Libby Slater Plenary Session

Trusts, Financial Services and Conflicts

19 February 2015

Brief description of paper

This paper seeks to identify issues in the general law and statutory regulation of conflicts of interest affecting participants in the superannuation industry, and particularly reviews areas of overlap and difference in the regulation of conflicts of interest, under the general law, the *Corporations Act* 2001 (Cth) and the covenants implied by s 52 of the *Superannuation Industry (Supervision) Act* 1993 (Cth).

Speaker:
Justice Ashley Black
Supreme Court of New South Wales

Introduction

I should first thank the organisers for the invitation to present the Libby Slater Plenary Session at this conference. Libby had, of course, made a substantial contribution to the development of superannuation regulation in Australia and to writing and teaching before her untimely death in 1994. I also recognise that, in speaking in this plenary session, I follow in the distinguished footsteps of those who have spoken in these sessions in previous years.

In this paper, I will seek to provide a kind of road map to the overlapping formulations of duties to address conflicts of interest that are applicable to superannuation trustees and financial advisers providing advice about superannuation. In particular, I will seek to identify which of the various formulations of those duties are likely to apply and how they overlap. By way of introduction, there will be situations where:

- only a statutory duty applies, for example, where a relationship is not fiduciary in the first place or a fiduciary duty is excluded, or the relevant conduct is not within the scope of any fiduciary duty; or

- both fiduciary and statutory duties apply, for example, where a fiduciary duty was not excluded or not effectively excluded and, in the case of the duties introduced by the Future of Financial Advice ("FOFA") reforms, the relationship is an advisory relationship with a retail client, or an entity is a registrable superannuation entity to which the covenants included in s 52 of the *Superannuation Industry (Supervision) Act* 1993 (Cth) ("*SIS Act*") apply.

There is also a possibility (albeit possibly somewhat theoretical) that only a fiduciary duty applies, if an entity (perhaps unusually) is not required to hold an Australian financial services licence (so that s 912A of the *Corporations Act* 2001 (Cth) does not apply) and a relationship is not an advisory relationship or the client is a wholesale client (so that Part 7.7A of the *Corporations Act* does not apply) and a relevant fiduciary duty has not been excluded or has not been effectively excluded.[1]

With the objective of mapping in mind, I begin by identifying, in the table below, the different formulations of the relevant duties and when they can apply:

Nature of duty	Source and application
Duty to avoid a real and sensible conflict of interest	General law - will apply to superannuation trustees as status based fiduciary, and will often apply to advisers as fact-based fiduciaries, unless excluded
Duties to act efficiently, honestly and fairly and to manage conflicts of interests	*Corporations Act* ss 912A(1)(a), 912A(1)(aa) - will apply to Australian financial services licence holders (but not directly to representatives or advice providers)
"Best interests" duties	General law, *SIS Act* s 52(2)(c), s 52A(2)(c) - will apply to superannuation trustees and directors of corporate trustees *Corporations* Act s 961B - will apply to providers of financial advice to retail clients
Duty to prioritise client interests	*SIS Act* s 52(2)(d), s 52A(2)(d) – will apply to superannuation trustees and directors of corporate trustees *Corporations Act* s 961J - will apply to providers of financial advice to retail clients *Life Insurance Act* ss 32(1)(b), 48(2)(b) – will apply to life insurers and their directors

[1] This range of possibilities is noted in P Hanrahan, "The relationship between equitable and statutory best interests obligations in financial services law" (2013) 7 *J Eq* 46 at 47.

This table plainly indicates the complexity of the relevant regulatory structure, involving the general law, the *Corporations Act* and the *SIS Act*, as amended by the FOFA and Stronger Super reforms respectively, and regulation directed to the licensing of Australian financial services providers and responsible superannuation entities. I will also refer below to the application of Prudential Standards issued by the Australian Prudential Regulation Authority ("APRA"). The complexity of this position, even prior to the FOFA and Stronger Super amendments, has not been welcomed by all commentators.[2] A somewhat more generous view of that issue treats the availability of multiple layers of regulation, involving a range of private and public actors, as increasing the potential of regulation to affect behaviour.[3] At the least, the multiple levels of regulation allow the potential for actions by different regulators including the Australian Securities and Investments Commission ("ASIC") and APRA or private claims for compensation.

When a fiduciary duty arises at general law

The equitable "no conflicts" rule will potentially be the most exacting of the duties considered in this paper, so far as it requires the avoidance and not merely the management of conflicts of interest or prioritising one interest over another. There is, perhaps, still an open question as to the content of the duty, to which I will refer below. The practical significance of the duty turns, of course, on the extent to which it will be excluded or narrowed by the terms of the trust deed, in the case of a superannuation trust, or the relevant contract in the case of a financial adviser. The increasing focus on statutory duties, to which I will refer below, may anticipate the possibility that attempted contractual exclusion of fiduciary status, and consequently the equitable "no conflicts" rule, may be or become commonplace in the financial services industry.

This duty is coincident with the classification of the person who owes it as a "fiduciary", either within a traditional fiduciary category or within an ad hoc categorisation of the relationship as fiduciary. Many participants in the superannuation industry will, in principle, owe duties of a fiduciary character to their clients. Some of those participants, and particularly superannuation trustees, will owe such duties because they fall within recognised traditional fiduciary categories. The leading case as to the nature of fiduciary obligations owed by a financial services licensee to its client within, or in anticipation of, a traditional fiduciary category to its client is *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, which dealt with dealings between a stockbroker and its potential client. Brennan J there noted (at 376) that, as a fiduciary, a broker is under a particularly demanding duty if it proposes to offer the client an investment in which he or she has a financial interest; that duty was, incidentally, formulated in positive terms, at a time that the distinction between proscriptive and prescriptive duties was not given the emphasis that it now receives.

Other participants in the superannuation industry, such as financial advisers, may be held to owe fiduciary duties within a fact-based (or "ad hoc") fiduciary relationship, arising in the circumstances of the relationship. Professor Finn has argued that such obligations arise from a duty of loyalty that reflects "higher community standards or values" and gives rise to a

---

[2] M Adams et al, "Preliminary review of overregulation in Australian Financial Services" (2006) 20 *AJCL* 1.
[3] M Scott Donald, "Regulating for fiduciary qualities of conduct" (2013) 7 *J Eq* 142 at 159 – 161.

"legitimate expectation that the other party will act in the interests of the first party or at least in the joint interests of the parties and not solely self-interestedly". He argues that factors relevant to the existence of such an expectation are the importance of the client interest involved in the relationship, so that the protection of the client's physical or financial well-being justifies the imposition of a fiduciary relationship; the societal significance of the role of the service provider; community expectations as to the standard of probity to be expected of a service provider of that type; and whether the nature of the service is one in which the service provider could be expected to be promoting a separate interest of his or her own.[4] He also suggests that a service relationship will be fiduciary if "the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purpose of the relationship" and that:

> "Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the fiduciary expectation".[5]

In a recent article, Professor Finn has described the basis for a fiduciary relationship as follows:

> "A person will be in a fiduciary relationship with another when that other is reasonably entitled to expect that he or she will act in the other's interest (or their joint interests) to the exclusion of his or her own several interest, for a purpose, or for some or all purposes of their relationship."[6]

In *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 68; [1984] HCA 64, Gibbs CJ observed that the case law provided "no comprehensive statement of the criteria by which the fiduciary relationship may be established". Mason J observed (at 96-97) that the critical feature of the traditional fiduciary relationship was the undertaking or agreement by the fiduciary to act for or on behalf of or in the interests of another person in the exercise of power or discretion which will affect the interests of that other person in a legal or practical sense and that:

> "The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position … It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed."

In *Breen v Williams* (1996) 186 CLR 71 at 106 – 107, Gaudron and McHugh JJ observed that Australian Courts have consciously refrained from adopting a general test for the existence of a fiduciary relationship, although their Honours pointed to matters which may suggest the

---

[4] PD Finn, "The Fiduciary Principle" in T Youdan (ed), *Equity, Fiduciaries and Trusts*, 1989.
[5] Ibid pp 46-47.
[6] PD Finn, "Fiduciary Reflections" (2014) 88 *ALJ* 127 at 137.

existence of such a relationship, including a relation of confidence, inequality of bargaining power, an undertaking by one party to perform a task or fulfil a duty in the interests of the other party, the unilateral exercise of a discretion or power by one party which may affect the interests of the other, or reliance by one party on the other arising from dependence or vulnerability. In *John Alexander's Clubs Pty Limited & Anor v White City Tennis Club Limited* (2010) 241 CLR 1; [2010] HCA 19 at [87], a unanimous High Court identified the 'critical feature' of fiduciary relationships as being that:

> "the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interest of that other person in a legal or practical sense. From this power or discretion comes the duty to exercise it in the interests of the person to whom it is owed."

In *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6, the Full Court of the Federal Court (Finn, Stone and Perram JJ) observed (at [177]) that a fiduciary duty may exist:

> "When and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest."

