable basis for his advice to four clients in relation to their superannuation and Total and Permanent Disability (TPD) insurance arrangements during late 2013. ASIC had found Mr Prasad's SOAs breached s 947C through inadequately detailing his conversations with clients and not outlining their financial circumstances, and failing to detail the comparative features, and suitability of the financial products he recommended to clients. Other SOAs omitted information about fees and charges, and one SOAs failed to warn that the client would lose an income protection entitlement under another fund policy and that the client's amount of TPD cover would be reduced by \$300,000.<sup>118</sup> ASIC had also found Mr Prasad's files were poorly maintained – with many documents unsigned, undated and left blank, and considerable inter-mingling between financial services and mortgage broking files,<sup>119</sup> prompting the imposition of a three year ban.

Whilst Mr Prasad identified previous Tribunal decisions on s 920A bans where prohibitions of less than three years were imposed for what he characterised as 'demonstrably more egregious conduct',<sup>120</sup> Deutsch DP rejected such arguments, noting that all Tribunal decisions depended heavily on the circumstances of each case.<sup>121</sup> Whilst agreeing that Mr Prasad's 'could not be bothered' attitude to the preparation and completion of SOAs breached s 947C, Deutsch DP considered that s 961B(1), which provides a safe harbour for financial advisors who can demonstrate their adherence to the measures outlined in s 962B(2), was '... not the only way in which acting in the best interests of the client can be demonstrated';<sup>122</sup> although he did not elaborate further on this reasoning. After determining that Mr

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<sup>115</sup> *Seagrim and ASIC* [2012] AATA 583 at [84] – [85]

<sup>116</sup> *Seagrim and ASIC* [2012] AATA 583 at [96] – [97]

<sup>117</sup> *Seagrim and ASIC* [2012] AATA 583 at [100]

<sup>118</sup> *Prasad and ASIC* [2016] AATA 384 at [24] – [27]

<sup>119</sup> *Prasad and ASIC* [2016] AATA 384 at [41]

<sup>120</sup> *Prasad and ASIC* [2016] AATA 384 at [48] – the previous Tribunal decisions cited by Mr Prasad included *Fraser and ASIC* [2011] AATA 944 (resulting in a six month ban); *Musumeci and ASIC* [2009] AATA 524 (resulting in a two year ban); *Seagrim and ASIC* [2012] AATA 583 (resulting in a six month ban) and *Hickie and ASIC* [2013] AATA 853

<sup>121</sup> *Prasad and ASIC* [2016] AATA 384 at [56]

<sup>122</sup> *Prasad and ASIC* [2016] AATA 384 at [53] – [54]

Prasad's conduct involved carelessness (rather than dishonesty or deliberate deception); that he made no personal gain from his breaches of s 947C; and that his clients suffered no financial detriment from his breaches, the Tribunal considered his misconduct to warrant a shorter ban of 18 months.<sup>123</sup>

More recently in *Downey and ASIC* [2017] AATA 958 the former director of a financial services business was approached by a migration lawyer whose client was applying for a Significant Investor Visa. Such visas required applicants to make a minimum investment of \$5 million into a registered managed investment scheme which was a 'complying investment' under the *Migration Regulations* 1994 (Cth).<sup>124</sup> In response to the lawyer's request to establish a complying investment scheme for the client, Mr Downey advised that the scheme could not accept funds until it was registered with ASIC. However before the scheme was registered with ASIC (and without the prior knowledge of Mr Downey or the lawyer), the client deposited \$3 million into the scheme. Around two weeks later, Mr Downey returned the \$3 million to the client.<sup>125</sup> However, two days after the client had deposited the \$3 million into the fund, Mr Downey emailed the lawyer two signed letters certifying that the client had made 'complying investment' (which had not yet occurred), which the lawyer then forwarded (via the client's migration agent) to an officer within the Department of Foreign Affairs and Trade who was assessing the client's visa application.<sup>126</sup>

In imposing a six year ban ASIC's delegate determined that by sending these signed letters certifying that a complying investment had been made, Mr Downey had breached 1041H.<sup>127</sup> At the Tribunal Mr Downey maintained the signed letters were only drafts which he had not intended to be forwarded to the relevant government authorities. In rejecting this contention Kendall DP agreed with ASIC that Mr Downey's conduct breached s 1041H and thus warranted a banning order.<sup>128</sup> However he considered a four year ban to be more appropriate after characterising Mr Downey's actions as 'extraordinarily reckless, bordering on incompetent' rather than being malicious and intentionally deceptive.<sup>129</sup>

#### **D. Unlicensed provision of financial advice**

In a number of cases the AAT varied banning orders against individuals who had provided financial advice without holding AFS Licences or being Authorised Representatives of such licensees (in breach of s 911A), after assessing the need for future public protection from such activities as minimal. Firstly in *Nolan and ASIC* [2006] AATA 778 a financial advisor had operated a discretionary portfolio

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<sup>123</sup> *Prasad and ASIC* [2016] AATA 384 at [57] – [62]

<sup>124</sup> *Downey and ASIC* [2017] AATA 958 at [12] – [15]

<sup>125</sup> *Downey and ASIC* [2017] AATA 958 at [30] – [44]

<sup>126</sup> *Downey and ASIC* [2017] AATA 958 at [45] – [70]

<sup>127</sup> *Downey and ASIC* [2017] AATA 958 at [73] – [74]

<sup>128</sup> *Downey and ASIC* [2017] AATA 958 at [109] – [131]

<sup>129</sup> *Downey and ASIC* [2017] AATA 958 at [137] – [141]

management business through his company Global Portfolios Pty Ltd between 1993 and 2002 without holding a Securities Dealers Licence under the former *Corporations Law*. Mr Nolan had been refused a Securities Dealers Licence in 1997, but in 2002 ASIC granted Global Portfolios a Restricted General Advice Licence. Mr Nolan acted as a representative of Global Portfolios without holding a proper authority, causing Global Portfolios to breach its Securities Dealers Licence in 2002. Mr Nolan had also breached an undertaking he gave to ASIC in December 1998 to not advise or deal in securities during 1999. ASIC's delegate also found Mr Nolan had breached his duties to his clients through short selling units in a managed fund, and by using clients' funds to cover potential losses on these transactions; and in failing to maintain clients' funds in trust accounts separate from those of Global Portfolios.<sup>130</sup> After somewhat curiously criticising ASIC's decision to grant what he described as an 'inappropriate' Securities Dealers' Licence to Global Portfolios,<sup>131</sup> Olney DP accepted ASIC's concerns that Mr Nolan would not comply with financial services laws, thereby engaging s 920A(1)(f).<sup>132</sup> However after noting Mr Nolan's character references and his intentions of only working in the financial services industry as an employee (and not as an Authorised Representative), he characterised ASIC's five year ban as 'excessive' and varied it to a three year ban - albeit without referring to RG 98 or other authorities.<sup>133</sup>

The more recent case of *Amargianitakis and ASIC* [2015] AATA 720 involved an unlicensed dealing in financial products by an accountant. One of Mr Amargianitakis' companies (Vista Capital Pty Ltd) had raised money from clients of his accountancy business (Akis & Associates) to invest in property, mezzanine finance and mortgage lending schemes, with the clients becoming lenders to these projects. In 2011 both Vista and Akis collapsed in insolvency.<sup>134</sup> The Tribunal noted with concern that Vista had raised around \$36 million from financially unsophisticated retail clients of Akis,<sup>135</sup> in respect of whom Mr Amargianitakis did not ascertain their financial objectives or the appropriateness of these loans, nor direct them to obtain independent legal advice. Deputy President Deutsch also rejected Mr Amargianitakis' contention that he had merely offered his clients an investment opportunity,<sup>136</sup> and his denial that the clients had depended on his advice.<sup>137</sup> Deutsch DP considered that with his 25 years in the finance industry Mr Amargianitakis ought to have appreciated that by facilitating this financing,

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<sup>130</sup> *Nolan and ASIC* [2006] AATA 778 at [6] – [30]

<sup>131</sup> *Nolan and ASIC* [2006] AATA 778 at [29], [38]

<sup>132</sup> *Nolan and ASIC* [2006] AATA 778 at [30] – [34]

<sup>133</sup> *Nolan and ASIC* [2006] AATA 778 at [35] – [41]. A similar approach was adopted in the later decision of *Littlemore and ASIC* [2009] AATA 679 (involving a retired insurance broker who was assisting his son's insurance business without being authorised under s 911A), where the Tribunal found no detriment had been experienced by clients.

<sup>134</sup> *Amargianitakis and ASIC* [2015] AATA 720 at [14], [19]; See also ASIC Media Release 14-318MR 'ASIC moves to protect public from unlicensed conduct' (28 November 2014)

<sup>135</sup> *Amargianitakis and ASIC* [2015] AATA 720 at [60] – with the Tribunal noting a number of the affected clients to have been nearing retirement with several having only their retirement savings, superannuation and/or compensation entitlements, and little in savings

<sup>136</sup> *Amargianitakis and ASIC* [2015] AATA 720 at [35]

<sup>137</sup> *Amargianitakis and ASIC* [2015] AATA 720 at [52]

Vista providing financial services without being licensed or authorised.<sup>138</sup> He also found Mr Amargianitakis had breached s 1041H through his misrepresentations of the loan arrangements and the former s 945A by failing to consider his clients' financial circumstances.<sup>139</sup> In light of the *Adler* (2002) propositions, Deutsch DP found these factors to warrant a longer ban.<sup>140</sup> However he also found factors in favour of a shorter ban including the lack of dishonesty on Mr Amargianitakis' part; his expressions of contrition (and that he had taken steps to improve understanding of financial services regulations.<sup>141</sup> After rejecting a proposed enforceable undertaking, which Deutsch DP considered to lack specificity<sup>142</sup> he varied ASIC's eight year ban to six years.<sup>143</sup>

#### **IV. Section 920A bans that have been affirmed**

##### **A. Importance of protecting consumers from serious and/or repeated breaches**

In a number of cases the Tribunals affirmed s 920A banning orders imposed for serious and/or repeated breaches of financial services laws, in order to protect consumers from the risk of such misconduct recurring in the future.<sup>144</sup>

In *Parker and ASIC* [2016] AATA 983 Senior Member Walsh affirmed ASIC's permanent ban under s 920A (and also under s 80 of the *NCCP Act*) of a former automotive finance broker. ASIC's investigation had found Mr Parker had engaged in misleading and deceptive conduct in breach of s 1041H of the Act, s 12DA of the *ASIC Act*, and s 33 of the *NCCP Act* through misleading four clients with poor credit histories into believing that their motor vehicle finance applications would be approved, and through also preparing loan applications without the knowledge or consent of guarantors named in the applications.<sup>145</sup> SM Walsh also noted with concern that for around half of the motor vehicle loans he brokered, Mr Parker arranged unsolicited insurance (for which he gained commissions), which

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<sup>138</sup> *Amargianitakis and ASIC* [2015] AATA 720 at [26], [64]

<sup>139</sup> *Amargianitakis and ASIC* [2015] AATA 720 at [66] – [77]

<sup>140</sup> *Amargianitakis and ASIC* [2015] AATA 720 at [99]

<sup>141</sup> *Amargianitakis and ASIC* [2015] AATA 720 at [98]

<sup>142</sup> The Enforceable Undertaking that Mr Amargianitakis offered was to '... do all things reasonably required of him to obtain and also to use his best endeavours to obtain a limited AFS license by 30 June 2016 (limited to those items described as "Provide financial product advice" at Table 1 on page 2 of INFO 179) and for the conditions of any such limited AFS License to be that he is subjected to an annual audit or any such conditions as the ASIC imposes': *Amargianitakis and ASIC* [2015] AATA 720 at [100]

<sup>143</sup> *Amargianitakis and ASIC* [2015] AATA 720 at [101] – [103]

<sup>144</sup> See, eg, *Coakley and ASIC* [2008] AATA 247 (involving the banning of an accountant involved in promoting an unregistered mezzanine financing scheme); *Coshott and ASIC* [2014] AATA 677 (involving misleading conduct by an insurance broker who deceived a client into believing that insurance had been arranged for the client's hotel); and *Liu and ASIC* [2014] AATA 817 (which involved the permanent banning of the former Chief Investment Strategist of Trio Capital Ltd on account of misleading statements in Trio's Product Disclosure Statements)

<sup>145</sup> ASIC Media Release 16-132MR 'ASIC bans a fifth broker from Get Approved Finance' (9 May 2016); *Parker and ASIC* [2016] AATA 983 at [20] – [26]; [33] – [131]

inflated the amounts that clients were obliged to pay for their loans.<sup>146</sup> After finding all of the breaches alleged by ASIC to be substantiated,<sup>147</sup> the Tribunal rejected Mr Parker's expressions of remorse for his conduct; his claim that he was only 24 years old at the time of his misconduct and had been 'naïve and stupid'; and that he had been 'brainwashed' into going along the practices of other brokers in his company.<sup>148</sup> After considering the guidelines in RG 98, the Tribunal concluded his serious and dishonest misconduct to be premeditated and repeated, which had the potential to undermine public confidence in the credit and financial services industries.<sup>149</sup>

*Panganiban and ASIC* [2017] AATA 1026 arose from ASIC's permanent banning of a financial adviser who had made unnecessary changes to the insurance arrangements of 49 of his clients.<sup>150</sup> Between 2011 and 2014 as an authorised representative of AMP Financial Planning Pty Ltd, Mr Panganiban advised the 49 clients who held risk insurance through their AMP superannuation fund to cancel their existing AMP insurance policies and replace these with new AMP insurance policies. By ceasing and replacing the insurance policies, rather than simply transferring them, the full rate of commission became payable to AMP Financial Planning Pty Ltd, with Mr Panganiban's remuneration being positively influenced by the upfront commissions generated as a result of this advice. Of concern to ASIC was that Mr Panganiban's actions in replacing the insurance policies exposed the clients to avoidable risks including gaps in cover and changes in policy terms, the possibility of extra policy loadings and exclusions, and that it also unnecessarily restarted the non-disclosure period that allows insurers to avoid policies within the first three years of inception for inadvertent non-disclosure.<sup>151</sup> The Tribunal concurred with ASIC's assessment of the seriousness of Mr Panganiban's deliberate and repeated misconduct,<sup>152</sup> and noted that rather than acting in the best interests of his clients, he had been motivated by his own financial self-interest.<sup>153</sup> Senior Member Taylor concluded that Mr Panganiban's lack of insight into the nature and extent of his misconduct demonstrated that he was 'not of good fame or character', which justified ASIC's permanent banning under s 920A(1)(d).<sup>154</sup>

In *McCormack and ASIC* [2016] AATA 1021, the Tribunal initially set aside the five year banning of a former financial planner. In a highly complex and unusual set of circumstances, after becoming

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<sup>146</sup> *Parker and ASIC* [2016] AATA 983 at [27] – [32]; [172] – [173]

<sup>147</sup> *Parker and ASIC* [2016] AATA 983 at [143] – [177]

<sup>148</sup> *Parker and ASIC* [2016] AATA 983 at [187]

<sup>149</sup> *Parker and ASIC* [2016] AATA 983 at [189]

<sup>150</sup> Also, in *Panganiban v ASIC* (2016) 113 ACSR 452; [2016] FCA 510, Bromwich J dismissed an application by Mr Panganiban for access to the files of his former clients that ASIC held prior to the hearing before the ASIC delegate

<sup>151</sup> ASIC Media Release 16-309MR 'ASIC permanently bans former AMP financial planner' (14 September 2016); *Panganiban and ASIC* [2017] AATA 1026 at [11]

<sup>152</sup> *Panganiban and ASIC* [2017] AATA 1026 at [30] – [39]

<sup>153</sup> *Panganiban and ASIC* [2017] AATA 1026 at [42]

<sup>154</sup> *Panganiban and ASIC* [2017] AATA 1026 at [48]



concerned that one of his new clients appeared to have been defrauded through a superannuation transfer, Mr McCormack had impersonated the new client, and then assisted the new client to forge the signature of another person, in order to recover the funds that he (incorrectly) assumed had been stolen.<sup>155</sup> Whist SM Fice accepted ASIC's view that these 'deceptive and foolhardy' actions breached s 1041H,<sup>156</sup> he accepted Mr McCormack's explanation that his sole concern was to protect the interests of his new client.<sup>157</sup> He also accepted Mr McCormack's submission that his actions had been out of character in his otherwise complaint-free career; that he had not been motivated by financial gain; and that he had taken immediate steps to return the moneys to the affected account holder after becoming aware of his gross error.<sup>158</sup> He concluded that with the adverse publicity following ASIC's ban (which he considered would deter others from similar misconduct), Mr McCormack would not undertake similar actions in the future; and that rather than protecting the public, the ban would effectively penalise Mr McCormack for his poor judgment.<sup>159</sup> However ASIC successfully appealed the Tribunal's determination in the FCA. O'Callaghan J held that the Tribunal had erred in concluding the a ban was unwarranted given that no actual financial loss had occurred through Mr McCormack's misconduct;<sup>160</sup> that ASIC had not alleged dishonesty by Mr McCormack;<sup>161</sup> and that the Tribunal had failed to give adequate weight to the importance of general deterrence.<sup>162</sup> Although the matter was remitted to the AAT for re-hearing, Mr McCormack subsequently withdrew his application.<sup>163</sup>

More recently in *O'Sullivan and ASIC* [2017] AATA 644, the Tribunal affirmed ASIC's seven year banning of the former Managing Director of Provident Capital Ltd, a property finance company which collapsed in October 2012. Provident had issued debentures to retail investors through a Fixed Term Investment Portfolio and advanced these funds to third party borrowers including property developers. At the time of its collapse, Provident owed around \$201 million to its debenture holders.<sup>164</sup> In a lengthy decision, the Tribunal found that the former Managing Director had been involved in causing Provident to make misleading and deceptive statements in its debenture prospectus to investors about the status of Provident's loan for its major Queensland property development, in contravention of ss 728 and 1041H.<sup>165</sup> In concluding Mr O'Sullivan's conduct had involved 'the repeated camouflaging and

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<sup>155</sup> *McCormack and ASIC* [2016] AATA 1021 [6] – [21]

<sup>156</sup> *McCormack and ASIC* [2016] AATA 1021 at [45]

<sup>157</sup> *McCormack and ASIC* [2016] AATA 1021 at [65]

<sup>158</sup> *McCormack and ASIC* [2016] AATA 1021 at [68] – [72]; [83]

<sup>159</sup> *McCormack and ASIC* [2016] AATA 1021 at [84] – [87]

<sup>160</sup> *ASIC v McCormack* [2017] FCA 672 at [34] – [44]; [68] – [73]

<sup>161</sup> *ASIC v McCormack* [2017] FCA 672 at [51] – [59]

<sup>162</sup> *ASIC v McCormack* [2017] FCA 672 at [45] – [50]

<sup>163</sup> ASIC Media Release 17-201MR 'Federal Court upholds ASIC's appeal on Gerard McCormack' (23 June 2017)

<sup>164</sup> *O'Sullivan and ASIC* [2017] AATA 644 at [3], [49], [700]

<sup>165</sup> *O'Sullivan and ASIC* [2017] AATA 644 at [456] – [518]

concealment of critical information from investors’, Deputy President Deutsch affirmed the seven year ban under s 920A(1)(e).<sup>166</sup>

In two later decisions the Tribunal affirmed ASIC’s banning of former non-executive directors of Provident Messrs Sweeney and Seymour, holding that they had been knowingly involved in Provident’s contraventions of s 1041H through their acquiescence in approving misleading statements in its prospectus. In Mr Sweeney’s case the Tribunal affirmed his two year ban and rejected his proposed enforceable undertaking to not seek future roles as an Authorised Representative.<sup>167</sup> In the case of Mr Seymour (who had also served as a Responsible Officer of Provident for its AFS licence) Senior Member Taylor affirmed his three year ban.<sup>168</sup>

### **B. Protecting consumers from persons convicted of fraud**

Whilst s 920A(1)(c) enables ASIC to make a banning order when a person is ‘convicted of fraud’, the Act does not define ‘fraud’. Nevertheless in several cases the Tribunals affirmed ASIC’s permanent banning orders against individuals who had been convicted of offences involving fraud, emphasising the importance of protecting the investing public from the future risk of such misconduct.