Their Honours also noted (at [174]) that the relevant fiduciary duties were:

> "concerned with the setting of standards of conduct for persons in fiduciary positions. Its burden, put shortly, is with extracting disinterested and undivided loyalty from a fiduciary – hence, for example, its focus on conflicts between duty and undisclosed personal interest, conflicts between duty and duty and misuse of a fiduciary position for personal gain or benefit."

Several cases have recognised the possibility that the relationship between financial advisor and client may give rise to fiduciary duties. In *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390; [1991] FCA 375, the Full Court of the Federal Court held that a commercial bank owed fiduciary duties to its customer where it has assumed an advisory role and, in *Aequitas Ltd v Sparad No 100 Pty Ltd (formerly Australian European Finance Corp Ltd)* (2001) 19 ACLC 1006; [2001] NSWSC 14, Austin J held that a corporate advisor was in a fiduciary relationship with its client.

In *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35; 62 ACSR 427, the Federal Court of Australia considered the questions whether the relationship between an investment bank providing takeovers advice and a takeover bidder could be fiduciary in character, whether any fiduciary relationship had been excluded by contract and whether proprietary trading by the investment bank in the target's shares, without the use of confidential information which was protected by an information barrier (or "chinese wall") would have breached the no conflicts rule. Jacobson J reviewed (at [282]-[286]) the basis on which a fiduciary relationship would arise outside the traditional categories and observed (at [325]) that, apart from the terms of the mandate letter in that case, pre-contractual dealings between Citigroup as an adviser in respect of takeovers and its client would have pointed strongly towards the existence of a fiduciary relationship. His Honour noted (at [326]-[330]) that indicia of a fiduciary relationship in those dealings included that Citigroup was providing advice as to the wisdom and merits of the transaction; was using its financial acumen, judgment and expertise to further the client's interests, had a close working relationship with the client, and had emphasised its abilities and its commitment to the transaction in its pitch to be retained by the client; and the size of its fees.

In *Wingecarribee Shire Council v Lehman Bros Australia Ltd (in liq)* (2012) 301 ALR 1; [2012] FCA 1028, a group of municipal councils brought representative proceedings against the defendant (formerly known as Grange Securities Limited ("Grange")) in respect of the sale of synthetic collateralised debt obligations ("SCDOs"). In broad summary, the councils alleged the Grange had represented to them that the SCDOs were suitable investments within a conservative investment strategy, were prudent and capital-protected and complied with requirements by statute and under the councils' investment policies and were easily tradeable on an established secondary market. Rares J recognised (at [719]) that the central feature of the relationships between each council and Grange was a contract, either to buy or sell a particular financial product or, in the case of portfolio agreements with two councils, authorising Grange to undertake such sales and purchases on their behalf. Relevantly, the councils claimed that Grange acted in breach of fiduciary duty as an investment adviser or portfolio manager. His Honour observed (at [732]) that a fiduciary "such as a financial adviser" will be under two proscriptive duties, the no conflict and no profit rule. His Honour did not there specifically distinguish between the fiduciary duty applicable in a traditional fiduciary relationship, such as agency, and the ad hoc fiduciary duty which may arise in non-traditional arrangements.

In *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200, Jagot J in turn dealt with claims and cross claims arising from the sale of complex structured financial products known as "Constant Proportion Debt Obligations" ("CPDOs"). The defendants were Local Government Financial Services Pty Ltd ("LGFS"), an Australian financial services licensee that had acquired the CPDOs and onsold them to local councils; ABN Amro, an investment bank that had designed and distributed the products; and Standard & Poors ("S&P"), a credit rating agency that had been retained by ABN Amro to rate the products. The councils brought, inter alia, claims for breach of fiduciary duty against LGFS. Jagot J held that a fiduciary relationship existed and a LGFS breached the prohibition on conflict of interest by reason of the undisclosed commercial pressures upon it to distribute the products in order restore the success of its business. That finding should arguably be treated as confined to an interest in the sale of the products which is out of the ordinary course, here because of the extent of the then pressures on LGFS's business. The councils also brought successful claims against S&P for misleading and deceptive conduct and negligence and against ABN Amro for misleading and deceptive conduct, knowing involvement in S&P's alleged misleading and deceptive conduct and for negligence. On appeal in *ABN Amro Bank NV v Bathurst Regional Council & Others* (2014) 309 ALR 445; [2014] FCAFC 65, the Full Court of the Federal Court (Jacobson, Gilmour and Gordon JJ) largely dismissed an appeal from that decision.

The scope of the fiduciary duty

A fiduciary obligation will also arise only in relation to that part of the relationship which is fiduciary in character[7] and the fiduciary duty owed by a party will be limited to the scope of the service which that party undertakes to provide.[8] The importance of definition of the scope of the fiduciary's undertaking is emphasised by Professor Finn in observing that:

> "The all-important matter is the undertaking actually given by the fiduciary. Until the scope and ambit of the duties assumed by the fiduciary have been ascertained no question of conflict of duty and interest can arise. You must ascertain what the fiduciary has undertaken to do, before you can say he has permitted his interests to conflict with his undertaking."[9]

A contract governing the relationship between the fiduciary and the beneficiary may define the nature of the relationship and obligations between the parties in a way which limits the scope of any fiduciary duty. In *Hospital Products Ltd v United States Surgical Corporation* above at 97, Mason J observed that:

> "A contract regulates the rights and liabilities of the parties, any fiduciary relationship must accommodate itself to the terms of the contract so it is consistent with and conforms to them."

In *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 539, the Full Federal Court similarly observed that:

> "In a relationship constituted by contract, the nature of the fiduciary obligations owed by the parties - and indeed whether there are any fiduciary obligations at all - may be determined by the terms of the parties' agreement".

In *Breen v Williams* above, Gummow J similarly observed (at 132-133) that a contractual term may be so precise in its regulation of what a party may do that there is no scope for the creation of a fiduciary duty.

I should also refer briefly to the decision in *Eric Preston Pty Ltd v Euroz Securities Ltd* (2010) 77 ACSR 135; [2010] FCA 97, aff'd (2011) 274 ALR 705; [2011] FCAFC 11, not because it raises issues of any novelty, but because it involves an orthodox determination of issues involving the scope and content of fiduciary duties in the context of financial services. In that case, the plaintiff alleged that a stockbroking firm had breached contractual, tortious and fiduciary duties in failing to warn it of the risks of entry into a margin lending facility with Opes Prime, as a result of which it suffered loss on the Opes Prime's failure. At first instance, Siopis J held that there was no evidence that the stockbroking firm had agreed to act as investment advisor (as distinct from as stockbroker) and did not accept the plaintiff's claim that, as a matter of fact, it had encouraged the plaintiff to enter that facility. More generally, Siopis J held that the fiduciary relationship must "accommodate itself to the terms of the contract between the parties", and it was not a term of the retainer that the stockbroker would act as financial advisor to the plaintiff

[7] *Birtchnell v Equity Trustee Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408 per Dixon J; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 at 1130 per Lord Wilberforce.
[8] *Aequitas v AEFC* (2001) 19 ACLC 1006 at [307].
[9] PD Finn, *Fiduciary Obligations*, 1977, [541].

so there could be no fiduciary obligation to that effect. His Honour also held that, even if the plaintiff had proved that it was a term of the retainer that the stockbroker would act as its financial advisor and owed fiduciary obligations of the type alleged, those obligations would not have given rise to positive duties of investigation and advice as to the nature of the Opes Prime facility and the financial state of Opes Prime. That decision was affirmed on appeal.

The importance of defining the scope of the relevant duty was also recently emphasised in the decision of the High Court of Australia in *Howard v Commissioner of Taxation* (2014) 309 ALR 1; [2014] HCA 21. In that case, a taxpayer argued, inter alia, that he was not liable for a tax on a judgment in his favour because he had received the relevant amount as constructive trustee for a company for which he was a director. The High Court held that there was no conflict and no substantial possibility of conflict between his personal interest and duty to the company, where he had not obtained any gain or benefit by use of his position as a director so there was no basis for a constructive trust. French CJ and Keane J noted (at [34]) that the limits of fiduciary duties were to be determined by the character of the relationship, the parties' express agreement and their course of dealings and that:

> "the scope of the fiduciary duty generally in relation to conflicts of interest must accommodate itself to the particulars of the underlying relationship which give rise to the duty so that is consistent with and conforms to the scope and limits of that relationship".

Alternatively, the contract may authorise an act that would otherwise be a breach of fiduciary duty, so as to narrow the scope of that duty, or amount to informed consent or ratification. For example, in *National Nominees Ltd v Agora Asset Management Pty Ltd* [2011] VSC 425, a fund manager's determination to charge a 5% withdrawal fee, which was permitted by the terms of the constitution of the relevant fund, was not found to amount to a breach of the conflict rule. That decision is perhaps best seen as involving a narrowing of the scope of the relevant duties by contract or an advance ratification of the relevant conduct.

In principle, a disclosure of matters in a financial services guide issued under ss 942B – 942C of the *Corporations Act* or a statement of advice issued under ss 947B – 947C of the *Corporations Act*, if accepted by the relevant client, may give rise to fully informed consent to conduct that would otherwise amount to a breach of the conflict rule. However, there may be difficulties in achieving sufficient disclosure to give rise to a narrowing of the scope of the duty or informed consent to the relevant conduct, in the context of some forms of financial advice. In a recent article, Professor Degeling and Ms Hudson consider the interaction between the statutory duties introduced by FOFA (to which I will refer below) and fiduciary duties generally and, in particular, identify practical limits to the exclusion of fiduciary duties (including the no conflict rule) in the context of providing financial advice to retail clients.[10] They distinguish between advice given early in the advisory relationship, which they characterise as "advice about advice", and substantive advice being recommendations by the financial adviser about actual investment decisions and strategies capable of implementation by the client. They suggest that "advice about advice" would include early guidance by the adviser about the selection of topics as to which the client would later receive substantive advice. They argue that, in providing advice about advice, an adviser may be subject to a fiduciary duty in equity, although that duty may be

[10] S Degeling and J Hudson, "Fiduciary obligations, financial advisers and FOFA" (2014) 32 *C&SLJ* 527.

limited in scope, and that compliance with Pts 7.7 – 7.7A of the *Corporations Act* will not necessarily discharge that obligation. They also note that compliance regimes calibrated to the statutory obligations may not ensure that fiduciary obligations in equity are discharged. Both of those propositions may well be correct, given the differences in scope of the duties to which I refer below.

Professor Degeling and Ms Hudson note that the possibility that a financial services guide will not have been provided at the point of advice about advice, since it may not be reasonably apparent at that time that financial product advice will be or is likely to be provided to the client.[11] They refer to an example from the Explanatory Memorandum for the FOFA Bill 2014, where a client approaches an adviser seeking advice as to a number of topics, including superannuation, debt consolidation and life insurance, but the advice is restricted to one of those topics to reduce its cost, and the client provides the adviser with confidential information and looks to the adviser for guidance as to the restriction, and suggest that a fiduciary relationship could exist at that point. This depends on questions as to whether, in practice, an adviser will assume an advisory role at that point, prior to issuing a financial services guide, and also as to the extent to which any fiduciary services guide or other contract between the parties has excluded a fiduciary relationship, and whether that exclusion has been or will be effective. Professor Degeling and Ms Hudson also point to the possibility for conflict of interest in, for example, restricting the scope of advice to an area in which an adviser is qualified to advise, and excluding areas of advice as to which the adviser may not be qualified to advise. They argue that the disclosures in a financial services guide are not likely to be detailed enough to provide a basis for informed consent. They note that a statement of advice is provided at a later point and may contain fuller disclosures, but will arguably be too late to restrict the scope of the fiduciary duty. It might be added that, as the decision in *Citigroup* recognised, a requirement for full disclosure and informed consent to a narrowing of the duty is likely to arise where a fiduciary duty is limited after it has arisen. They also note that a statement of advice will contain fuller information about adviser remuneration and other benefits and may come closer to achieving informed consent, but that it will not give rise to ratification unless the client actively consents to the position, and that disclosure would be limited to the narrower scope of advice that was given and would not extend to areas which had been excluded from the advice which was given.

Exclusion of fiduciary duties and limiting a trustee's duties

Outside the trust context, the parties to a relationship may also seek expressly to provide that their relationship is not fiduciary in character. In *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at [134] – [135], Finn J observed that the parties may cast their relationship in a form that excludes a particular category, but that mere labelling will not achieve that result, although the label is an indication of the parties' intent that should be given "proper weight in relation to the rest of their agreement and such other relevant circumstances as evidence the true character of the relationship". In *ASIC v Citigroup Global Markets Australia Pty Ltd* above at [337], Jacobson J observed that it was open to the parties to contract to exclude or modify the operation of fiduciary duties, and held that a contractual

[11] Section 941D(1) of the *Corporations Act* requires a financial services guide to be provided, under s 941B(1), as soon as practicable after it becomes apparent that financial advice will be, or is likely to be, provided to the client.

exclusion in the particular case was effective to prevent a fiduciary obligation from arising. His Honour noted that the position may differ if a fiduciary relationship pre-existed the relevant contract, so that informed consent to the excluding provision may be required.[12] His Honour also noted (at [296]) that consent could be implied from the client's knowledge of an investment bank's structure including its proprietary trading activities, and consent would more readily be implied in the case of large commercial, sophisticated and well-advised clients, and held that informed consent to any conflict of interest arising from Citigroup's proprietary trading was implied in that case from the relevant client's knowledge of Citigroup's structure and method of operation.

Professor Finn has recently criticised the recognition of contracting out of the fiduciary relationship in *Citigroup*, although he accepts that the parties to a relationship which is otherwise fiduciary can agree that specified conduct may be lawfully engaged in with disclosure and informed consent.[13] That criticism seems to proceed on an assumption that the functions performed by financial and corporate advisers are "usually fiduciary"; that assumption may or may not be correct, as a matter of common experience and subject to contractual exclusions of the duty, although I have noted above that, absent agency, such relationships are not traditional status-based fiduciary relationships. The difference between the approach in *Citigroup* and that of Professor Finn is real and its significance may be highlighted by a simple question – in what circumstances can it be found that a relationship is in truth fiduciary notwithstanding that the parties have stated that it is not. One possible answer to that question, relevant for present purposes, is where the adviser has emphasised its commitment to advance the client's interests notwithstanding a contractual exclusion of a fiduciary duty. However, that answer returns us to Professor Finn's criticism of *Citigroup*, since that case sounds very much like *Citigroup.*

Another commentator, Mr Mark Leeming (writing prior to his appointment to the Court of Appeal) has suggested that, while the contract informs fiduciary obligations, "equity to an extent accommodates, but also to an extent outflanks, the parties' contractual choices."[14] He observes that the terms of the contract are the starting point of the analysis of the scope of fiduciary obligations and that those terms may amount to "fully informed consent [which] will negate what would otherwise amount to a breach of fiduciary obligation However he also notes that courts will look to factors other than the terms of a contract alone and that:

> "it would be wrong to regard that explanation [by reference to informed consent] as a complete account of the interplay between common law and equity in this context … Equity, through principles it has developed about fiduciary duty, protects interests which differ from those protected by the law of contract and tort, and protects those interests from a standpoint which is peculiar to those principles."[15]

---

[12] *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408; *Morris Fletcher & Cross Bill of Costs* [1997] 2 Qd R 228; *Symonds v Raphael* (1998) 148 FLR 171; *McNamara Business & Property Law v Kasmerides* [2007] SASC 90; *ASIC v Citigroup* at [397].

[13] P Finn, "Fiduciary Reflections" (2014) 88 *ALJ* 127.

[14] M Leeming, "The scope of fiduciary obligations: How contract informs, but does not determine, the scope of fiduciary obligations" (2009) 3 *J Eq* 1 at 2.

[15] ibid 3-4.

It is, of course, also possible to limit the duties of a trustee through the provisions of the trust instrument.[16] For example, the terms of a superannuation trust deed may narrow the scope of relevant fiduciary duties by permitting the trustee and any investment manager and their associates to contract with the fund or be directly or indirectly involved in such a contract; permitting the trustee and any investment manager to exercise powers or discretions, notwithstanding that it or they or their associates have an interest in the matter, possibly subject to an express good faith requirement; and permitting the trustee or manager to enter into contracts or transactions in which it or a related corporation obtains a benefit or advantage which might otherwise have been available to the fund. The scope of the duties of a trustee, or its directors, may also be limited by the structure of the relevant fund. An example of such a limitation in the case law is the recognition that employee representatives who are trustees of a fund, or directors of a trustee, will generally not be prevented, by the no conflicts rule, from exercising or benefiting from the exercise of a discretion which affects them as beneficiaries of the relevant fund.[17]

However, there is an irreducible core of duties owed by a trustee to the beneficiaries which cannot be excluded, and is necessary in order for the relationship to be properly characterised as a trust.[18] At a minimum, a trustee is obliged to perform the trust honestly and in good faith for the benefit of the beneficiaries, and a trustee cannot exclude liability for actual fraud or other breach of duty involving dishonest intention. In *Armitage v Nurse* (1998) Ch 241 at 252-253, Millett LJ held that a trust deed cannot exclude a trustee's liability for "wilful default" but may validly exclude liability for a fiduciary's actions which are not dishonest or in bad faith; see also, in Australia, *Green v Wilden Pty Ltd* [2005] WASC 83 at [496]; *Leerac Pty Ltd v Fay* [2008] NSWSC 1082 at [23]. The English Law Commission subsequently accepted that it was settled English law that a trustee could, by appropriate language, be exempted from all breaches of trust other than fraud and dishonesty.[19] In *Spread Trustee Co v Hutcheson* [2011] UKPC 13; [2012] 2 AC 194 at [52], the Privy Council held that the principle in *Armitage v Nurse* above correctly stated the present English law. Section 56(2) of the *SIS Act* in turn avoids any provision of a trust deed that would exempt a trustee from, or indemnify it against, inter alia, liability for a breach of trust which involves a failure to act honestly or an intentional or reckless failure to exercise the degree of care and diligence that the trustee was required to exercise.