For instance, in *Howarth and ASIC* (2008) 101 ALD 602; (2008) 48 AAR 1, [2008] AATA 278 an insurance broker had arranged fictitious insurance premium funding loans totalling around \$1.4 million. In collusion several clients, Mr Howarth then mis-directed the funds obtained towards repayment of personal debts and the purchase of race horses.<sup>169</sup> His firm received approximately \$86,593 in commissions for arranging these fictitious loans.<sup>170</sup> In the Victorian County Court Mr Howarth pleaded guilty to four counts of obtaining financial advantage by deception under s 82 of the *Crimes Act* 1958 (Vic). In imposing a suspended sentence, and noting that all loans had been fully repaid, the County Court judge was satisfied that Mr Howarth was unlikely to re-offend.<sup>171</sup>

However different considerations applied at the Tribunal hearing. Whilst noting no clients had lost money through his misconduct Deputy President Forgie was concerned by Mr Howarth’s concession during that if his practices had not been discovered, he would have continued his fraudulent arranging of such loans.<sup>172</sup> Given the elements of dishonesty in the offences for which he was convicted, Forgie

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<sup>166</sup> *O’Sullivan and ASIC* [2017] AATA 644 at [737] – [747]

<sup>167</sup> *Sweeney and ASIC* [2017] AATA 2182 at [172] – [192]

<sup>168</sup> *Seymour and ASIC* [2017] AATA 2581 at [208] – [237]

<sup>169</sup> *Howarth and ASIC* [2008] AATA 278 at [67]

<sup>170</sup> ASIC Media Release 06-181 ‘ASIC bans Victorian insurance representative for life’ (5 June 2006)

<sup>171</sup> *Howarth and ASIC* [2008] AATA 278 at [18] – [27]

<sup>172</sup> *Howarth and ASIC* [2008] AATA 278 at [70], [85], [89]. In cross-examination during the tribunal hearing, in response to the question ‘Were you aware that this was illegal?’, Mr Howarth had responded ‘I wasn’t aware that it was illegal. I was aware that it was probably on the grey -- on the grey edges of what was being done’

DP agreed that s 920A(1)(c) justified Mr Howarth's banning.<sup>173</sup> She concluded ASIC's permanent ban was justified given Mr Howarth's deliberate making of false statements when arranging the loans;<sup>174</sup> his claims that the financiers' forms and practices enabled him to take advantage of them;<sup>175</sup> and his dismissal of the seriousness of his misconduct by emphasising all loans had been repaid.<sup>176</sup> Forgive DP rejected Mr Howarth's proposed enforceable undertaking for twice-yearly audits of his business and his compliance with financial services laws, which she considered would not adequately protect the public, nor uphold public confidence in the ethical operation of the financial services industry.<sup>177</sup>

In two cases involving finance brokers the Tribunals affirmed permanent bans imposed under s 920A(1)(c) as well as the parallel bans imposed under s 80(1)(c) of the NCCP Act. Firstly in *Sahay and ASIC* [2016] AATA 583 a finance broker had been convicted by the NSW Local Court on three counts of making false statements and using false documents for home loan applications, and was sentenced to 350 hours of community service. The total amounts of these home loans was over \$7 million, with Mr Sahay's company receiving over \$5,000 in commissions for arranging these.<sup>178</sup> Constance DP reasoned that whilst the sentencing magistrate had assessed Mr Sahay's misconduct at the lower end of the scale of criminal seriousness, the different considerations of protecting the public and deterring others from such conduct applied to the Tribunal's considerations.<sup>179</sup> He noted Mr Sahay's misconduct had been deliberate and repeated, continuing until his fraud was discovered by authorities; that it had breached the trust placed in him both by his clients and by lenders; and that as an experienced operator in the credit industry, he ought to have known better.<sup>180</sup>

Secondly in *JSKN and ASIC* [2017] AATA 818 a mortgage broker had been convicted on eight counts of contravening s 160D(2) of the NCCP Act through her actions in falsifying letters about the employment status of several of her self-employed clients. She submitted these falsified letters to Westpac to support mortgage applications by her clients totalling over \$1.6 million - from which she received over \$6,000 in commissions.<sup>181</sup> Senior Member Tavoularis held that whilst the Magistrate had

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<sup>173</sup> *Howarth and ASIC* [2008] AATA 278 at [128] – [129]

<sup>174</sup> *Howarth and ASIC* [2008] AATA 278 at [188]

<sup>175</sup> *Howarth and ASIC* [2008] AATA 278 at [189] – [191]

<sup>176</sup> *Howarth and ASIC* [2008] AATA 278 at [192]

<sup>177</sup> *Howarth and ASIC* [2008] AATA 278 at [106] – [109]; [193] – [194]; [201]. More recent examples of permanent bans arising from fraud convictions that were affirmed by the AAT include *Wittensleger and ASIC* [2015] AATA 902 (where an accountant had been convicted and sentenced to eight years imprisonment for 86 counts of gaining a financial benefit by fraud for his role in creating false applications for insurance premiums); and *Chapple and ASIC* [2016] AATA 1032 (where an insurance broker had been convicted on four counts of obtaining a financial advantage by deception for his actions in invoicing clients for fees they were already paying to their insurance broking firm)

<sup>178</sup> *Sahay and ASIC* [2016] AATA 583 at [1] – [13]

<sup>179</sup> *Sahay and ASIC* [2016] AATA 583 at [35]

<sup>180</sup> *Sahay and ASIC* [2016] AATA 583 at [37] – [40]

<sup>181</sup> *JSKN and ASIC* [2017] AATA 818 at [4] – [12]

imposed a fine of \$8,500, the actual penalty imposed was of no relevance to the definition of ‘serious fraud’ under s 5 of the NCCP Act and s 9 of the *Corporations Act 2001* (which both define ‘serious fraud’ to mean offences involving fraud or dishonesty which are punishable for a period of at least three months). Rather he clarified that it need only be demonstrated that each of the offences for which the mortgage broker had been convicted *carried* a possible penalty of imprisonment for a period in excess of three months.<sup>182</sup> In finding her misconduct involved several of the factors listed in Table 2 of RG 98 (and Table 2 of RG 218) justifying lengthy bans, the Tribunal affirmed ASIC’s permanent bans.

### **C. Protecting consumers from serious and/or repeated breaches of financial advice standards**

In contrast to the cases involving breaches of financial advice standards reviewed in Part III, in the cases discussed below the Tribunals concurred with ASIC’s determinations about the seriousness and effect of the financial advice breaches. Themes in these decisions include the seriousness and repeated nature of the breaches over lengthy periods; the failure to disclose potential conflicts of interest; losses by affected clients; the lack of contrition by the applicants; the disdain for compliance with financial advice laws; the importance of general deterrence and the upholding of professional standards.

A number of serious breaches of financial advice standards were considered in *Fuoco and ASIC* (2010) 117 ALD 659; [2010] AATA 739 where Deputy President McDonald affirmed ASIC’s five year banning of an authorised representative of the financial advisory firm Elite Equities. Mr Fuoco had advised his clients to invest in the Dollarforce Fixed Interest Program (for which he had previously been a commission-based salesperson<sup>183</sup>) and the Ivory Property Trust – unregistered property investment schemes that were wound up by ASIC in 2009 after improperly raising over \$45 million from the public.<sup>184</sup> ASIC found Mr Fuoco had failed to properly investigate his clients’ financial circumstances; and the suitability of the products he recommended (several of which were not on his firm’s Recommended Products List); failed to provide accurate or timely SOAs; that he had breached s 947C(2)(e) in failing to properly disclose the commission payments he would receive for promoting the Dollarforce investments; and that he had pressured several clients to invest.<sup>185</sup> McDonald DP found all these breaches to be substantiated, and found Mr Fuoco’s provision of financial advice to fall well short of the former s 945A requirements.

Whilst noting Mr Fuoco had established his own successful financial advisory business since leaving Dollarforce which employed several staff, his references from satisfied clients, and that he had a dependent infant daughter, the Tribunal considered these factors did not outweigh his responsibilities

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<sup>182</sup> *JSKN and ASIC* [2017] AATA 818 at [16] – [32]

<sup>183</sup> *Fuoco and ASIC* [2010] AATA 739 at [8] – [16]

<sup>184</sup> ASIC Media Release 10-06AD ‘Victorian man banned from providing financial services’ (14 January 2010)

<sup>185</sup> *Fuoco and ASIC* [2010] AATA 739 at [5]; [26] – [28]; [46] – [47]; [78]

as an Authorised Representative when advising retail clients. McDonald DP also rejected Mr Fuoco's claims of being pressured to sell to his former clients; and also his attempts to attribute his breaches to his former employer's failure to supervise him or have adequate compliance arrangements in place.<sup>186</sup> Whilst assessing the likelihood of future breaches by Mr Fuoco to be low, the Tribunal nevertheless emphasised the importance of general deterrence as a significant factor in the imposition of a banning order.<sup>187</sup> McDonald DP rejected Mr Fuoco's proposed enforceable undertaking for regular audits of his business over a two year period as not adequately protecting the investing public.<sup>188</sup> In affirming ASIC's five year ban, Deputy President McDonald dismissed ASIC's argument for a higher ban of ten years, considering such an increase would be excessive and amount to a punishment of Mr Fuoco.<sup>189</sup>