The no conflict rule

It is, of course, trite that proscriptive duties, being the prohibition on an unauthorised profit and the prohibition on an unauthorised profit and the rule against conflict of interest apply within a fiduciary relationship. The classic description of the "no conflict" rule is that given by Lord Cranworth LC in *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461 at 471, namely that:

---

[16] JD Heydon and MJ Leeming, *Jacob's Law of Trusts in Australia* (7th ed) at [1617].
[17] *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32 at 41 – 42; *Edge v Pension Ombudsman* [1998] Ch 512, aff'd [2000] Ch 602.
[18] JD Heydon and MJ Leeming, *Jacob's Law of Trusts in Australia* (7th ed) at [1620]; N D'Angelo, *Commercial Trusts*.2014, [4.32]ff.
[19] Law Commission for England and Wales, *Trustee exemption clauses*, Report No 301, 2006, [2.16]

> "no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

In *Hospital Products Ltd v United States Surgical Corporation* above, Dawson J described that rule and the "no profit" rule as requiring that a person under a fiduciary obligation:

> "… shall not put himself in a position where his interest and duty conflict or, if conflict is unavoidable, shall resolve it in favour of duty and shall not, except by special arrangement, make a profit out of his position."

The no conflict rule was described by the plurality in *Pilmer v Duke Group Ltd* (2001) 207 CLR 165 at 199; [2001] HCA 31 as follows:

> "… The fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is 'a conflict or a real or substantial possibility of a conflict' between personal interests of the fiduciary and those to whom the duty is owed ... Similar reasoning applies where the alleged conflict is between competing duties, for example, where a solicitor acts on both sides of a transaction."

The test for when a conflict arises has been expressed in various ways in the cases, but the shorthand "real [and] sensible possibility" is often applied. In *Boardman v Phipps* [1967] 2 AC 46 at 124, Lord Upjohn formulated the test for whether a conflict exists as whether a:

> "reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict."

That passage was approved by the Privy Council in *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 at 3 and by Mason J in *Hospital Products Ltd v United States Surgical Corp Hospital Products Ltd v United States Surgical Corporation* above at 103. In *Chan v Zacharia* (1984) 154 CLR 178 at 198, the test was expressed as "a conflict … or significant possibility of such conflict". At the same time, Deane J (with whom Brennan and Dawson JJ agreed) there referred to an observation of Sir Frederick Jordan in *Chapters in Equity in New South Wales* (6th ed 1947, p 115) that:

> "It has often been said that a person who occupies a fiduciary position ought to avoid placing himself in a position in which his duty and his interest, or two different fiduciary duties, conflict.
>
> This is rather a counsel of prudence than a rule of equity; the rule being that a fiduciary must not take advantage of such a conflict if it arises."

His Honour also noted (at 198) that that formulation, even as an unqualified counsel of prudence, may be inappropriate in some circumstances and that:

> "The equitable principle governing the liability to account is concerned not so much with the mere existence of a conflict between personal interest and fiduciary duty as with the pursuit of personal interest by, for example, actually entering into a transaction or engagement 'in which he has, or can have, a personal interest conflicting … with the

> interests of those whom he is bound to protect' (per Lord Cranworth L.C., *Aberdeen Railway Co v Blaikie Brothers* [1854] 1 Macq 461 at p 471 or the actual receipt of personal benefit or gain in circumstances where such conflict exists or has existed."

In *Hospital Products Ltd v United States Surgical Corp* above at 103, Mason J also referred to Sir Frederick Jordan's observation and noted that:

> "[t]he fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or real or substantial possibility of conflict between his personal interests and those of the persons whom he is bound to protect."

That formulation places emphasis upon the fiduciary's conduct in making or pursuing a gain, and not merely upon his or her occupying a position where a conflict or potential conflict exists. One commentator has suggested the adoption of that test of a "real or substantial possibility of a conflict", as expressed by Mason J in *Hospital Products* at 103, and adopted by the High Court in *Pilmer* at [78], excludes the approach suggested by Sir Frederick Jordan.[20] I adopted Sir Frederick Jordan's approach in *Re Colorado Products Pty Ltd (in prov liq)* [2014] NSWSC 789; (2013) 101 ACSR 233, in a case concerning an allegation of conflict of interest affecting a director. On the other hand, in *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102; (2014) 98 ACSR 515, also in the context of allegations of breach of directors' duties, Edelman J (at [266]) observed that the conflict rule will extend to situations involving a "potential" for personal interest to be preferred or for breach of duty to one principal in the case of conflict in duties owed to different principals, and treated the reference to a "counsel of prudence" as relating to the profit rule or liability to account rather than the scope of the duty against conflict of interest.

I have pointed to this difference in approach because the emphasis in Sir Frederick Jordan's approach on the conduct of the fiduciary, that is whether he or she took advantage of a conflict, may be close to the statutory approaches to which I refer below. On the other hand, the wider approach may, in principle, better protect beneficiaries' interests and may be more consistent with the prophylactic purpose that is often attributed to fiduciary duties. At least in some cases, there may be little practical difference between the two approaches, because circumstances in which a person is in a position of conflict, but does not take advantage of it, may also be cases where there was either no real or substantial possibility of conflict or where the terms or structure of the relationship had involved a narrowing of the relevant duty.

I should note here that English law adopts a further gloss on the no conflicts rule, known as the "no inhibition" principle, where a fiduciary has obtained informed consent such that it may act in circumstances that it owes conflicting duties to two beneficiaries. That principle requires that a fiduciary which acted for two parties with their consent must not be inhibited in the performance of his duties to one principal by reason of his employment by the other, and must not consciously prefer the interests of one principal over the other.[21] That principle has been

---

[20] J Campbell, "Fiduciary Relationships In A Commercial Context", Sydney Law School, Legal Studies Research Paper, No 14/26. Note, however, that Mason J referred to Sir Frederick Jordan's approach with apparent approval in *Hospital Products*, so he plainly did not see it as inconsistent with his approach.
[21] *Bristol & West Building Society v Mothew* (1998) Ch 1.

referred to in at least two Australian cases[22], although its status in Australian law may still be an open question. It is perhaps worth keeping this principle in mind, when we later turn to the general covenant dealing with conflicts of interest under s 52 of the *SIS Act*, which has something in common with this principle.

I should also add that the emphasis on the proscriptive character of fiduciary duties in Australian law has led to the rejection of any affirmative duty of disclosure as a separate fiduciary duty or an incident of the no conflict rule, so that non-disclosure of information relevant to the beneficiary, or indeed of a fiduciary's breach of duty, is not in itself a separate breach of duty.[23] The fact of disclosure may, of course, still be relevant to informed consent to or ratification of conduct that would otherwise be a breach of fiduciary duty. English law has taken a different approach, treating a fiduciary's non-disclosure of a breach of duty as itself a potential breach of fiduciary duty.[24]

Duties imposed on Australian financial services licensees – "efficiently, honestly and fairly" and conflicts management

Duty to act efficiently, honestly and fairly (s 912A(1)(a))

The next level of applicable duties which may impact on conflicts of interest arises from the fact that most, if not all, participants in the superannuation industry will be required to hold Australian financial services licences and will be subject to the conduct of business requirements applicable to such licensees. It will come as no surprise to anyone at this conference that s 912A(1)(a) of the *Corporations Act* requires a financial services licensee to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly. In *Story v NCSC* (1988) 13 NSWLR 661; 13 ACLR 225; 6 ACLC 560, Young J held that the words 'efficiently, honestly and fairly' should be read as a requirement that a person goes about their duties efficiently having regard to the dictates of honesty and fairness; honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty, and that the ultimate question was whether the appellant's performance of his functions fell short of the reasonable standard of performance which the public was entitled to expect of a licensee. In *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission* (1989) 1 ACSR 93, the court noted that the 'efficiently, honestly, and fairly' standard could be breached by conduct which is not criminal but which is morally wrong in a commercial sense, and that the test of whether conduct failed the relevant standard required that the conduct be viewed objectively.

Duty to have adequate arrangements in place to manage conflicts of interest (s 912A(1)(aa))

---

[22] *Re Moage Ltd* (1998) 153 ALR 711 at 718-721; *Rigg v Sheridan* [2008] NSWCA 79 at 46.
[23] *Compaq Computer Australia Pty Ltd v Merry* (1998) 157 ALR 1 at 21; *National Mutual Property Services Pty Ltd v Citibank Savings Ltd* [1998] FCA 564; *Fitzwood Pty Ltd v Unique Gold Pty Ltd (in liq)* (2001) 188 ALR 566; [1001] FCA 1628 at [32]-[33]; *Dresdna Pty Ltd v Linknarf Management Services Pty Ltd (in liq)* (2006) 156 FCR 474; [2006] FCAFC 193 at [130]-[132]; *P & V Industries Pty Ltd v Parlo & Ors (No 2)* [2007] VSC 64 at [24]; *Collard v Western Australia (No 4)* [2013] WASC 455 at [1096], [1211] – [1214].
[24] *Item Software (UK) Ltd v Fassihi* [2004] EWCA (Civ) 1244; *Hanco ATM Systems Ltd v Cashbox ATM Systems Ltd* [2007] EWHC 1599 (Ch) at [65]; *GHLM Trading Ltd v Maroo* [2012] 2 BCLC 369 at [192] – [195]; *McTear v Englehad* [2014] EWHC 1056 (Ch) at [10] – [91].

Section 912A(1)(aa) requires a financial services licensee to have in place adequate arrangements for managing conflicts of interest that arise wholly, or partly, in their financial services business.[25] There are obvious differences between that duty and the equitable duty, including that that duty contemplates that a conflict will be "manage[d]" rather than necessarily avoided, and that duty cannot be excluded by contract although disclosure (including within the terms of the contract) may be a means of managing a conflict.

The leading case as to this requirement is again *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)* above, where ASIC alleged that Citigroup did not have in place adequate arrangements for the management of a conflict between its own interests and the interests of its client in respect of that client's takeover offer for Patrick and had contravened its obligation under s 912A(1)(aa) of the *Corporations Act* to manage that conflict of interest. Jacobson J (at [445], [452]) rejected ASIC's submission that managing that conflict of interest required eliminating it by express consent, and held that the concept of 'managing' a conflict of interest assumes that a potential conflict will exist which must then be managed by adequate arrangements rather than totally eliminated, and held that Citigroup's arrangements as to chinese walls and for identification and management of conflicts were adequate. That finding must be understood, of course, in the context that his Honour had held that a general law fiduciary duty had been excluded by the terms of the mandate letter, and also that the client had given informed consent to Citigroup's proprietary trading in the target's shares. Had that not been the case, and had the conflict been found to be a real and sensible conflict, then the usual formulation of the no conflict rule would have required Citigroup to avoid the conflict, and the adequacy of its arrangements to manage it would not be to the point.

ASIC Regulatory Guide 181 *Licensing: Managing conflicts of interest* sets out ASIC's view as to what is required to comply with s 912A(1)(aa), and expresses the view that arrangements to manage conflicts of interest, in compliance with that section need to include arrangements to control, avoid and disclose conflicts of interest as appropriate. RG 181 acknowledges that a licensee may provide financial services although a conflict of interest exists, if it takes proper steps to manage that conflict. The Regulatory Guide notes (at [181.27]) that

> "The conflicts management obligation does not prohibit all conflicts of interest. It does not provide that a licensee can never provide financial services if a conflict of interest exists. Rather, the conflicts management obligation requires that all conflicts of interest be adequately managed."

That Regulatory Guide focusses, reasonably enough, on the statutory obligation to which it is addressed rather than the no conflicts rule. That focus will, however, require qualification if a fiduciary duty has not been excluded or effectively excluded, and the no conflicts rule applies, so that the option of "managing" rather than avoiding a real and sensible conflict may not be available.

---

[25] For discussion of this requirement, see Baxt, Black and Hanrahan, *Securities and Financial Services Law*, 8th ed, [13.17]-[13.31]; G Pearson, *Financial Services Law and Compliance in Australia*, 2009, [4.3.34], [4.4], [4.4.5]-[4.4.6]; J Moutsopoulos, "Finance Industry has Duty to Manage Conflicts" (2005) *IFLR 41*; P Latimer, "Providing Financial Services 'Efficiently Honestly and Fairly'" (2006) 24 *C&SLJ* 362; V Battaglia, "Dealing with conflicts: The equitable and statutory obligations of financial services licensees" (2008) 26 *C&SLJ* 483.

"Best interests" duties in trust law

A commonly cited formulation of the trustee's duty to act in the best interests of its beneficiaries is found in the decision in *Cowan v Scargill* [1985] Ch 270 at 286-287 where Sir Robert Megarry V-C observed that:

> "The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty of the trustees towards their beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interests of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests."

One commentator has observed that the reference to a duty to act in the best interest of beneficiaries is to a combination of the established duties (1) to have regard, in exercising fiduciary powers, to the interests of the beneficiaries and not to extraneous considerations and (2) to act with reasonable care and diligence.[26] The requirements of the general law duty have also been formulated as involving impartiality and the exercise of the trustee's powers for a proper purpose[27] and as a duty of loyalty and as a duty to pursue the beneficiaries' interests "to the utmost with appropriate diligence and prudence".[28] In *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342 at [467], Murphy J noted that the "best interests" duty recognised in *Cowan v Scargill* above has been linked in other cases with the duty of loyalty[29]; with a trustee's duty to act fairly and in good faith[30] and with a trustee's duty to act for a proper purpose.[31] His Honour also described (at [468]) the "best interests" duty as:

> "a trustee's duty to give undivided loyalty to the beneficiaries, which includes the duty to act in the interests of the beneficiaries, to avoid any conflict between the interests of the trustee and the interests of the beneficiaries, and to adhere to the terms of the trust."

I turn now to s 52 of the *SIS Act* which deems specified covenants to be contained in the relevant fund's rules, if they are not already contained in those rules. Although those covenants extend to other matters such as the duty to act honestly and to exercise care, skill and diligence, the particular focus of this paper is on the covenants to perform the trustee's duties and exercise its powers in the best interests of the beneficiaries and as to conflicts of interest. Section 55(4) of the *SIS Act* provides that a breach of the covenants contained in s 52 of the *SIS Act* will be actionable by a person who has suffered loss, which may include beneficiaries of the trust. Section 350 of the *SIS Act* preserves the operation of State and Territory law, which I would understand to include the general law.

---

[26] J Lehane, "Delegation of Trustees' Powers and Current Developments in Investment Funds Management" (1995) 7 *Bond LR* 36 at 38
[27] *Edge v Pensions Ombudsman* [1999] 4 All ER 546; *Knudsen v Kara Kar Holdings Pty Ltd* [2000] NSWSC 715.
[28] *Invensys v Austrac Investments* [2006] VSC 112; (2006) 198 FLR 302 at [107].
[29] *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Boveri Pty Ltd* [1999] 1 VR 144 at [58]. [65].
[30] *Graham v Perpetual Trustees* (1989) 1 WAR 65 at 92.
[31] *Knudsen v Kara Kar Holdings Pty Ltd* [2000] NSWSC 715 at [60].

Section 52(2)(c) of the *SIS Act*, as amended by the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act* 2012, imports a covenant by the trustee into the governing rules of each superannuation fund requiring the trustee to "perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries".[32] In *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87 at [107] Byrne J referred to the "best interests" covenant implied by the former s 52(2)(c) of the *SIS Act* and observed that the relevant duty was:

> "An amalgam of two distinct obligations said to be imposed by law upon trustees of a superannuation fund. The first, which is sometimes referred to as the duty of loyalty or the duty of fidelity to the trust, is that to act in the interests of the beneficiaries; that their interests are paramount and must certainly be placed ahead of the trustee's own interests. Nor may the trustee have regard to considerations which are extraneous to the trust. The second is to pursue to the utmost with appropriate diligence and prudence the interests of the beneficiaries." (citations omitted)

That view was recently approved in *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)* above. In *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* (2011) 282 ALR 167; [2011] NSWCA 204 at [103]-[104], the Court of Appeal observed that the broadly corresponding statutory covenant contained in the former section did not materially alter a trustee's general law duty to act in beneficiaries' best interests, and the words "to ensure" did not impose strict liability but emphasised the seriousness of the covenant and the requirement that it be strictly observed. That decision also suggests that the "best interests" duty arising under that covenant is directed to the process by which an adviser provides advice rather than mandating the outcome of that advice and does not give rise to liability for advice which is given with the best interests of the client in mind but ultimately has an adverse outcome.[33] The Final Report of the Super System Review in turn pointed to two elements of the duty, for trustees to place member interests ahead of other interests and actively endeavour to achieve the best outcome for members.[34]

Section 601FC(1)(c) of the *Corporations Act* similarly requires the responsible entity of a managed investment scheme to act in the best interests of members and, relevantly, give priority to members' interests, if there is a conflict between those interests and its own interests. In *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)* above at [484], Murphy J summarised the "best interests duty" contained in that section as encompassing "a responsible entity's fundamental duty of undivided loyalty" and as requiring the responsible entity and its directors:

---

[32] See generally M Stone, "The superannuation trustee: Are fiduciary obligations and standards appropriate?" (2007) 1 *J Eq* 167; M Scott Donald, "'Best' interests?" (2008) 2 *J Eq* 245; GW Thomas, "The duty of trustees to act in the 'best interests" of their beneficiaries" (2008) 2 *J Eq* 177; D Mendoza-Jones, "Superannuation trustees: Governance, best interests, conflicts of interest and the proposed reforms" (2012) 30 *C&SLJ* 297; P Collins, "The best interest duty and the standard [of] care for superannuation trustees" (2014) 88 *ALJ* 632.