Numerous breaches of financial services laws were considered by the Tribunal in *Nguyen and ASIC* [2012] AATA 156, where Senior Member Ettinger affirmed ASIC's seven year banning of Mr Don Nguyen, a former financial advisor with Commonwealth Financial Planning (CFP) within the Commonwealth Bank of Australia (CBA) between 1999 and 2009. It has been widely acknowledged that media and public reaction to Mr Nguyen's misconduct, which caused significant losses to his clients, was a major factor in prompting the 2014 Senate inquiry into the performance of ASIC.<sup>190</sup> SM Ettinger concurred with ASIC's finding that Mr Nguyen had failed to have a reasonable basis for his advice, or to warn that his advice was based on incomplete information (in breach of the former ss 945A and 945B); that he failed to provide SOAs and Product Disclosure Statements; and that through making false or misleading statements (including the expected returns of investments, and convincing risk-averse clients to invest using margin loans), he breached ss 1041E, 1041F and 1041H.<sup>191</sup>

The Tribunal noted with concern Mr Nguyen's attribution of his predicament to the Global Financial Crisis and the lack of training and supervision he received from CFP, and his denial that he had breached financial services laws.<sup>192</sup> Mindful of the importance of specific and general deterrence and of upholding public confidence in the financial advisory profession, the Tribunal determined Mr Nguyen's

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<sup>186</sup> *Fuoco and ASIC* [2010] AATA 739 at [67] – [73]; [85]

<sup>187</sup> *Fuoco and ASIC* [2010] AATA 739 at [82]

<sup>188</sup> *Fuoco and ASIC* [2010] AATA 739 at [86] – [87]

<sup>189</sup> *Fuoco and ASIC* [2010] AATA 739 at [88]. For other examples of serious breaches of financial advice standards, see for example *Franke and ASIC* [2008] AATA 83 (where the Tribunal affirmed the two year banning of a financial adviser who had failed to adequately disclose the remuneration and commissions he would receive for arranging insurance for his clients); *Turner and ASIC* [2009] AATA 417 (where the Tribunal affirmed ASIC's six year ban issued to a financial adviser who had failed to disclose his interests in a managed investment scheme he was promoting to his clients); and *Chong and ASIC* [2016] AATA 338 (where the Tribunal affirmed the five year banning of a financial adviser who inappropriately recommended high risk products to risk-averse clients, and who cut and pasted the signature of two clients onto an "Authority to Proceed" form)

<sup>190</sup> Senate Economics Reference Committee 'Performance of the Australian Securities and Investments Commission' June 2014; 109 – 124

<sup>191</sup> *Nguyen and ASIC* [2012] AATA 156 at [88] – [89]; [95]; [130] – [136]; [157]

<sup>192</sup> *Nguyen and ASIC* [2012] AATA 156 at [14] – [16]; [146]

conduct reflected the RG 98 criteria justifying a banning in the range of three to ten years. This included his false and misleading conduct being inconsistent with the orderly operation of a financial market (thus undermining public confidence); the significant losses of his clients; his past and current disregard for compliance with the law (including the failure to maintain appropriate records); his failure to have a reasonable basis for his advice to clients; and his failure to disclose his receipt of commissions and other benefits, and relevant interests and associations.<sup>193</sup> In addition to finding s 920A(1)(e) to be enlivened through these numerous breaches, SM Ettinger also found Mr Nguyen's pattern of conduct justified a ban under s 920A(1)(f) – holding that it was not necessary for the Tribunal to be satisfied that Mr Nguyen *would breach* a financial services law in the future.<sup>194</sup>

As noted previously in Part III, the collapse of Trio Capital in 2009 resulted in the loss of over \$176 million from Australian superannuation funds, with ASIC taking enforcement action against a range of advisors who promoted investment into funds controlled by Trio Capital.<sup>195</sup> In the two cases below the Tribunal affirmed two s 920A bans made against financial advisors whose clients had sustained major losses through their investments in Trio-controlled funds.

First, in *Caines and ASIC* [2012] AATA 289, the Tribunal affirmed the five year banning order against a financial advisor, after an earlier tribunal hearing in 2011 had varied the ban to three years.<sup>196</sup> ASIC had found that Mr Caines had advised eight of his clients to invest amounts totalling around \$1 million in Trio-controlled Astarra Capital, without disclosing to his clients that he (together with his wife and one of his companies) had received loans totalling over \$500,000 from a director of Astarra Capital, thus breaching s 947C. The ASIC delegate also noted Mr Caines had become bankrupt after the failure of a property development, thereby also enlivening s 920A(1)(bb) as a basis for a banning order. Whilst imposing a permanent ban due to his bankruptcy, the delegate informed Mr Caines of his right to apply under s 920D to vary the ban upon his discharge from bankruptcy. However when Mr Caines applied for a variation to his permanent ban in 2010 upon his discharge from bankruptcy, the delegate determined a five year ban to be appropriate.<sup>197</sup>

At the 2011 Tribunal hearing, Mr Caines submitted that given his otherwise unblemished record, the five year ban had adversely impacted upon his professional prospects at his age of 58 and his ability to support his two dependent children. He also claimed to have originally considered the \$500,000 loan from the director of Astarra Capital to be a personal loan which did not influence his advice to clients;

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<sup>193</sup> *Nguyen and ASIC* [2012] AATA 156 at [150]

<sup>194</sup> *Nguyen and ASIC* [2012] AATA 156 at [158] – [159]

<sup>195</sup> ASIC 'Key matters – Trio and Astarra' <http://www.asic.gov.au/about-asic/media-centre/key-matters/trio-and-astarra/>

<sup>196</sup> *Caines and ASIC* [2011] AATA 169

<sup>197</sup> *Caines and ASIC* [2011] AATA 169 at [2] – [8]

but conceded during the 2011 Tribunal hearing that in hindsight it ought to have been disclosed. After referring to RG 98 and noting his lack of previous contraventions; that the ASIC delegate did not find any dishonesty or intention to defraud; and Mr Caines' evidence of acquainting himself with relevant legislation and ASIC regulatory guidance,<sup>198</sup> Deputy President Handley varied ASIC's ban to three years, and also accepted an enforceable undertaking requiring Mr Caines to complete an ASIC-approved professional education course and be subject to closer supervision by any new employers.<sup>199</sup>

However these orders were set aside by the FCA, which remitted the matter back to the AAT for re-hearing.<sup>200</sup> At the 2012 Tribunal hearing, Senior Member Letcher found no significant changes to warrant a variation of ASIC's five year ban..<sup>201</sup>

Secondly, in *Tarrant and ASIC* [2013] AATA 926; (2013) 62 AAR 192, ASIC had imposed a seven year ban against a financial advisor who had invested more than \$23 million on behalf of his clients in the Trio-controlled Astarra Strategic Fund (ASF). ASIC had found that Mr Tarrant's promotion of investment in the ASF to his clients, involved numerous serious breaches. These included his failure to have a reasonable basis for his advice to eight clients who lacked financial literacy and had a conservative financial risk profile, but whom he convinced to take out significant margin loans and to set up Self-Managed Superannuation Funds to invest in the ASF (in breach of the former s 945A); his failure to disclose that he would receive a marketing allowance (totalling over \$1 million) for investing clients' monies in the ASF (in breach of ss 947B and 947C); and making false or misleading statements to clients about the remuneration and benefits he would receive (in breach of ss 1041E and 1041H).<sup>202</sup> The Tribunal found these breaches to have been established in over 40 instances,<sup>203</sup> and also noted with concern evidence from a former employee that Mr Tarrant had instructed his client advisors to 'Stress the need to educate the client and make them understand the concept of margin lending and how it can help build their strategy', and that he had also emphasised to his staff that clients could be changed from an 'assertive' to an 'aggressive' risk profile as they became 'more educated'.<sup>204</sup>

In dismissing Mr Tarrant's arguments that the failings of regulators, auditors and other market participants to identify and intervene in the fraudulent operation of the ASF negated his obligations under the former s 945A of the Act, the Tribunal reasoned that whilst he was not on notice of the Trio Capital fraud, the high risk nature of the ASF ought to have been apparent to a prudent financial

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<sup>198</sup> *Caines and ASIC* [2011] AATA 169 at [40] – [42]

<sup>199</sup> *Caines and ASIC* [2011] AATA 169 at [43]

<sup>200</sup> *Caines and ASIC* [2012] AATA 289 at [10]

<sup>201</sup> *Caines and ASIC* [2012] AATA 289 at [60] – [61]

<sup>202</sup> *Tarrant and ASIC* (2013) 62 AAR 192; [2013] AATA 926 at [23] – [31];

<sup>203</sup> *Tarrant and ASIC* (2013) 62 AAR 192; [2013] AATA 926 at [376]

<sup>204</sup> *Tarrant and ASIC* (2013) 62 AAR 192; [2013] AATA 926 at [325] – [328]

advisor.<sup>205</sup> The Tribunal determined that 12 of the 15 factors identified by Santow J in *Adler* (2002) applied in Mr Tarrant's case – noting that whilst not deliberately dishonest, he had been both incompetent and negligent. In concluding these breaches to have been serious, repeated and causing large losses to the retirement savings of investors, and Mr Tarrant had shown no contrition for his misconduct, the Tribunal concluded ASIC's seven year ban was warranted to protect the public from such misconduct.<sup>206</sup>

The Full Federal Court considered but dismissed Mr Tarrant's appeal against the Tribunal's determination. Rares, Yates and Griffiths JJ held that Mr Tarrant had not identified any legal errors in the Tribunal's reasoning – in particular noting that the Tribunal had been justified in applying Santow J's 15 propositions from *Adler* (2002)<sup>207</sup> relating to the determination of the length and banning and disqualification orders;<sup>208</sup> and that in its inquisitorial function, the Tribunal had been justified in asking its own questions of the various witnesses that gave evidence at the various hearings.<sup>209</sup>

#### **D. Deterring insider trading**

Three AAT cases affirmed s 920A banning orders imposed for insider trading. In two related cases, the Tribunals considered banning orders imposed against stockbrokers whom ASIC alleged to have been involved in insider trading, pending the criminal prosecution of the individuals. Both cases concerned trading in listed healthcare company Vision Systems Ltd (VSL), before VSL entered into a confidentiality agreement with US-based Ventana Medical Systems Inc to undertake due diligence with a view to a making a takeover offer.

In the first case, *McKenzie and ASIC* [2009] AATA 1003, Deputy President McDonald affirmed the three year banning of stockbroker Mr Mark McKenzie,<sup>210</sup> whom ASIC alleged to have procured others to acquire VSL securities based on inside information he obtained from colleagues and other contacts in the stockbroking industry, in contravention of s 1043A(1)(d). In noting the Tribunal's role as standing in the place of the ASIC delegate as the original decision-maker to determine the correct or preferable decision (where neither party bore the onus of proof), McDonald DP reasoned that it would be impracticable to expect an ASIC delegate to call expert evidence (as a court would do) to an administrative hearing to determine the imposition of a banning order.<sup>211</sup> After accepting ASIC's

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<sup>205</sup> *Tarrant and ASIC* (2013) 62 AAR 192; [2013] AATA 926 at [359]

<sup>206</sup> *Tarrant and ASIC* (2013) 62 AAR 192; [2013] AATA 926 at [385] – [387]

<sup>207</sup> *ASIC v Adler* (2002) 42 ACSR 80; (2002) 20 ACLC 1146; [2002] NSWSC 483

<sup>208</sup> *Tarrant v ASIC* (2015) 317 ALR 328; (2015) 104 ACSR 275; [2015] FCAFC 8 at [114] – [120]

<sup>209</sup> *Tarrant v ASIC* (2015) 317 ALR 328; (2015) 104 ACSR 275; [2015] FCAFC 8 at [135] – [137]

<sup>210</sup> As a result of confidentiality orders made by the Tribunal on 14 August 2009 (TNST and ASIC [2009] AATA 602), Mr McKenzie was referred to by the codename "TNST". However in these proceedings, Deputy President McDonald directed that these confidentiality orders would expire 28 days after 18 December 2009

<sup>211</sup> *McKenzie and ASIC* [2009] AATA 1003 at [39] – [40]



evidence that no research or media reports had mentioned the possibility of VSL being a takeover target around the time of the relevant trading, McDonald DP dismissed Mr McKenzie's claim that his purchases of VSL shares were prompted by 'generally circulating feelings in the market'.<sup>212</sup> McDonald DP held that as an experienced stockbroker, Mr McKenzie ought to have been aware of the prohibition against insider trading.<sup>213</sup> Whilst noting that Mr McKenzie (aged 39) had a young family to support, and his otherwise unblemished professional record, after considering the RG 98 guidelines he concluded the misconduct undermined public confidence in the integrity of financial markets, and that the importance of protecting the public, warranted the three year ban.<sup>214</sup> Several months after the Tribunal hearing, Mr McKenzie was charged with insider trading offences.<sup>215</sup>

In the second case, *YFFM and ASIC* [2010] AATA 340, Senior Member Penglis affirmed ASIC's five year banning of a stockbroker whom ASIC alleged to have communicated rumours about Ventana's possible bid before this information was generally available. After considering ASIC's evidence (including transcripts of recorded phone conversations), the Tribunal found the breach of s 1043A to be substantiated.<sup>216</sup> SM Penglis rejected YFFM's contention that the elements of the alleged breach of s 1043A were not sufficiently particularised by ASIC's evidence, noting that neither ASIC's delegate nor the Tribunal were bound by the laws on the particularisation of evidence for criminal prosecutions.<sup>217</sup> Whilst acknowledging the hardship the ban would cause YFFM,<sup>218</sup> in distinguishing his earlier decision in *Dollas-Ford and ASIC* [2006] AATA 704, SM Penglis noted the serious transgressions were not 'one-offs'; that YFFM had not shown contrition nor accepted responsibility for his misconduct; and that the public interest in market integrity prevailed over YFFM's personal interests.<sup>219</sup> YFFM's appeal to the FCA was dismissed – with Barker J holding that the Tribunal had not improperly imposed an onus upon YFFM to establish the existence of market rumours or speculation around the time of his trading in VSL shares. This meant he had not established a question of law for the court's determination under s 44(1) of the *AAT Act* 1975 (Cth).<sup>220</sup>

More recently, Deputy President Deutsch adopted a similar approach in *Batros and ASIC* [2017] AATA 399. ASIC's delegate had determined that Mr Batros (a private client adviser) had breached s 1043A(1)(c) through placing orders on behalf of clients to sell shares and options in the listed company Metals of Africa Ltd (MTA) whilst he had been in possession of inside information about MTA's

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<sup>212</sup> *McKenzie and ASIC* [2009] AATA 1003 at [35]

<sup>213</sup> *McKenzie and ASIC* [2009] AATA 1003 at [52]

<sup>214</sup> *McKenzie and ASIC* [2009] AATA 1003 at [53] – [54]

<sup>215</sup> ASIC Media Release 10-191AD 'Melbourne broker charged with insider trading' (14 September 2010)

<sup>216</sup> *YFFM and ASIC* [2010] AATA 340 at [59] – [84]

<sup>217</sup> *YFFM and ASIC* [2010] AATA 340 at [72]

<sup>218</sup> *YFFM and ASIC* [2010] AATA 340 at [88]

<sup>219</sup> *YFFM and ASIC* [2010] AATA 340 at [94] – [99]

<sup>220</sup> *Catena v ASIC (No 2)* [2010] FCA 865 at [56] – [73]; appeal dismissed: *Catena v ASIC* [2011] FCAFC 32

intention to conduct a \$5 million capital raising. In finding the s 1043A(1)(c) breaches to be substantiated,<sup>221</sup> Deutsch DP rejected Mr Batros' submission that by acting on an "execution only" basis and not providing any advice, he was a "mere cypher" for the trading in the MTA shares.<sup>222</sup> After also concluding that Mr Batros had consciously ignored instructions from senior personnel within his firm not to trade in MTA securities, and that he had neither acknowledged his misconduct nor expressed contrition, the Tribunal affirmed ASIC's five year ban.<sup>223</sup>

### **E. Deterring market manipulation**

The maintenance of market integrity was a primary concern in *Klusman and ASIC* [2011] AATA 150, (2011) 122 ALD 187, where the Tribunal affirmed ASIC's three year banning of a stockbroker. In the latter part of 2008 Aequs Securities (where Mr Klusman served as Head of Institutional Dealing), had been engaged by Regional Express Ltd (Rex) to facilitate its on-market buy-back.<sup>224</sup> ASIC's investigation found that during December 2008, Mr Klusman placed bids and asks on the ASX which resulted in him buying parcels of Rex shares for his relatives, and then on-selling those parcels of shares to Rex at higher prices. ASIC determined this trading to breach 1041A (through creating an artificial price) and s 1041B (through creating a false or misleading appearance of active trading) in respect of Rex's securities. Senior Member Ettinger agreed with ASIC's characterization of these breaches, accepting that Mr Klusman had been the dominant trader in the market to set ask and bid prices for Rex, which was a thinly-traded stock at the time.<sup>225</sup> SM Ettinger also agreed with ASIC's contention that in mid-September 2008, Mr Klusman had breached s 1041H through circulating a rumour to stockbroking personnel at his firm that Macquarie Bank was about to announce a rights issue and encouraging those present to sell the stock. During the Tribunal hearing Mr Klusman conceded that the information he had provided to ASIC during his examination under s 19 of the ASIC Act 2001 about hearing this rumour on his car radio that morning had been incorrect – with ASIC's investigation having found no evidence of such news reports.<sup>226</sup> During the Global Financial Crisis around this time, ASIC regarded the spreading of false market rumours with particular concern given the potential effect of such actions on investor confidence and market integrity, and implemented extensive surveillance measures to deter such conduct.<sup>227</sup> After considering RG 98, the Tribunal acknowledged Mr Klusman's 32 year otherwise unblemished career, his character references and that the ban would cause him hardship. However of greater concern was that Mr Klusman's breaches were multiple and serious, and that he had failed to

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<sup>221</sup> *Batros and ASIC* [2017] AATA 399 at [155]

<sup>222</sup> *Batros and ASIC* [2017] AATA 399 at [133] – [144]

<sup>223</sup> *Batros and ASIC* [2017] AATA 399 at [156] – [164]

<sup>224</sup> *Klusman and ASIC* (2011) 122 ALD 187; [2011] AATA 150 at [21]

<sup>225</sup> *Klusman and ASIC* (2011) 122 ALD 187; [2011] AATA 150 at [108] – [121]

<sup>226</sup> *Klusman and ASIC* (2011) 122 ALD 187; [2011] AATA 150 at [26] – [49]

<sup>227</sup> See for instance ASIC Media Release 08-47 'False or misleading rumours' (6 March 2008); ASIC Media Release 08-202 'Enquiries into market manipulation' (17 September 2008); ASIC Media Release 09-175AD 'ASIC releases responsible rumour handling proposals' (15 September 2009); and ASIC Media Release 10-99AD 'Market update on confidential information and rumours (11 May 2010)

realise the conflicts in trading on behalf of his relatives. In affirming ASIC's ban SM Ettinger distinguished the earlier Tribunal decision in *Lelliott and ASIC* [2009] AATA 110 – where Mr Lelliott had conceded his misconduct and impressed the Tribunal that he had learned from his mistakes.<sup>228</sup>

In *Bond and ASIC* (2009) 108 ALD 187; [2009] AATA 50 Deputy President Hack initially set aside ASIC's five year banning of a financial advisor. In late 2007 Mr Bond placed a sell order for 300,000 units in the thinly-traded Prime Retirement and Aged Care Property Trust (PTN) on his own behalf at \$1.00. He then placed a buy order on behalf of several clients for 2.5 million PTN units, gradually increasing his offer price for parcels of shares from \$0.89 until he acquired a final parcel at \$1.01.<sup>229</sup> ASIC determined this trading had created an artificial price for PTN's securities in breach of s 1041A.<sup>230</sup>