[33] *Manglicmot v Commonwealth Bank Officers Superannuation Corp* above at [45]ff ; K Lindgren, "Fiduciary Duty and the Ripoll Report" (2010) 28 *C&SLJ* 435; M Vrisakis, "So if the fiduciary duty of an adviser will be a duty to act in the best interest of the clients …" (2010) 9(1) *FSN* 5.

[34] Super System Review Final Report [2.2.1]

> "To use their best efforts to pursue solely the members' interests, to act honestly and to exercise care, competence and prudence in doing so, and to eschew any conflict of interests between the members' interests and its own [and if] any conflict of interest arose they were required to prefer the interests of the members to [the responsible entity's] own interests."

The "best interests" duty under FOFA

I turn now to the so-called "best interests" duty under Pt 7.7A Div 2 of the *Corporations Act*, introduced by the *Corporations Amendment (Further Future of Financial Advice Measures) Act* 2012 (Cth).[35] It should first be recognised that that statutory duty if, as will emerge below, formulated in a manner that may ultimately have little in common with a trustee's "best interests" duty.

The statutory "best interests" duty under s 961B of the *Corporations Act* applies to a person providing advice in relation to the provision of personal advice (as defined in s 766B) to a person as a retail client (as defined in s 761G). This Part addresses the concern identified in the Report of the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Financial Products and Services in Australia* (November 2009) that disclosure had not been effective to address conflicts of interest and that Inquiry's recommendation that the *Corporations Act* be amended to explicitly include a duty for financial advisers to place their clients' interests ahead of their own. Importantly, the provider of advice and his or her client may not contract out of the application of Part 7.7A (s 960A) and the obligations imposed on a provider under Part 7.7A Div 2 apply in addition to any obligations on the provider under the general law (s 961B).

Section 961B(1) requires a provider of personal advice to a retail client to act in the best interests of the client when giving the advice. On its face, and if it stood alone, that section would resemble other statutory provisions that require a person to have regard to the "best interests" of another will give some assistance as to the content of the "best interests" duty. For example, as I noted above, s 601FC(1)(c) of the *Corporations Act* requires a responsible entity, in exercising its powers and carrying out its duties, to "act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to

[35] For commentary, see Baxt, Black and Hanrahan, *Securities and Financial Services Law*, 8th ed, [14.56]-[14.57]; K Lindgren, "Fiduciary Duty and the Ripoll Report" (2010) 28 *C&SLJ* 435; M Vrisakis, "So if the Fiduciary Duty of an Adviser Will Be a Duty to Act in the Best Interest of the Clients..." (2010) 9(1) *FSN* 5; A Dahdal and E Kamerakis, "The future of financial advice (FOFA) reforms at a glance" (2012) *BCLB* [517]; G Craddock, "The Ripoll Committee Recommendation for a Fiduciary Duty in the Broader Regulatory Context" (2012) 30 *C&SLJ* 216; AJ Serpell, "The Future of Financial Advice Reforms" (2012) 30 *C&SLJ* 240; S Corones and T Galloway, "The Effectiveness of the Best Interests Duty – Enhancing Consumer Protection?" (2013) 41 *ABLR* 5; PF Hanrahan, "The Relationship between Equitable and Statutory 'Best Interests' Obligations in Financial Services Law" (2013) 7 *J Eq* 46; M Scott Donald, "Regulating for Fiduciary Qualities of Conduct" (2013) 7 *J Eq* 142; R Batten and G Pearson, "Financial Advice in Australia: Principles to Proscription; Managing to Banning" (2013) 87 *St John's L Rev* 511; S Corones and K Irving, "Raising Levels of Awareness of Rights and Obligations in the Provision of Financial Product Advice to Retail Clients" (2014) 32 *C&SLJ* 192; P Latimer "Protecting the Best Interests of the Client" (2014) 29 *AJCL* 8; ASIC CP 182 *Future of Financial Advice: Best interests duty and related obligations -- Update to RG 175* (August 2012) and see RG 175 *Licensing: Financial product advisers – conduct and disclosure*. ASIC provides guidance as to complying with the best interest duties in giving scaled advice in RG 244, *Giving information, general advice and scaled advice*.

the members' interests". I have referred above to the broadly comparable covenant that is implied in the rules of superannuation entities under s 52(2)(c) of the *SIS Act*.

However, s 961B(1) does not stand alone and its operation will be affected, and to some extent displaced, by s 961B(2) so far as taking the steps specified in s 961B(2) is treated as compliance with the "best interests" duty specified in s 961B(1). These steps are directed to the process of providing advice, and reflect "the notion that good processes will improve the quality of advice that is provided" and are intended to set out the minimum required to establish that a provider of advice has acted in the best interests of the client.[36] The specified steps presently require, in s 961B(2)(g), that a provider of advice also take any other step that would reasonably be regarded as in the client's best interests (as defined in s 961E[37]), given the client's relevant circumstances (as defined in s 961B(2)(b)). This requirement is intended to require a provider to take any additional step necessary to demonstrate that it had acted in the best interests of the client and to require that it did anything else that would reasonably be regarded as being in the best interests of the client to do, and to apply an objective standard based on the client's relevant circumstances, the provider's relevant expertise and the subject matter of the advice sought.[38] This requirement potentially expands the scope of s 961B(2) since a step that is not specified in the previous steps set out in the section may nonetheless be reasonably regarded as being in the client's best interests.

There has, of course, been a substantial debate as to whether s 961B(2)(g) should be removed. It may be accepted that the present form of the section does not guarantee a "safe harbour" if the six previous steps were taken, but the adviser has nonetheless not taken some other step that would reasonably be regarded as being in the client's best interests as defined. However, that observation begs the real question, which is whether any safe harbour should extend to that situation. On the other hand, if the six specified steps comprise all that should reasonably be done in the relevant circumstances, then s 961B(2)(g) has no additional content and the requirement for a safe harbour would be satisfied. Those supporting the removal of s 961B(2)(g) point to an alternative basis for the duty in the other six steps in the broader best interests duty in s 961B(1); the obligation to give appropriate advice under s 961G; and the requirement to give priority to client's interests when giving advice under s 961J. It has been contended that s 961B(1) establishes a best interests duty, irrespective of s 961B(2)(g). That proposition does not seem to me to have sufficient regard to the fact that, if s 961B(2)(g) is deleted and taking the six steps specified in s 961B(2)(a)-(f) have the result that the duty specified in s 961B(1) is treated as satisfied, then that duty can extend no wider than the six steps necessary to establish compliance with it. I will address the duty to give priority to a client's interests under s 961J below.

---

[36] Explanatory Memorandum to Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, [1.23], [1.25].

[37] Section 961E in turn provides that it would reasonably be regarded as in the best interests of the client to take a step, if a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, exercising care and objectively assessing the client's relevant circumstances, would regard it as in the best interests of the client, given the client's relevant circumstances to take that step.

[38] Explanatory Memorandum to Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 [1.43]-[1.44].

The Senate Economics Legislation Committee, in its Report on the proposed *Corporations Amendment (Streamlining of Future Financial Advice) Bill* 2014 (Cth), by majority, accepted the view that the removal of s 961B(2)(g) would not dilute the best interest duty, given the requirements in ss 961B(1), 961G, 961H and s 961J. The present Government subsequently sought to narrow the scope of some of these requirements by the Streamlining of Future of Financial Advice Regulations (30 June 2014)[39] which were disallowed by the Senate on 18 November 2014. The legislation is now in effect in substantially its original form. However, ASIC has indicated that it will take a facilitative approach to allow financial services licensees to address the implications of that development in the period to 1 July 2015.[40]

Compliance with the statutory "best interests" duty will not, in itself, comply with the general law duty to avoid either an actual conflict of interest or a real and sensible possibility of conflict of interest. So far as reliance is placed on the narrower steps specified in s 961B(2) of the *Corporations Act*, directed to the process by which advice is given, the fact that those steps were taken does not seem capable of avoiding any breach of the conflicts rule arising from the fact that advice is given in a conflicted setting. That result would not follow if the general law fiduciary duties, including the conflict rule, were read down to extend no wider than the statutory duties. One academic commentator has identified that possibility, noting that:

> "Advisers and trustees will remain fiduciaries, in the sense that the general law proscriptions will continue to apply, but the substance of their duties will be dictated by statute, regulation, prudential standard and regulatory interaction rather than the proscriptions of the general law."[41]

It may be that, in a practical sense, efforts made by trustees, advisers and their representatives to comply with the statutory standards may tend to reduce the risk of breach of the general law fiduciary duties, and the risk of regulatory action to the extent that the relevant regulators may give particular attention to the statutory duties. On the other hand, that proposition requires qualification where the statutory regimes (including the *Corporations Act* and the *SIS Act*) expressly preserve the operation of the general law, and where a fiduciary status is either not excluded or not effectively excluded by contract. It is always possible (or likely) that a regulator in a regulatory action, or a plaintiff in a private action, may rely on the most demanding standard – which is likely to be the no conflicts rule if it applies – to establish a breach, even if one or more of the statutory duties has been satisfied.