However Hack DP concluded that as the trades were made at prices reflecting the prevailing forces of genuine supply and genuine demand, there was nothing 'artificial' about the trading prices merely because they exceeded the prices paid by other purchasers before and after the purchases by Mr Bond.<sup>231</sup> Whilst characterising Mr Bond's trading on his own behalf as 'discreditable' through not avoiding conflicts between his own trading interests and those of his clients, he was not satisfied that Mr Bond would 'not comply' with a financial services law in the future according to the pre-2012 wording of s 920A(1)(f). Determining Mr Bond had learnt from his experiences, he set aside ASIC's ban.<sup>232</sup>

The Tribunal's interpretation of s 1041A was overruled in *ASIC v AAT; ASIC v Bond* (2010) 187 FCR 334; (2010) 271 ALR 593 [2010] FCA 807, where Dowsett J emphasised that s 1041A did not invite considerations of intention – but focused more broadly on market transactions between parties who were not genuine buyers and sellers seeking the most favourable price.<sup>233</sup> Consequently, His Honour J held that the Tribunal erred in concluding that Mr Bond's sale of his own shares was irrelevant to its consideration of the effect or likely effect of the transactions involving PTN shares.<sup>234</sup> Dowsett J also reasoned that for a banning order to be warranted, it was not necessary for ASIC or the Tribunal be satisfied that Mr Bond would in the future, breach a financial services law; but rather that the relevant decision-maker needed to have reason to believe that he would do so. The matter was remitted back to the Tribunal for further re-determination,<sup>235</sup> which affirmed ASIC's five year banning order.<sup>236</sup>

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<sup>228</sup> *Klusman and ASIC* (2011) 122 ALD 187; [2011] AATA 150 at [123] – [139]

<sup>229</sup> *Bond and ASIC* (2009) 108 ALD 187; [2009] AATA 50 at [1] – [18]

<sup>230</sup> *Bond and ASIC* (2009) 108 ALD 187; [2009] AATA 50 at [3], [19] – [20], [21] – [23]

<sup>231</sup> *Bond and ASIC* (2009) 108 ALD 187; [2009] AATA 50 at [37] – [41]

<sup>232</sup> *Bond and ASIC* (2009) 108 ALD 187; [2009] AATA 50 at [48]

<sup>233</sup> *ASIC v AAT; ASIC v Bond* [2010] FCA 807 at [47] – [49]

<sup>234</sup> *ASIC v AAT; ASIC v Bond* [2010] FCA 807 at [50]

<sup>235</sup> *ASIC v AAT; ASIC v Bond* [2010] FCA 807 at [51]

<sup>236</sup> ASIC Media Release 10-169AD 'Federal Court upholds ASIC's appeal' 2 August 2010

The definitional parameters of the term ‘financial products’ were tested in *Davidof and ASIC* [2017] AATA 37, where the Tribunal initially set aside ASIC’s three year banning of a former private client adviser with Macquarie Bank. The ASIC delegate determined that Mr Davidof had breached ss 1041A and 1041B through six transactions involving MINI warrants, which had been traded on the ASX. In February and June of 2013, Mr Davidof took part in back-to-back buy and sell trades in MINI warrants on the ASX with Mr Phillip McLean, a former senior equities trader Credit Suisse after the pair had pre-arranged the price, volume and approximate timing of the trade. On each occasion, in the preceding days, Mr McLean had traded SPI Futures on behalf of Mr Davidof resulting in a loss (in February) and a profit (in June) for Mr Davidof. ASIC found that the prices at which Messrs Davidof and McLean arranged to trade the MINI warrants were designed to transfer the profit/loss from all the preceding trading, without reflecting the SPI Futures that were actually traded. ASIC determined this trading was likely to have the effect of creating an artificial price for trading in the affected MINI warrants on ASX.<sup>237</sup> ASIC also imposed a three year ban against Mr McLean.<sup>238</sup>

In setting aside ASIC’s ban, Senior Member Kelly held that MINI warrants were not ‘derivatives’ within the meaning of s 761D(1)(b) (which requires that future consideration provided for a derivative transaction arrangement must not be paid before the time period prescribed by the regulations) and reg 7.1.04 (which prescribes the time period as one business day). Noting that the MINI warrants did not have a set expiry date, SM Kelly concluded that as the MINI warrants were not ‘financial products’ pursuant to s 765A(1)(c), meaning that Mr Davidof’s trading did not breach ss 1041A or 1041B.<sup>239</sup>

However ASIC successfully appealed this determination in the FCA.<sup>240</sup> In setting aside the Tribunal’s decision, Lee J took account of the High Court’s characterisation of the broad and inclusive definitional character of Chapter 7 of the Act in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)*.<sup>241</sup> Applying this reasoning, His Honour emphasised the disjunctive wording of ‘must, or may be required to’ in s 761D(1)(a)<sup>242</sup> and that the regulations provided for the provision of consideration at a future time which may be less than one business day after the arrangement is entered into,<sup>243</sup> to conclude that the MINI warrants were ‘derivatives’ within the

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<sup>237</sup> ASIC Media Release 15-398MR ‘ASIC bans former financial adviser for market manipulation’ (18 December 2015)

<sup>238</sup> ASIC Media Release 17-425MR ‘AAT upholds ASIC bans of client advisers trading in ‘MINI’ warrants (11 December 2017)

<sup>239</sup> *Davidof and ASIC* [2017] AATA 37 at [26] – [27]

<sup>240</sup> *ASIC v Davidof* [2017] FCA 658

<sup>241</sup> *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455 at 459 per French CJ, Gummow, Crennan and Bell JJ: *ASIC v Davidof* [2017] FCA 658 at [4]. For commentary on this decision, see Mark Schneider ‘High Court decision: *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)*’ (2012) 28 *Australian Banking and Finance Law Bulletin* 86

<sup>242</sup> *ASIC v Davidof* [2017] FCA 658 at [23]

<sup>243</sup> *ASIC v Davidof* [2017] FCA 658 at [26]

meaning of s 761D, and remitted the matter back to the Tribunal for re-determination. In two related decisions delivered on the same day, the Tribunal affirmed the bans imposed on Messrs Davidof<sup>244</sup> and McLean.<sup>245</sup> Deputy President Rayment agreed with ASIC's view that the trading in MINI warrants breached s 1041A.<sup>246</sup> He rejected Mr McLean's proposal to substitute the three year ban with a three year enforceable undertaking to avoid involvement in trading and/or market making, and his submission that he had lacked training for his trading role. In also dismissing Mr McLean's submission that the three year ban would cause him personal financial hardship, Rayment DP emphasised the importance of deterring similar misconduct in the future and maintaining investor confidence in financial markets.<sup>247</sup>

#### **F. Non-compliance with Managed Investment Scheme laws**

One Tribunal case involved the consideration of numerous breaches of the Act relating to the operation of managed investment schemes. *Hickie and ASIC* [2013] AATA 853 Senior Member Fice affirmed ASIC's two year banning of the former CEO of Lion Advantage (Lion), the responsible entity of four managed investment schemes. ASIC had also cancelled Lion's AFS licence.<sup>248</sup> SM Fice dismissed Mr Hickie's attribution of his failures to lodge financial reports for the schemes with ASIC within the stipulated timeframes on advice he claimed to have received from Lion's auditor, although he was unable to produce any evidence of such advice.<sup>249</sup> He also rejected Mr Hickie's attribution of these delays to property damage from the 2011 Brisbane floods – noting that the time of these floods Lion's 2009 financial reports were already 15 months late, and the 2010 financial reports were three months late.<sup>250</sup> Rather, he determined the reason for Lion's failure to have its financial reports completed, audited and lodged on time to be Mr Hickie's desire to avoid qualified reports from Lion's auditor; and also noted Mr Hickie had only belatedly lodged compliance plan audits following numerous requests from ASIC.<sup>251</sup> The Tribunal also dismissed Mr Hickie's explanation that Lion's failure to hold the required professional indemnity insurances as required by its AFS Licence resulted from rejections by insurers – which he again could not substantiate through his evidence.<sup>252</sup> The Tribunal noted with concern that Lion's membership of an ASIC-approved External Dispute Resolution scheme as required

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<sup>244</sup> *Davidof and ASIC* [2017] AATA 2594

<sup>245</sup> *McLean and ASIC* [2017] AATA 2566

<sup>246</sup> *McLean and ASIC* [2017] AATA 2566 at [27] – [39]; *Davidof and ASIC* [2017] AATA 2594 at [16]. See also ASIC Media Release 17-425MR 'AAT upholds ASIC bans of client advisers trading in 'MINI' warrants (11 December 2017)

<sup>247</sup> *McLean and ASIC* [2017] AATA 2566 at [41] – [61]

<sup>248</sup> ASIC Media Release 12-199MR 'ASIC cancels licence of Lion Advantage and bans CEO' (19 August 2012)

<sup>249</sup> *Hickie and ASIC* [2013] AATA 853 at [96] – [98]

<sup>250</sup> *Hickie and ASIC* [2013] AATA 853 at [104]

<sup>251</sup> *Hickie and ASIC* [2013] AATA 853 at [112], [130]

<sup>252</sup> *Hickie and ASIC* [2013] AATA 853 at [48]

under its AFS Licence had lapsed due to Lion's failure to pay membership fees.<sup>253</sup> The multitude of these breaches led SM Fice to conclude that:

'... it is far simpler to add up the number of times which Lion did comply with its statutory obligations. Between 2005 and 2012, Lion complied with its statutory lodgement obligations on two occasions. It is fair to say, that over that eight year period, compliance was a rare event. Furthermore, the delays themselves were often lengthy, some exceeding two years and many exceeding 12 months. A number of documents were not lodged at all'.<sup>254</sup>

After considering the guidelines in RG 98, SM Fice concluded that whilst there was only minimal detriment to Lion's investors from Mr Hickie's breaches, the need for specific and general deterrence justified ASIC's two year ban.

### **G. Impact of personal bankruptcy**

An interesting set of circumstances confronted the Tribunal in *Vissenjoux and ASIC* [2015] AATA 98. From 2010 to 2013 Mr Vissenjoux had been an Authorised Representative of an AFS Licensee, until he was prohibited under s 920A(1)(bb) by virtue of a sequestration order against his estate following the failure of his home construction business. This business collapsed owing \$994,940 to 43 creditors (including \$185,096 to the ATO), and with other creditors including tradespersons and suppliers.<sup>255</sup> In affirming ASIC's three year ban, SM Handley noted the consumer protection focus of Australia's financial services laws.<sup>256</sup> Whilst acknowledging that Mr Vissenjoux had experienced several personal problems issues shortly before his bankruptcy, and that he had worked in the financial services industry for 14 years without complaints,<sup>257</sup> the Tribunal expressed serious concerns about his management of his other businesses – including using a single bank account for both his construction and financial services businesses, and his failure to lodge personal or business tax returns for six years before his bankruptcy.<sup>258</sup> Another concern was his failure to appreciate the relevance of his bankruptcy to his ability to provide financial services – for instance during the Tribunal hearing he stated that: '... it just so happens in financial services, being bankrupt doesn't look as good. But so long as I'm not bankrupt for fraudulent reasons, I believe there's no issue'.<sup>259</sup> In determining that Mr Vissenjoux had exhibited a disregard for his legal obligations for both his previous businesses, SM Handley concluded that public trust in the financial services industry would be undermined through allowing a bankrupt to act as a financial advisor, questioning 'Realistically, how could any consumer or investor perceive him as

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<sup>253</sup> *Hickie and ASIC* [2013] AATA 853 at [60]

<sup>254</sup> *Hickie and ASIC* [2013] AATA 853 at [164]

<sup>255</sup> *Vissenjoux and ASIC* [2015] AATA 98 at [1] – [8]

<sup>256</sup> *Vissenjoux and ASIC* [2015] AATA 98 at [9]

<sup>257</sup> *Vissenjoux and ASIC* [2015] AATA 98 at [16] – [17]

<sup>258</sup> *Vissenjoux and ASIC* [2015] AATA 98 at [26]

<sup>259</sup> *Vissenjoux and ASIC* [2015] AATA 98 at [35]

upholding his statutory obligations in professional practice when his personal financial management has been so poor?'.<sup>260</sup>

## **V. Conclusion: Assessing the practice of the AAT and the courts in reviewing s 920A banning orders**

Several observations may be drawn from the 50 AAT decisions on s 920A banning orders reviewed above.

First, while the background circumstances of each of the cases have differed, on the whole the reasoning of the Tribunals exhibited a flexible approach in assessing the particular circumstances of each case and the need for future protection of consumers and investors from future repetitions of the misconduct in question. As Table B at the end of this article shows, on the whole the variations to the s 920A bans have been relatively minor.<sup>261</sup>

Second, and following on from the first point above, ASIC's RG 98 has been shown to be a useful guide in assisting in the determination of the appropriate length of s 920A banning orders – with most Tribunals consulting it, and none (as yet) criticising it. Although the AAT is not bound by the policies of the government agencies, it is recommended that when reviewing the merits of s 920A banning orders in the future, Tribunals should ensure that reference is made to RG 98 in order to ensure transparency in their reasoning.

Third, whilst decisions of the AAT do not create binding precedents, several of the decisions examined in this article have provided some clarification on the preferable interpretation of these provisions. These have included *XTWK and ASIC* (2008) 105 ALD 596; [2008] AATA 703 (in relation to s 991F); *Tweed and ASIC* (2008) 47 AAR 518; [2008] AATA 514 (in relation to s 1019G – although as noted in Part II of this article, s 1019G was subsequently amended) and *Bond and ASIC* (2009) 108 ALD 187; [2009] AATA 50 (in relation to s 1041A – with this clarification being provided by the FCA following

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<sup>260</sup> *Vissenjoux and ASIC* [2015] AATA 98 at [62]; [69] – [73]; [74]

<sup>261</sup> The exceptions to this general trend include the Tribunal decisions in *Tweed and ASIC* (2008) 47 AAR 518; [2008] AATA 514 (where the Tribunal set aside ASIC's permanent ban); *Dollas-Ford and ASIC* (2006) 91 ALD 747; [2006] AATA 704 (where the permanent ban was varied to four years); *Fraser and ASIC* [2011] AATA 944 (where the permanent ban was varied to six months); *JTMJ and ASIC* [2010] AATA 350 (where the Tribunal varied the 10 year ban to three years); *George and ASIC* [2014] AATA 167 (where the permanent ban was varied to three years); and *Kofkin and ASIC* [2009] AATA 660 (where the ban was varied from ten to three years. In all six of these cases the Tribunals were satisfied that the risk of future repetitions of the original misconduct was no longer present. However, in the cases reviewed in Part IV where ASIC's original banning orders were affirmed, as well as those where the variations of the lengths of the bans were relatively minor, the AAT nevertheless showed a firm approach in upholding compliance with financial services laws and standards of professional conduct.

ASIC's appeal of the original Tribunal decision. Given that ASIC has been successful in all of the AAT decisions on s 920A that it has appealed in the FCA, it is suggested that ASIC should continue to appeal future Tribunal decisions which it considers to have mis-construed the applicable legislation. Furthermore, as illustrated in the recent case of *ASIC v Davidof* [2017] FCA 658 (discussed in Part II above), the definitional parameters of the term 'financial product' are likely to continue to evolve with new developments in financial markets. For this reason it is recommended that when imposing banning orders involving complex financial market concepts, ASIC should carefully articulate its interpretation of the applicable legislation at future Tribunal hearings to lessen the likelihood of further (potentially costly) appeals to the FCA.

Fourth, the 2012 FOFA amendments to s 920A should be seen as positive reforms through expanding the grounds for ASIC to make banning orders. It is probable that the outcome in *Tweed and ASIC* (2008) 47 AAR 518; [2008] AATA 514 would have differed if it was decided according to the post-2012 wording of ss 920A(1)(g) and (h) – which added the grounds of a person being 'involved in the contravention of a financial services law by another person'. Furthermore, the post-2012 wording of 'likely to contravene' in s 920A(1)(f) sets a more flexible and workable standard for ASIC to satisfy when making banning orders to protect the public from the risk of future misconduct, and could well have resulted in a different outcome in *De Souza and ASIC* [2009] AATA 725.

Finally, whilst ten applicants proposed enforceable undertakings (involving the applicants submitting to audits and/or supervision, and undertaking further training), the Tribunal decisions reviewed above showed a general preference to either vary or affirm the original bans rather than accepting enforceable undertakings. Nevertheless, the final section below considers whether these examples of the willingness of banned applicants to be subject to supervision, audits and/or further training might form the basis of a new regulatory response option for ASIC in cases where it determines that a banning order against a financial services provider is not warranted – but nevertheless has concerns about the provider's competence and/or the likelihood of their future compliance with financial services laws. It is suggested that a minor addition to the 2017 Professional Standards Amendments might provide ASIC with this more flexible regulatory response option.

#### **A. The impact of the 2017 Professional Standards amendments and scope for further reforms**



As noted in Part I of this article, the 2017 Professional Standards Amendments will introduce significant changes to the educational standards to be a ‘relevant provider’;<sup>262</sup> continuing professional development obligations and the requirements for ‘provisional’ relevant providers to be supervised until successfully completing a common entrance exam. It remains to be seen whether these new provisions will have the effect of lessening the scope for misconduct similar to the cases examined above to occur in the first instance – or conversely, whether these more extensive requirements may result in ASIC identifying more instances of misconduct and taking banning and/or other enforcement action after they come into effect on 1 January 2019.

Although many of the Tribunal decisions examined above noted that banning orders can protect the public from the risk of future misconduct by financial services providers, the question remains about whether periods of banning result in any changes to the knowledge, skills and attitudes of the banned individuals. Twenty years ago in *Re Kippe and ASC* [1997] AATA 580 (which involved a three year banning order under s 829 of the former *Corporations Law* against a stockbroker who had operated accounts under false names and failed to advise clients of his personal interests in the shares he was trading for them), Forgie DP remarked that:

‘Banning of itself will certainly have the effect of removing Mr Kippe from the industry and so protect the investing public during that time. More indirectly, it may protect the public by discouraging other dealer’s representatives from following his example. *Whether or not it plays any part in changing his attitudes or in encouraging him to familiarise himself with the standards and laws he should follow remains to be seen*’.<sup>263</sup> [emphasis added]

From 1 January 2019, s 921B(4) will require ‘provisional relevant providers’ to be supervised until they complete their professional year and pass an exam set by the ‘Standards Body’. The responsibilities of supervisors of provisional relevant providers will include approving in writing any SOAs to be provided to clients under s 921F(4); and assuming responsibility for advice provided by provisional relevant providers under s 921F(5). Section 910A will define a ‘provisional relevant provider’ as ‘a relevant provider who is undertaking work and training in accordance with subsection 921B(4)’. It is suggested that further legislative amendments could be made to enable ASIC to *designate* a relevant provider as a ‘provisional relevant provider’ in cases where the provider has engaged in misconduct which ASIC deems not sufficiently serious to warrant a banning order, but still has concerns about the future

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<sup>262</sup> Under the amended form of s 910A which will apply from 1 January 2019, the term ‘relevant provider’ will include employees, directors and authorised representatives of financial services licensees who are authorised to provide personal advice to retail clients. For an overview of these reforms, see Robin Bowley ‘Regulating the financial advice profession: An examination of recent developments in Australia, New Zealand and the United Kingdom and recommendations for further reform’ (2017) 36 *University of Queensland Law Journal* 191 - 193

<sup>263</sup> *Re Kippe and ASC* [1997] AATA 580 at [226]

suitability about the provider. This “designation” power could also be used in conjunction with s 920A banning orders – for example through designating a relevant provider as a “provisional relevant provider” for a specified period upon the expiry of a period of banning.