Duty to prioritise client interests

Several provisions adopt the concept of "prioritising" client interests, which is an alternative to, and plainly a less exacting standard than, the avoidance of conflicts of interest.

[39] Regulation 7.7A.2 and 7.7A.3, introduced by the Streamlining of Future of Financial Advice Regulations (30 June 2014), narrowed the first step specified in s 961B(2)(a) to require the provider to have identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client, and displaced the wider requirement under s 961B(2)(g) by providing that an adviser was not required to prove that he or she has taken that step, in each case if advice was provided in the period to 31 December 2015.

[40] ASIC 14-307MR Disallowance of FOFA Regulations, 19 November 2014.

[41] M Scott Donald, "Regulating for fiduciary qualities of conduct" (2013) 7 *J Eq* 142 at 143.

Section 961J of the *Corporations Act* requires a person who provides financial advice to a retail client to “give priority” to the interests of the retail client when giving advice where it knows, or reasonably ought to know, there is a conflict between the interests of the client and those of the provider, licensee, authorised representative or their associates. The language of this section is, as one commentator has pointed out, “open textured”[42], with the advantage that it will be capable of applying in a range of circumstances, and the corresponding disadvantage that there may be uncertainty, or at least room for factual debate, as to whether conduct gave “priority” to a client’s interests in any particular case.

A duty to give priority to a client’s interests appears to assume the coexistence of two interests, that of the client and another interest, and to be satisfied by preferencing the client’s interest while still having regard to the other interest. This seems to follow from the use of the language “give priority”, which falls short of requiring that exclusive attention be given to the client’s interest. That reading of the section is consistent with the observation in the Explanatory Memorandum to the *Corporations Amendment (Further Future of Financial Advice Measures) Bill* 2011 that this requirement was not intended to prevent an adviser from pursuing his or her own interests or the interests of another party, provided he or she did not fail to give priority to the client's interests in the case of a conflict; and was also not intended to prevent an adviser receiving remuneration from a person other than the client, provided he or she did not give priority to maximising remuneration over the client's interests.[43] It seems to me that compliance with this requirement, in the manner that it is contemplated by the Explanatory Memorandum, would not comply with a requirement to avoid a conflict of interest in equity. Indeed, the section contemplates that the adviser will take a course that equity does not permit, that is to avoid liability for a conflict of interest by asserting that he or she preferred the client’s interest, as a matter of fact, to the conflicting interest. Compliance with that section will therefore not avoid liability for breach of the equitable conflict rule unless any fiduciary duty (which is expressly preserved by s 960B of the *Corporations Act*) has been effectively narrowed or excluded by contract or informed consent. Conversely, the fact that giving priority to the client’s interest does not satisfy the equitable conflicts duty may cause difficulty if that duty has not been excluded or has not been effectively excluded.

The *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act* 2012 also introduced a specific covenant dealing with conflicts of interest in s 52(2)(d) of the *SIS Act*, which similarly accepts the existence of a conflict but seeks to ensure that priority is given to beneficiaries’ interests and they achieve no worse a result than if that conflict had not existed. That covenant requires a trustee:

> “where there is a conflict between the duties of the trustee to the beneficiaries, or the interests of the beneficiaries, and the duties of the trustee to any other person or the interests of the trustee or an associate of the trustee:
>
> (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and

---

[42] M Scott Donald, “Regulating for fiduciary qualities of conduct” (2013) 7 *J Eq* 142 at 147.
[43] Explanatory Memorandum to Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, [1.66], [1.68].

(ii) to ensure that the duties to the beneficiaries are met despite the conflict; and

(iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and

(iv) to comply with the prudential standards in relation to conflicts."

The first obligation, to give priority to beneficiaries' interests, implicitly assumes that any absolute duty to avoid conflicts of interest will have been excluded by the terms of the trust deed, since the approach contemplated by the covenant would not comply with such a duty. This covenant may also raise the possibility that a trustee will face irreconcilable obligations, if it is the trustee of two trusts and the interests of the beneficiaries of those trusts are in conflict, the covenant implied in each trust deed requires the trustee to give priority to the interests of the beneficiary of that trust over the interests of the beneficiaries of the other trust, and both obligations cannot be met. That position would also involve a breach of the no conflict rule, if it had not been excluded or limited by the terms of the trust, but not necessarily of an obligation to "manage" conflicts of interest if arrangements have been put in place fairly to deal with such a situation. This covenant is broadly similar to the obligation presently imposed on the responsible entity of a managed investments scheme to give priority to members' interests if there is a conflict between its interests and the members' interests (*Corporations Act* s 601FD(1)(c)); however, the covenant in s 52(2)(d) of the *SIS Act* applies to both conflicts of interest and conflicts of duty and interest, whereas s 601FD(1)(c) of the *Corporations Act* appears to be restricted to the former. The obligation to give priority to beneficiaries' interests overrides any conflicting duty which an executive officer or employee of the trustee has under Part 2D.1 of the *Corporations Act* and Part 3 Div 4 of the *Commonwealth Authorities and Companies Act* 1997 (Cth) (*SIS Act* s 52(4)). However, the general law duties of executive officers are not overridden by that section, although they overlap with directors' duties under Part 2D.1 of the *Corporations Act*.

The fact that ss 52(2)(d) and 52A(2)(d) of the *SIS Act* are structured so as to import covenants into the relevant trust deed raises a further possibility which I should identify but express no view about. If the trust deed is taken to include provisions that specify that conflicts will be addressed by giving priority to the interests of beneficiaries and ensuring that duties to them are met and their interests are not adversely affected, is that sufficient to impliedly exclude the more demanding general law duty to avoid the conflict rather than manage it in the specified fashion? That outcome may be possible where the covenant is part of the terms of the trust, by contrast with the position if it were a freestanding statutory duty operating in parallel to the general law duty.

Section 32(1) of the *Life Insurance Act* 1995 (Cth) similarly requires that a life company, in investing, administering and managing the assets of a statutory fund must, inter alia, give priority to the interests of the owners and prospective owners of policies referable to the fund.[44]

[44] Section 32(4) of the *Life Insurance Act* provides that a reference in that section to the interests of owners of policies referable to a statutory fund is a reference to the interests of those persons viewed as a group. Section 48(3) of the *Life Insurance Act* in turn provides that, in the event of conflict between the interests of owners and prospective owners of policies referable to a statutory fund and the interests of shareholders of a life company, a

The scope of that duty was considered in *ACN 074 971 109 Pty Ltd (as trustee for the Argot Unit Trust) v National Mutual Life Association of Australasia Pty Ltd* (2013) 305 ALR 722; [2013] VSCA 241, where the plaintiff sought to read that requirement widely as requiring that the life insurer subrogate its interests to those of the insured in adopting procedures for switching between cash and other assets in which the insured's interest was held. In a joint judgment, Nettle and Neave JJA observed (at [108]) that the reference to the "interests of owners and prospective owners of policies referable to the fund" in that section was to their interests as framed under the relevant policies, and rejected any suggestion that the section could give rise to an obligation on the insurer to allow switching profits to the insured which were not contemplated by those policies. That decision provides some support for a proposition that the interests to which a superannuation trustee, financial adviser or life insurer must give priority are those that fall within the scope of the relevant arrangement.

The second and third covenants in s 52(2)(d) of the *SIS Act*, to ensure that the duties to the beneficiaries are met and that the interests of the beneficiaries are not adversely affected focus upon the outcome of the trustees' conduct in a situation of conflict. That approach has something in common with the positive duty identified by Brennan J in *Daly v Sydney Stock Exchange Ltd* above, before the recent emphasis on the distinction between proscriptive and prescriptive duties had fully developed. The covenants introduced by s 52(2)(d)(ii) – (iii) each use the language "to ensure", requiring the trustee "to ensure" that duties to beneficiaries are met despite the conflict and "to ensure" that interests of beneficiaries are not adversely affected by the conflict. The same phrase, used in former s 52(2)(c) of the *SIS Act*, was considered in *Manglicmot* and *Invensys*, which recognised that the language "to ensure" may add nothing to the content of the relevant duty. However, the language at least draws attention to the affirmative obligation placed on the trustee in that regard.

The fourth obligation, to comply with prudential standards in relation to conflicts, overlaps with the obligation under s 34C of the *SIS Act* to comply with prudential standards. That obligation in turn picks up APRA's Prudential Standard SPS 521 *Conflicts of Interest*, which requires an RSE licensee to develop and maintain a conflicts management framework comprising internal controls and reporting, directed to ensuring that all directors understand the circumstances which might give rise to a conflict; undertake thorough inquiries to identify any conflicts; adopt procedures for the disclosure of interests; and maintain a record of how actual conflicts are managed. The summary to that Prudential Standard notes that the board of an RSE licensee is ultimately responsible for having a conflicts management framework that is appropriate to its size, business mix and the complexity of its business operations, and which applies to the entirety of those business operations, and must be approved by the board.

Specifically, that Prudential Standard requires an RSE licensee to have a conflicts management framework approved by its board and to ensure that it "identifies all potential and actual conflicts in the RSE licensee's business operations and takes all reasonably practicable actions to ensure they are avoided or prudently managed (SPS 521 [8]). The Prudential Standard identifies the forms of conflict of interest, in a manner that focuses on traditional categories of

---

director of the life company must take reasonable care, and use due diligence, to see that the company gives priority to the interests of owners and prospective owners of those policies over the interests of shareholders.

conflict of duty and duty and interest. The board is required to take all reasonable steps to ensure that all responsible persons and employees clearly understand the need to identify potential conflicts; circumstances that might give rise to conflicts; the content and purpose of the conflict management framework; and obligations, where applicable, as a responsible person of the RSE licensee (SPS 521 [11]). The Prudential Standard places particular focus on the position where an RSE licensee is part of a group and utilises group policies or functions, and requires that the board "must approve the use of group policies or functions and must ensure that the policies and functions give appropriate regard to the RSE licensee's business operations and its specific requirements (SPS 521 [13])). The Prudential Standard requires that the conflicts management framework "provide reasonable assurance that all conflicts are being clearly identified, identified, avoided or prudently managed" and, at a minimum, include a conflicts management policy approved by the board, that meets the requirements of the Prudential Standard; clearly defined roles, responsibilities and resources for oversight of conflicts management within the RSE's business operations; and up-to-date register of relevant duties and relevant interests. The Prudential Standard in turn treats a duty or interest as relevant where it:

> "might reasonably be considered to have the potential to have a significant impact on the capacity of the RSE licensee, the associate of the RSE licensee or the responsible person with the relevant duty or holding the relevant interest, to act in a manner that is consistent with the best interests of beneficiaries" (SPS 521 [16]).

The Prudential Standard also sets out the required contents of a conflicts management policy and requires a review of the conflicts management framework every three years.

A corresponding covenant applicable to directors in respect of conflicts under s 52A(2)(d) of the *SIS Act* takes substantially the same form as the covenant applicable to trustees under s 52(2)(d) of the *SIS Act*. The resulting obligation of a director of a corporate trustee to give priority to their duties to and the interests of beneficiaries overrides any conflicting duty of a director of the corporate trustee under Part 2D.1 of the *Corporations Act* and Part 3 Div 4 of the *Commonwealth Authorities and Companies Act* (*SIS Act* s 52A(3)). Again, the general law duties of directors are not overridden by that section, although they overlap with directors' duties under Part 2D.1 of the *Corporations Act*. Section 55(4) of the *SIS Act* has the result that a breach of the covenant contained in s 52A will be actionable by a person who has suffered loss, including beneficiaries of the trust.

Limitation of general law conflict rule applicable to trustee of regulated superannuation fund

Section 58B of the SIS Act in turn applies if the trustee of a regulated superannuation fund acquires a service from or invests assets of the fund in or through an entity, invests assets of the fund in or through a financial product or purchases a financial product using assets of the fund, or uses assets of the fund to make payments in relation to a financial product. In that case, the general law relating to conflict of interest does not apply to prevent the trustee doing that thing, if it would not breach the *SIS Act*, any other Act, the prudential standards or operating standards or governing rules of the fund, or any covenant referred to or prescribed under *SIS*

Act Pt 6. That provision will protect a trustee which complies with a statutory obligation that is less demanding than the general law conflict principles, but only in respect of the specified matters. It does not extend more widely to address any situation in which, for example, the equitable principles as to conflict of interest would be more demanding in respect of the provision of financial advice than the statutory standards.

Outsourcing by superannuation trustees

There is plainly scope for conflicts of interest affecting superannuation trustees, where it will be common for them to obtain services such as group life insurance, group salary continuance insurance, fund administration and investment management services from related companies of the trustee, so that a conflict of interest could arise at the time the related company is retained to provide the service or in supervising the performance of that service. A conflict of interest in respect of decisions to outsource functions to related companies of a trustee may be exacerbated where a director of the corporate trustee of the fund is employed by a related company which provides services to the fund or by that company's parent company.[45] A conflict of interest can also arise in respect of investments of the fund in products issued by related companies of the trustee.[46]

An early example of a conflict affecting a trustee in respect of outsourcing was considered by the High Court of New Zealand in *Jones v AMP Perpetual Trustee Company NZ Ltd* [1994] 1 NZLR 690, where a trustee invested the funds of the trust in a superannuation vehicle established by its holding company, which invested primarily in equities and suffered losses in the 1987 stock market crash. Thomas J expressed the conflict rule in orthodox terms, noting (at 711) that:

> "[e]stablished principle prohibits a trustee from making any profit by his or her management of a trust or from putting himself or herself in the position where their personal interests conflict with the duty of trustee."

His Honour recognised that there was, in fact, a potential for conflict where the trustee placed business with its holding company which would receive fees and observed that he was not persuaded that a subsidiary would not obtain an indirect benefit from placing that business with its holding company. Indeed, his Honour went somewhat further in observing – in what may or may not be a statement that could still be made today – that it was "unthinkable" that the trustee would have invested with its holding company's main competitor, rather than with its holding company. Nonetheless, he held that there was no conflict between the trustee's personal interests and the interests of its beneficiaries when the business could be directed to its holding company at the same time as serving its beneficiaries' interests. An Australian Court would not necessarily reach the same result at general law, absent an exclusion of the fiduciary duty by

---

[45] The current requirements relating to outsourcing for RSE licensees are contained in *SIS Act* ss 29H and 29P and SIS Regulations r 4.16 which deals with the content of outsourcing agreements. APRA has issued, inter alia, Superannuation Guidance Note 130.1 *Outsourcing* and SPG 200 *Frequently asked Questions (FAQs) on Outsourcing*. APRA's Discussion Paper, *Prudential Standards for Superannuation* (28 September 2011) indicates that it also proposes to introduce Prudential Standard SPS 231 *Outsourcing* dealing with appointment of service providers which will initially be based on the content of CPS 231 which applies to other APRA regulated entities.

[46] This issue is specifically addressed by s 109 of the *SIS Act* which, broadly, requires investments of superannuation entities to be made and maintained on an arm's length basis.

contract. It might be suggested that the recognition of a risk of conflict on the facts, and of the practical necessity of the trustee placing the business with its holding company, would establish a breach of the conflict rule, which could not be answered, at general law, by a proposition that the beneficiary was no worse off.

Section 58A of the *SIS Act*, introduced by the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act* 2012 with effect from 1 July 2013, avoids any provision in the governing rules of a regulated superannuation fund that specifies a person (including a related party) from whom the trustee must acquire a service in administering the trust, extending to services such as investment management, insurance and the administration of member benefits. That section reflects that observation of the Super System Review that:

> "from a governance perspective it is important that the benefits of vertical integration (say by appointing a service provider like an administration company or an insurer from within the same group of companies) be tested regularly against external alternatives by the trustee."[47]

Prudential Standard 231 also applies to outsourcing arrangements for material business activities of a trustee, and deals with the requirement for board approval for such arrangements and with the processes and documentation which must be in place in respect of them.

Conclusion

This paper has sought to identify and map several overlapping duties applicable to superannuation trustees and financial advisers providing advice about superannuation. The resulting map is complex, with significant areas of overlap and different formulations of duties which may well lead to different results in a factual setting.

There has, in recent times, been a significant and understandable focus on compliance with the relevant statutory duties, initially the duty to manage conflicts of interest (*Corporations Act* s 912A(1)(aa)) and more recently the duties introduced by FOFA and the amended covenants in ss 52 and 52A of the *SIS Act* introduced by the Stronger Super reforms. The focus on these changes has plainly been necessary from a compliance perspective for industry participants and desirable from a public interest perspective.

It is nonetheless worth remembering that fiduciary duties at general law are not always excluded, or effectively excluded, in the financial services industry. The question of the overlap between those duties and the statutory duties, and the extent to which general law duties may be breached by conduct that would not breach the statutory duties – specifically, where an adviser seeks to point to the content of advice given or action taken in a conflicted setting to claim that the conflict was "managed" or the client's or beneficiaries interests were prioritised – is of continuing importance, although not easily answered.

---

[47] Super System Review: Final Report – Part Two, [6.2].