This suggested reform would provide three key benefits. First, a relevant provider designated as ‘provisional’ could still continue working within the financial services industry, albeit under supervision. Secondly, it would afford some measure of protection to consumers and investors through subjecting the relevant provider designated as ‘provisional’ to the supervision requirements under the new s 921F which will apply from 1 January 2019. Thirdly, it would provide a mechanism for assessing the provisional relevant provider’s knowledge, skills and attitudes through the requirement to successfully complete an exam, and possibly further assessment processes such as a panel interview before the removal of the ‘provisional’ designation. This assessment mechanism would go some way towards addressing the doubts expressed in *Re Kippe and ASC* [1997] AATA 580 above about the potential for the banning orders to lead to a change of the knowledge, skills and attitudes of banned individuals. Furthermore, as the AAT may exercise all of the powers available to the original decision maker,<sup>264</sup> this proposed power to designate a relevant provider as a “provisional relevant provider” would also increase the range of options available to the Tribunal when determining challenges to s 920A banning orders.

Examples of cases reviewed in Part II of this article where this option of requiring the individuals to either undertake further training, or to be subject to enhanced supervision, could have been beneficial in lessening the scope for further breaches include *Hayes and ASIC* [2006] AATA 1506; (2006) 93 ALD 494 and *Prasad and ASIC* [2016] AATA 384 (where the advisers had failed to have an adequately documented basis for their advice to their clients); *George and ASIC* [2014] AATA 167 (where the adviser falsified documentation for loan approvals – although the Tribunal was satisfied that Mr George’s extenuating personal circumstances contributed to this misconduct); and *Amargianitakis and ASIC* [2015] AATA 720 (where the adviser failed to properly assess his clients’ financial objectives before they invested in high-risk property financing schemes).

With the major changes to the regulation of professional standards in the financial services industry coming into effect from 1 January 2019, which could well lead to increased enforcement action by ASIC, it is recommended that serious consideration should be given to enacting the reforms suggested above in order to further enhance the flexibility and effectiveness of ASIC’s regulatory toolkit.

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<sup>264</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1)

**Table 2: Summary of AAT determinations on challenges to s 920A banning orders**

<b>Tribunal decision</b>	<b>s 920A / NCCPA s 80 limbs invoked by ASIC</b>	<b>Corporations Act 2001 and other provisions considered</b>	<b>ASIC ban</b>	<b>AAT ban</b>	<b>Difference</b>	<b>Final outcome</b>
Nolan [2006] AATA 778	920A(1)(f)	787 (now repealed), 921A(1), ASICA s 12DA	5 years	3 years	2 years	Varied
Hayes [2006] AATA 1506	920A(1)(e), (f)	945A, 946C, 947D	3 years	1 year	2 years	Varied
Dollas-Ford [2006] AATA 704	920A(1)(e), (f)	1041G	Permanent	4 years	Significant	Varied
Franke [2008] AATA 83	920A(1)(e), (f)	946A, 946C and 947B	2 years	2 years	Nil	Affirmed
Coakley [2008] AATA 247	920A(1)(e), (f)	727(1), 911C, 1041E	4 years	4 years	Nil	Affirmed
Howarth [2008] AATA 278	920A(1)(c), (f)	1041F, 1041G; Crimes Act 1914 (Cth) s 72; Crimes Act 1958 (Vic) ss 81(4), 82	Permanent	Permanent	Nil	Affirmed
Tweed [2008] AATA 514	920A(1)(e), (f)	1041H, 1019E, 1019G, 1019I	Permanent	Nil	Significant	Set aside
XTWK [2008] AATA 703	920A(1)(e), (f)	991F; ASX Market Rule 7.8.2	3 years	Nil	3 years	Set aside
Moore [2008] AATA 1164	920A(1)(c)	ASICA s 64(1)(b)	18 months	18 months	Nil	Affirmed
Bond [2009] AATA 50	920A(1)(f)	1041A	5 years	5 years	Nil	Affirmed
Lelliott [2009] AATA 110	920A(1)(e)	1041H(1)	2 years	9 months	15 months	Varied
Turner [2009] AATA 417	920A(1)(e), (f)	947C(2)(f)(i)-(ii), 942C(2)(g), 1041H	6 years	6 years	Nil	Affirmed
Eikelboom [2009] AATA 474	920A(1)(e), (f)	945A	3 years	2 years	1 year	Varied
Musumeci [2009] AATA 524	920A(1)(e)	1041A	4 years	2 years	2 years	Varied
Littlemore [2009] AATA 679	920A(1)(e)	911A	1 year	7 months	5 months	Varied
Kofkin [2009] AATA 660	920A(1)(e)	945A	10 years	3 years	7 years	Varied
De Souza [2009] AATA 725	920A(1)(f)	1041H	2 years	Nil	2 years	Set aside
Mackenzie [2009] AATA 1003	920A(1)(e)	1043A(1)(d)	3 years	3 years	Nil	Affirmed
YFFM [2010] AATA 340	920A(1)(f)	1043A(1), (2)	5 years	5 years	Nil	Affirmed
JTMJ [2010] AATA 350	920A(1)(f)	1041A, 1041B, 1041H	10 years	3 years	7 years	Varied

<b>Tribunal decision</b>	<b>s 920A / NCCPA s 80 limbs invoked by ASIC</b>	<b>Corporations Act 2001 and other provisions considered</b>	<b>ASIC ban</b>	<b>AAT ban</b>	<b>Difference</b>	<b>Final outcome</b>
Rosenberg [2010] AATA 654	920A(1)(e)	1041B, 1041H	4 years	Nil	4 years	Set aside
Fuoco [2010] AATA 739	920A(1)(e)	945A, 947C; ASICA s 12DA	5 years	5 years	Nil	Affirmed
Klusman [2011] AATA 150	920A(1)(e)	1041A; s 1041B; s 1041H	3 years	3 years	Nil	Affirmed
Fraser [2011] AATA 944	920A(1)(c)	1041G, 1041H	Permanent	6 months	Significant	Varied
Nguyen [2012] AATA 156	920A(1)(e), (f)	945S, 946A, 946C, 1012D, 947D, 1041E, 1041F, 1041H	7 years	7 years	Nil	Affirmed
Caines [2012] AATA 289	920A(1)(e),(bb), (f)	947C	5 years	5 years	Nil	Affirmed
Seagrim [2012] AATA 583	920A(1)(e), (f)	912A, 912D(1B), 941B, 942C, 945A, 947C	3 years	6 months	2.5 years	Varied
Hickie [2013] AATA 853	920A(1)(e)	319, 601HG, 601FD, 912D(1B)	2 years	2 years	Nil	Affirmed
Tarrant [2013] AATA 926	920A(1)(e), (f)	945A(1), 947B(2)(d), 947C(2)(e), 1041E(1), 1041H(1)	7 years	7 years	Nil	Affirmed
George [2014] AATA 167	920A(1)(d), (da); NCCPA s 80(1)(f)	No contraventions noted	Permanent	3 years	Significant	Varied
Coshott [2014] AATA 677	920A(1)(d), (da), (e), (f), (g)	1041G, 1041H	Permanent	Permanent	Nil	Affirmed
Liu [2014] AATA 817	920A(1)(d), (da), (e), (f), (g), (h)	1012B, 1012C, 1021B, 1041G, 1041H	Permanent	Permanent	Nil	Affirmed
Vissenjoux [2015] AATA 98	920A(1)(bb), (d)	Bankruptcy Act 1966 s 269	3 years	3 years	Nil	Affirmed
Amargianitakis [2015] AATA 720	920A(1) (da), (e), (g), (f)	941A, 941B, 945A, 946A, 946B, 1041H	8 years	6 years	2 years	Varied
Wittensleger [2015] AATA 902	920A(1)(c); NCCPA s 80(1)(c)	Criminal Code (WA) s 409(1)	Permanent	Permanent	Nil	Affirmed
Chong [2016] AATA 338	920A(1)(e)	945A, 946A, 946C, 947C, 1041H	5 years	5 years	Nil	Affirmed
Prasad [2016] AATA 384	920A(1)(da), (e)	961B, 961G, 946A, 947C	3 years	18 months	1.5 years	Varied
Sahay [2016] AATA 583	920A(1)(c); NCCPA s 80(1)(c)	No contraventions noted	Permanent	Permanent	Nil	Affirmed
Parker [2016] AATA 983	920A(1)(d), (e), (f), (g), (h); NCCPA s 80(1)(d), (e), (f)	1041H; ASICA s 12DA; NCCPA s 33	Permanent	Permanent	Nil	Affirmed

<b>Tribunal decision</b>	<b>s 920A / NCCPA s 80 limbs invoked by ASIC</b>	<b>Corporations Act 2001 and other provisions considered</b>	<b>ASIC ban</b>	<b>AAT ban</b>	<b>Difference</b>	<b>Final outcome</b>
McCormack [2016] AATA 1021	920A(1)(e), (g)	1041H	5 years	Nil	5 years	Affirmed
Chapple [2016] AATA 1032	920A(1)(c)	Crimes Act 1900 (NSW) ss 178BA, 192E	Permanent	Permanent	Nil	Affirmed
Batros [2017] AATA 399	920A(1)(e )	1043A	5 years	5 years	Nil	Affirmed
O'Sullivan [2017] AATA 644	920A(1)(e )	728, 1041H	7 years	7 years	Nil	Affirmed
JSKN [2017] AATA 818	920A(1)(c), (d); NCCPA s 80(1)(c)	NCCPA s 160D	Permanent	Permanent	Nil	Affirmed
Downey [2017] AATA 958	920A(1)(e )	1041H	6 years	4 years	2 years	Varied
Panganiban [2017] AATA 1026	920A	961G	Permanent	Permanent	Nil	Affirmed
Sweeney [2017] AATA 2182	920A(1)(e ); (g)	1041H	2 years	2 years	Nil	Affirmed
McLean [2017] AATA 2566	920A(1)(e); (g)	1041A	3 years	3 years	Nil	Affirmed
Seymour [2017] AATA 2581	920A(1)(e)	1041H	3 years	3 years	Nil	Affirmed
Davidof [2017] AATA 2594	920A(1)(e)	761D, 764A	3 years	3 years	Nil	Affirmed